INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 08-070
File: 06-313-4
May 21,2008

BACKGROUND

On December 6th, 2006, the Applicant requested that I review the decision of the Department of Industry, Tourism and Investment to refuse access to a report entitled "Report on National Energy Board Tolling Methodologies and Toll Design as Applied to the Mackenzie Valley Pipeline" dated October 14th, 2004 (hereinafter referred to as the "Report"). He also requested any correspondence, e-mails. briefing notes and other documents related to or discussing the contents of the report and, in particular, any document which discussed why the Government of the Northwest Territories decided not to make the report public.

By letter to the Department dated December 12th, I asked them to provide me with copies of all the responsive records, as well as a detailed submission setting out the grounds and the reasons for their decision to refuse access to the records in question. After some initial delay, on March 2nd, 2006 the public body provided this office with a detailed, eight page submission indicating its reasons for declining to disclose the records in question. In that letter, they also advised that they were objecting to my request for copies of the responsive records because the records in questions were extremely sensitive. They provided me only with copies of the records which had already been disclosed to the Applicant. A number of efforts were made to address this issue and eventually, in February of 2008 an agreement was reached allowing me access to the records for the purpose of this review on the condition that I provide my solicitor's undertaking that they would be returned to the public body, uncopied, upon the completion of my review.

The public body relies on sections 14, 15, 16, 17 and 24 of the *Access to Information and Protection of Privacy Act* for its refusal to disclose the responsive documents.

The Applicant, in turn, was given the opportunity to provide its response to the Department's position and he did so on April 17th, 2007.

THE RELEVANT SECTIONS OF THE ACT

As noted above, the public body relies on the following sections of the Act:

- Section 13, which prohibits public bodies from disclosing records which constitute cabinet confidences:

  13.(1) 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 Councilor the Financial Management Board; ....

  (d) briefings to members of the Executive Councilor the Financial Management Board in relation to matters that
  (i) have been before, or are proposed to be brought before, the Executive Councilor the Financial Management Board, ...

- Section 14, which allows a public body to refuse to disclose records where the disclosure might reveal advice from officials:

  14.(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal
  (a) advice, proposals, recommendations, analyses or policy

options developed by or for a public body or a member of the Executive Council;

(b) consultations or deliberations involving

(i) officers or employees of a public body,

(ii) a member of the Executive Council, or

(iii) the staff of a member of the Executive Council;

(c) 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;

(d) plans that relate to the management of personnel or the administration of a public body that have not yet been implemented;

(e) the contents of draft legislation, regulations and orders;

(f) the contents of agendas or minutes of meetings of an agency, board, commission, corporation, office or other body that is a public body; or

(g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

(2) 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;

- Section 15, which provides the public body with discretion to refuse to disclose information which is subject to a legal privilege:

15. 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;

(b) information prepared by or for an agent or lawyer of the Minister of Justice or a public body in relation to a matter involving the provision of legal services; or

(c) 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.

- Section 16, which allows the public body to refuse to disclose records where such disclosure would be prejudicial to intergovernmental relations:

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

(a) impair relations between the Government of the Northwest Territories and any of the following or their agencies:

(i) the Government of Canada or the government of a province or territory,

(ii) an aboriginal organization exercising governmental functions, including, but not limited to

(A) a band council, and

(B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement or treaty with the Government of Canada,

(iii) a municipal or settlement councilor other local authority,

(iv) the government of a foreign state,

(v) an international organization of states; .....

(2) The head of a public body shall not disclose information referred to in paragraphs (1)(a) and (b) without the approval of the Commissioner in Executive Council

- Section 17, which allows a public body the discretion to refuse disclosure where the disclosure might harm the financial interest of the public body or of the Government of the Northwest Territories:

17.(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the economic interest of the Government of the Northwest Territories or a public body or the ability of the Government to manage the economy, including the following:

(a) trade secrets of the Government of the Northwest Territories or a public body;

(b) financial, commercial, scientific, technical or other information in which the Government of the Northwest Territories or a public body has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;

(c) information the disclosure of which could reasonably be expected to

(i) result in financial loss to,

(ii) prejudice the competitive position of, or

(iii) interfere with contractual or other negotiations of, the Government of the Northwest Territories or a public body;

(d) scientific or technical information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee or public body of priority of publication.

- Section 24, which allows public bodies to refuse disclosure where the disclosure might be reasonably expected to harm the business or financial interests of a third party:

24.(1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant

(a) information that would reveal trade secrets of a third party;

(b) financial, commercial, scientific, technical or labour relations information

(i) obtained in confidence, explicitly or implicitly, from a third party, or

(ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement;

(c) information the disclosure of which could reasonably be expected to

(i) result in undue financial loss or gain to any person,

(ii) prejudice the competitive position of a third party,

(iii) interfere with contractual or other negotiations of a third party, or

(iv) result in similar information not being supplied to a public body;

(d) information about a third party obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax;

(e) a statement of a financial account relating to a third party with respect to the provision of routine services by a public body;

(f) a statement of financial assistance provided to a third party by a prescribed corporation or board; or

(g) information supplied by a third party to support an application for financial assistance mentioned in paragraph (f).

ISSUES

This review raises a number of issues:

With respect to the Report,

a) Is the Report properly the subject of solicitor-client privilege and, if so has the public body exercised its discretion pursuant to section 15 of the Act?

b) Would the disclosure of the Report be reasonably expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council and, if so, has the public body exercised its discretion pursuant to section 14(1)(a) of the Act?

c) Does section 14(2) apply to this record?

d) Would the disclosure of the Report be reasonably be expected to impair relations between the Government of the Northwest Territories and the Government of the Yukon and, if so, has the public body exercised its discretion pursuant to section 16(1)(a) of the Act, keeping in mind subsection 16(2)?

e) Would the disclosure of the Report constitute the disclosure of financial, commercial, scientific, technical or labour relations information obtained in confidence, explicitly or implicitly, from a third party, or that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement, thereby prohibiting its disclosure pursuant to section 24(1)(b)?

f) Would the disclosure of the Report be reasonably expected to harm the economic interest of the Government of the Northwest Territories or a

public body or the ability of the Government to manage the economy. In particular, would the disclosure reveal financial, commercial, scientific, technical or other information in which the Government of the Northwest Territories or a public body has a proprietary interest or a right of use and does the information have monetary value? If so, has the public body exercised its discretion in refusing disclosure pursuant to section 17(1)(b);

With respect to the Memoranda and E-mails involving Legal Counsel:

g) Are these communications properly the subject of solicitor-client privilege and, if so has the public body exercised its discretion pursuant to section 15 of the Act?

With respect to the "Desk Review of Pipeline Harmonization File" and associated email:

h) Would the disclosure of the "Desk Review" be reasonably expected to 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)(a))?

i) Would the disclosure of these records be reasonably expected to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council (section 14(1)(b))?

j) Would the disclosure of these records be reasonably expected to reveal information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision (section 14(1)(g))?

k) Does section 14(2) apply to these records?

l) Could the disclosure of these records be reasonably be expected to impair relations between the Government of the Northwest Territories and the Government of the Yukon and, if so, has the public body exercised its discretion pursuant to section 16(1)(a) of the Act, keeping in mind subsection 16(2)?

m) Could the disclosure of these records be reasonably expected to harm the economic interest of the Government of the Northwest Territories or a public body or the ability of the Government to manage the economy. In particular, is this financial, commercial, scientific, technical or other information in which the Government of the Northwest Territories or a public body has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value? If so, has the public body exercised its discretion in refusing disclosure pursuant to section 17(1)(b);

n) Would the disclosure of these records constitute the disclosure of financial, commercial, scientific, technical or labour relations information obtained in confidence, explicitly or implicitly, from a third party, or that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement, thereby prohibiting its disclosure pursuant to section 24(1)(b)?

With respect to the Cabinet Information Item entitled "Pipeline Harmonization"

o) Would the disclosure of this record reveal advice, proposals, requests for directions, recommendations, analyses or policy options prepared for presentation to the Executive Council or the Financial Management Board (Section 13(1)(a)) or briefings to members of the Executive Council or the Financial Management Board in relation to matters that have been before, or are proposed to be brought before, the Executive Council or the Financial Management Board (section 13(1)(d)(I))?

p) Could the disclosure of this record be reasonably be expected to impair relations between the Government of the Northwest Territories and the Government of the Yukon and, if so, has the public body exercised its discretion pursuant to section 16(1)(a) of the Act, keeping in mind subsection 16(2)?

q) Could the disclosure of this record be reasonably expected to harm the economic interest of the Government of the Northwest Territories or a public body or the ability of the Government to manage the economy. In particular, is this financial, commercial, scientific, technical or other information in which the Government of the Northwest Territories or a public body has a proprietary interest that has, or is reasonably likely to have, monetary value? If so, has the public body exercised its discretion in refusing disclosure pursuant to section 17(1)(b);

r) Would the disclosure of this record constitute the disclosure of financial, commercial, scientific, technical or labour relations information obtained in confidence, explicitly or implicitly, from a third party, or information that was of a confidential nature, supplied by a third party in compliance with a lawful requirement, thereby prohibiting its disclosure pursuant to section 24(1)(b)?

Generally:

s) Was the public body justified in refusing, in the first instance, to provide this office with the responsive records for the purpose of this review process?

THE PARTIES POSITIONS

1. The Report

The Department's Position

Section 15 -

The Department in this case relies primarily on section 15 of the Act, taking the position that the report is protected by solicitor-client privilege in that it was prepared "by or for an agent or lawyer of the Minister of Justice or a public body in relation to a matter involving the provision of legal advice".

In this particular case, the public body indicates that the report was prepared for a joint task force of the Government of the Northwest Territories and the Government of the Yukon. It was prepared by the law firm of Lawson Lundell in co-operation with Confer Consulting and Peter Eglington and Associates. The report is marked "Privileged and Confidential" and they say it was intended that it be treated as such. It is submitted by the public body that the Report was requested to assist the Governments of the Northwest Territories and the Yukon in formulating their positions prior to the commencement of National Energy Board (NEB) hearings related to the Mackenzie Valley Pipeline (MVP). It is their position that the hearings commenced in January of 2006 and had not, at the time of the request for information, been concluded. In these circumstances, the public body takes the position that the Report is subject to solicitor-client privilege and that they have accordingly exercised their discretion under section 15 to refuse disclosure.

In support of this position, the public body relies on two decisions. The first is the case of *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)* out of the Ontario Court of Justice [1997] O.J. No. 1465. In this case, the Court considered solicitor-client privilege in the context of access to information legislation. The court confirmed that solicitor-client privilege is a 'fundamental right' that 'protects the entire communication and not merely those specific items which involve actual advice'. The second case is an Order made by British Columbia's Information and Privacy Commissioner David Loukedelis. *Order F06-16, British Columbia (Ministry of the Environment)(Re),* [2006] B.C.I.P.C.D. No. 23. In this case, the Commissioner

considered a claim of litigation privilege over documents collected by the Ministry's lawyers for the sole purpose of providing legal advice to prepare the province for hearings before the NEB and the Washington State Facility Site Evaluation Council.

The Commissioner in that case accepted that litigation privilege applied to protect the confidentiality of a wide range of records.

Section 14 -

The public body further relies on section 14(1)(a) in that the document constitutes legal advice developed by or for the public body.

Section 24 -

Further, the public body takes the position that the report constitutes privileged information in which both the Government of the Northwest Territories and the Government of the Yukon have a proprietary interest. They say that the report was requested jointly by the two governments in light of common interests with respect to the issue discussed in the Report. They say that, as such, they are prohibited from disclosing the Report pursuant to section 24(1)(b) because to do so would disclose financial, commercial, scientific, technical or labour relations information obtained in confidence from a third party or information of a confidential nature which was supplied by a third party in compliance with a lawful requirement.

Section 16 -

It is also their position that section 16(1)(a) applies because if ITI were to disclose the Report, it would be against the wishes of the Government of the Yukon and would therefore be prejudicial to relations between the two governments. In support of this proposition, the department provided me with copies of correspondence from the department to its Yukon equivalent, requesting their views with respect to the disclosure of the record. The response received, also provided to me, stated as follows:

> We are of the view that the information in question was prepared by a legal team and associated non-legal experts at the request of public bodies in both governments to assist them in deciding if it was in their respective interests to place a jurisdictional complaint before the National Energy Board, itself a regulatory body with quasi-judicial powers and to which the rule of litigation privilege applies.

Section 17 -

Finally with respect to the Report, the public body takes the position that section 17(1)(b) justifies the refusal to disclose the Report because if third parties were to have access to the privileged information contained in the report, they could use that information to support a position on tolling methodologies that is contrary to the economic interests of the Government of the Northwest Territories.

The Applicant's Position

Section 15 -

The Applicant points out that Lawson Lundell was only one of three parties that were involved in the preparation of the report with the other two being consultants and industry experts. It is the Applicant's position that it is unreasonable to apply the blanket of solicitor-client privilege to the entire report when there are quite likely large sections of the report that have nothing to do with legal advice but are instead focused on regulatory matters using advice from two non-legal consulting firms.

He further points out that to be protected from disclosure pursuant to section 15, the information prepared by the lawyer also has to be 'in relation to a matter involving the provision of legal services'. He suggests that just because advice or information has been received by a lawyer it does not automatically mean that the advice can be considered 'legal' advice. He suggests that many lawyers develop expertise in regulatory matters such as tolling to the point that advice obtained from them could be

entirely about non-legal regulatory matters. He takes the position that it is highly likely that only a small portion of the report amounts to what could strictly be considered to be legal advice as opposed to regulatory advice.

Finally, although the public body suggested that the NEB hearings had not been concluded, the Applicant suggested that the evidentiary portion of the hearings were complete and that even if the report were to be disclosed at this point, it could not be placed before the NEB as evidence.

Section 14 -

The Applicant notes that it is difficult to make comment on whether or not the Report constitutes "advice" as contemplated under section 14 so as to protect it from disclosure. He points out, however, that it is very unlikely that every word of the report would qualify as "advice" pursuant to this section and that it seems more reasonable that sections of the report could be released without disclosing those parts of the report which constitute advice.

Section 24 -

The Applicant suggests that the Department's argument on this section of the act is weak at best. He points out that in order to qualify as an exemption under this section, the information in question must have been "obtained from" or "supplied by" the Yukon Government as a Third Party and that the information in the Report was neither obtained from nor supplied by the Government of the Yukon, the supposed Third Party. He suggests that the use of Section 24(1)(b) to justify the refusal to disclose is a fairly blatant attempt to "throw as much in the way as possible and hope that something stays".

Section 16-

The Applicant argues that while the Government of the Yukon indicated that it would

prefer not to have the report released, it is a huge leap from there to suggest that the disclosure of the report would result in impaired relations between the two governments. He suggests that the very brief response received from the Yukon Government suggests that maintaining the confidentiality of the report does not appear to be a high priority for them. In fact, he says, the entire basis of the Yukon's objection appears to be the involvement of lawyers in the preparation of the report. He points out that the letter from the Yukon does not explicitly state that the disclosure of the report would impair relations between the two governments. Based on this, he suggests that the public body had not met the onus of establishing that this section applies in this case.

2. Memoranda and E-mails

The Department's Position

There are three records included in this group. One is a Memorandum and the other two are e-mails, both of which involve Keith Bergner, legal counsel.

Section 15 -

The public body has declined to disclose these records under section 15, claiming that they are "direct communications between the government and its legal counsel at the law firm Lawson Lundell" and are therefore subject to solicitor/client privilege.

The Applicant's Position

On this group of documents, the Applicant says only that without being privy to the records, there is little he can say other than what has already been submitted with respect to the Report.

3. Desk Review of Pipeline Harmonization File and Associated E-Mails

The Department's Position

Section 14 -
The Department indicates that the Desk Review of Pipeline Harmonization File (the "Desk Review") was prepared by a consultant. It was requested by Mr. Peter Vician, Deputy Minister of the Department who is the individual responsible for preparing and overseeing the Government's intervention before the NEB with respect to the Mackenzie Valley Pipeline. In fulfilling this responsibility, he reports to the Executive Council. They further point out that the Terms of Reference for the Desk Review (which have been disclosed) confirm that it was directed toward assisting the GNWT in formulating its position for hearings before the NEB. They say that it is clear from the Terms of Reference that the Desk Review was to provide advice on strategic issues as well as optimal timing for taking certain steps.

In relying on section 14 to refuse access to this record, the public body relies on Order 2004-024; *Alberta Finance (Re)*, [2006J A.I.P.C.D. No 21, an Order out of the office of the Alberta Information and Privacy Commissioner, Frank Work. In that case, Commissioner Work set out the test for determining the whether or not a record constitutes "advice":

> The "advice" must be:
> - sought or expected, or be part of the responsibility of a person by virtue of that person's positions;
> - directed toward taking an action; and
> - made to someone who can take or implement the action

The Department argues that the Desk review and the associated e-mails all fall squarely into the definition of "advice" as stated by Commissioner Work. Furthermore, they also rely on subsections (b) and (g) of section 14. They argue that the disclosure of the Desk Review would reveal the GNWT's deliberations in preparing for the NEB hearings and would reveal, as well, the Government's decision making process in developing its legal position.

Section 16(1)(a) -

The Department argues that this section applies to justify the refusal to disclose the Desk Review. They point to the Terms of Reference which included a requirement to review the GNWT's position regarding the appropriate regulatory regime for portions of the Alberta natural gas pipeline network. This might, they say, include a discussion of issues which might cause friction and disagreement between the Government of the Northwest Territories and other provincial governments. For that reason, they take the position that the contents of the record could potentially impair relations between the Government of the Northwest Territories and the Government of Alberta or other jurisdictions.

Section 17(1)(b) -

The public body argues that if third parties were to have access to the information contained in the Desk Review, they could use that information to support a position on tolling methodologies that is contrary to the economic interests of the Government of the Northwest Territories. They further say that privileged information from the Report is inextricably interwoven into the Desk Review and for that reason it is impossible to elaborate further without waiving the section 14 exception and the solicitor-client privilege.

Section 24(1)(b) -

The public body argues that section 24(1)(b) applies to the Desk Review for the same reasons that it applies to the Report, discussed above.

Section 15-

Although not originally relied on in refusing disclosure, the public body argued in its submission to me that the litigation privilege of section 15 applies to the Desk Review as well. They say that although it was not specifically requested by counsel, it was

requested as a follow-up to the Report and for the dominant purpose of preparing for the NEB hearings. They rely on the comments made by B.C. Information and Privacy Commissioner David Loukidelis in *Order F06-16; British Columbia (Ministry of Environment)(Re),* quoted above.

The Applicant's Position

Section 14(1) -

The Applicant notes that without seeing the Desk Review it is difficult to assess nature of the record in question other than to say that he considers it highly unlikely that every word of the requested record would qualify for an exemption under Section 14()(a). He feels that it would be more reasonable that sections of the record could be disclosed without revealing the advice given.

Section 16(1)(a) -

The Applicant argues that the Department has failed to identify those governments with whom relations might be impaired, why they would be impaired or how they would be impaired as a result of the disclosure of the Desk Review. He points to a lack of any evidence to support the Department's claim under this section of the Act. He also once again points out that the evidentiary portion of the NEB hearings are complete and any information contained in this document could not be used to counter the interests of the Government of the Northwest Territories.

Section 17(1)(b) -

The Applicant relies on the same argument made by him concerning this section in connection with the Report.

Section 24(1)(b) -

Similarly, the Applicant relies on the same argument made in relation to the Report under this section.

4. Cabinet Information Item - "Pipeline Harmonization"

The Department's Position

This group of documents consists of three records, all entitled "Pipeline Harmonization" dated November 24, November 22 and November 16th respectively. The three records appear to be different drafts of the same document. Also included in this grouping is an e-mail dated January 26th, 2005 from Peter Vician, the Deputy Minister of the Department which contained the "Pipeline Harmonization" document.

Section 13-

For these records, the Department relies primarily on section 13 of the Act, more specifically, section 13(1)(a) and (d)(I).

The public body relies on two precedents:

Order 02-38; British Columbia (Office of the Premier and Executive Council Operations) [2002] B.C.I.P.C.D. No. 38 in which Commissioner Loukidelis referred to Supreme Court of Canada authority to highlight the rationale behind the cabinet confidence exception to disclosure, being that those responsible for making government decisions must be able to discuss the issues in a free and unfettered manner. This case also makes the point that the importance of this exception to the right to disclosure is reflected in the mandatory wording of the section.

Order 97-010; Alberta (Treasury) and Alberta (Community Development)(Re) [1997] A.I.P.C.D. No. 14 in which Commissioner Robert Clark (as he then was) confirmed that mandatory nature of this exception is absolute and, once the exception is established,

there is no need to engage in balancing disclosure against potential harm to the public interest.

The public body argues that the cabinet confidence exception in NWT legislation is broader than the same exception in other jurisdictions in that it exempts records that would disclose a "confidence" of the Executive Council, whereas other jurisdictions generally exempt information that would reveal the "substance of deliberations". The Department argues that the records in question in both draft and final form clearly fall within the exception of section 13. The record summarizes the analysis, conclusions and options set out in the Report and the Desk Review. It was prepared as a briefing note to the members of the Executive Council and outlines a recommended position with respect to tolling methodologies and design and solicits direction from the Executive Council with respect to that position. In the circumstances, they say there is no discretion to exercise as the section is mandatory.

Sections 16(1)(a), 17(1)(b) and 24(1)(b)-

The public body argues that even if section 13 did not apply, sections 16(1)(a), 17(1)(b) and 24(1)(b) all apply for the reasons set out above.

The Applicant's Position

Section 13 -

It is the Applicant's position that the record cannot be considered to be a Cabinet Confidence in that it was prepared by government staff. It was not prepared by the Cabinet. He argues that the disclosure of the record itself could not possibly reveal the nature or the substance of the Cabinet's deliberations on the polling methodologies issue. Furthermore, he argues, the Cabinet's ultimate response to the document is already a matter of public record as that response would have constituted the core of the Government's evidentiary submission to the NEB's public record.

5. Release of Responsive Records to the Information and Privacy Commissioner for the purposes of the Review process.

Although this issue has been resolved in that the public body eventually agreed to allow me to have a copy of the responsive records in order to allow me to undertake this review, it was only on the basis that I provide my solicitor's undertaking to return them uncopied upon my completion of the review. Although I agreed to do that in order to allow me to proceed with the Review, I would suggest that the demand was improper and inappropriate and for that reason I will comment, although briefly, on the issue

The Department's Position

The Department initially refused to provide me with copies of those records over which the public body had asserted a solicitor-client privilege. They argued that recent court decisions have held that provisions in Access to Information Legislation which authorize Information and Privacy Commissioners in various jurisdictions of Canada to examine any record are to be read and applied restrictively and that solicitor-client privilege should only be abrogated where absolutely necessary. In support of this position, they refer to *Canada (Attorney General) v. Canada (Information Commissioner)* [2004] 4 F.C.R. 181 and the *Blood Tribe Department of Health v. Canada (Privacy Commissioner)* [2006] F.C.J. No. 1544 (Fed. CA) as well as *Goodis v. Ontario (Ministry of Correctional Services)* [2006] S.C.J. No. 31 (SCC).

The Applicant's Position

The Applicant argues that the Information and Privacy Commissioner must have access to the records in order to be able to confirm that they do, in fact, constitute records that are privileged.

DISCUSSION:

Any discussion of the arguments made by either of the parties to this review must begin by noting section 33(1) of the Act which provides that:

> 33.(1) On a review of a decision to refuse an applicant access to all or part of a record, 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.

It is, therefore, incumbent on the public body to provide real and cogent evidence to establish that the various sections relied on do apply to the fact situation at hand. I must say that in many respects, the public body has not met this onus. I tend to agree with the Applicant that to some extent it simply looks like the Department was taking a shotgun approach and throwing everything out in the hope that some of it would stick, without really providing the background 'evidence' necessary to support their position. Although I would always encourage public bodies to be thorough, in this case it seems to me that there was an element of overkill involved.

Addressing the issues outlined earlier, I would make the following comments and observations:

1. The Report

a) Is the Report properly the subject of solicitor-client privilege and, if so has the public body exercised its discretion pursuant to section 15 of the Act?

In *Order 96-015, Alberta (Justice)* (April 24, 1977), Commissioner Robert Clarke, as he then was, discusses the application of privilege in some detail and his discussion was very useful to me in reviewing the Report. He said:

> In Order 96-017, I stated that to correctly apply section 26(1)(a) (solicitor client privilege), the Public Body must meet the common law criteria for that privilege, as set out in *Solosky v. The Queen,* [1980] 1 S.C.R. 821. In

that case, the Supreme Court of Canada stated that solicitor-client privilege must be claimed document by document, and each document must meet the following criteria: (i) it is a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties ....

Ronald D. Manes and Michael P. Silver in *Solicitor-Client Privilege in Canadian Law* (Toronto, Ontario: Butterworths, 1993), at p. 26, say there is a debate as to the extent of solicitor-client privilege. The broad view would have solicitor-client privilege protect all communications passing between a solicitor and client, thus focusing solely on the confidentiality aspect of the professional relationship. The narrower view would have solicitor-client privilege protect only those communications that meet the tests in *Solosky v. The Queen,* thus focusing on the communication and its purpose.....

I want to make it clear that my conclusion in this regard is based on the application of the second criterion set out in *Solosky v. The Queen,* and not on an application of the rules of discovery relating to what part of a document is factual, and therefore not privileged. As Commissioner, I believe that while I have jurisdiction to apply the *Solosky* criteria to a document to determine whether solicitor-client privilege applies to that document, I do not have jurisdiction to delve into any document to determine what part of a solicitor client communication is legal advice and therefore privileged, and what part is factual and therefore not privileged...

With respect to the "litigation privilege" he made the following statements

The guiding principle for litigation privilege is that all papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated, are privileged: *Susan Hosiery Ltd. v. Minister of National Revenue,* [1969] 2 Ex. C.R. 27. This means that such papers

and materials are confidential and do not have to be disclosed.

The privilege applies to papers and materials created or obtained by the client for the lawyer's use in existing or contemplated litigation, or created by a third party or obtained from a third party on behalf of the client for the lawyer's use in existing or contemplated litigation: *Waugh v. British Railway Board,* [1979] 2 All E.R. 1169 (H.L.)....

To correctly apply litigation privilege, the Public Body must show that the "dominant purpose" for which the documents were prepared was to submit them to a legal advisor for advice and use in the litigation, whether existing or contemplated: *Nova, An Alberta Corporation v. Guelph Engineering Company(1984),* 30 Alta. L.R. (2d) 183 (C.A.); *Waugh v. British Railway Board,* [1979] 2 All E.R. 1169 (H.L.);

The "dominant purpose" test consists of three requirements, each of which must be met: see Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, p. 93. Those requirements are:

(i) the documents must have been produced with existing or contemplated litigation in mind,
(ii) the documents must have been produced for the dominant purpose of existing or contemplated litigation, and
(iii) if litigation is contemplated, the prospect of litigation must be reasonable.

The intent of the maker of the document or the person under whose authority the document was made is to be considered when determining "dominant purpose": *Opron Construction Co. v. Alberta* (1989), 71 Alta. L.R. (2d) 28 (C.A.).

Furthermore, the maker of the document or the person under whose

> authority the document was made must have intended the document to be confidential (the one possible exception, not applicable in this case, being the "work product" or "lawyer's brief' rule): see Manes and Silver, *Solicitor-Client Privilege in Canadian Law,* p. 96.

Based on the materials before me, including the Report itself, I am satisfied that the Report meets the criteria for protection from disclosure under section 15(b). The Report was clearly produced with existing or contemplated "litigation" before the NEB in mind, the dominant purpose of the Report was to prepare for that "litigation" and the prospect of the "litigation" was reasonable. The makers of the Report clearly intended it to be confidential, as that is clearly indicated on the document itself.

I'm afraid that I do not agree with the Applicant's argument that the Report is likely to be more "regulatory" than "legal" in nature. Law is more than what happens in the courts. Legal advice entails advice on matters which are far wider than criminal law, torts or family law. It can also mean providing advice on regulatory matters. Furthermore, having found that the Report is protected from disclosure pursuant to section 15, as noted by Commissioner Clark, "while I have jurisdiction to apply the *Solosky* criteria to a document to determine whether solicitor-client privilege applies to that document, I do not have jurisdiction to delve into any document to determine what part of a solicitor client communication is legal advice and therefore privileged, and what part is factual and therefore not privileged ... ".

I am satisfied that the information contained in the Report was created to assist the Government of the Northwest Territories to prepare its submissions to the NEB hearings. As such, the public body has the discretion to refuse to disclose the record. I am also satisfied, based on the submissions provided to me that they have, in fact, actively exercised that discretion by weighing the pros and the cons of disclosure. So long as a public body has actively exercised its discretion, it is not for me to say whether that exercise of discretion was reasonable or correct.

Having found that the public body has discretion to refuse access to the Report

pursuant to section 15, it is unnecessary for me to consider whether other sections apply. However, I will comment briefly on each of the arguments.

b) Would the disclosure of the Report be reasonably expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council and, if so, has the public body exercised its discretion pursuant to section 14(1)(a) of the Act?

Even if the Report did not attract the protection of section 15 as privileged, it is my opinion the section 14(1)(a) would provide a secondary discretionary exemption as the record clearly contains analysis and advice. If the public body were relying only on section 14, however, there would have had to be a more focused consideration of the record section by section to determine what portion of the record is merely factual background material and what portion constitutes "advice". Because section 15 does apply, however, I do not propose to undertake that exercise.

c) Does section 14(2) apply to this record?

The only point I would make with respect to this section is that it provides that section 14(1) does not apply to protect information that is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal. If section 15 did not apply, it is my opinion that at least part of this record might well fall into the category of background research of a technical nature. The public body did not address this possibility in its submissions to me and did not, therefore, satisfy the onus on them to establish that the Applicant had no right of access to the Report pursuant to this section.

d) Would the disclosure of the Report be reasonably be expected to impair relations between the Government of the Northwest Territories and the Government of the Yukon and, if so, has the public body exercised its discretion pursuant to section 16(1)(a) of the Act, keeping in mind subsection 16(2)?

Once again, keeping in mind that the onus is on the public body to establish that the Applicant had no right of access to the Report, I'm not sure that they have met that onus based on the submissions before me. As noted by the Applicant, the evidence that relations would be impaired is weak. The response to the public body's inquiry came not from a senior manager, but from an ATIPP Co-Ordinator for the department involved. The response is not strongly worded such as to suggest that this is an issue of significant importance for the Yukon government. If this were the only section being relied on, I would agree with the Applicant that the public body did not meet its onus of establishing that this section applied in this case.

e) Would the disclosure of the Report constitute the disclosure of financial, commercial, scientific, technical or labour relations information obtained in confidence, explicitly or implicitly, from a third party, or that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement, thereby prohibiting its disclosure pursuant to section 24(1)(b)?

I agree with the Applicant in this case that the information contained in the Report was not "obtained from" the Yukon Government as a third party nor was it "supplied by" the Yukon Government as a legal requirement. Section 24(1)(b) does not apply to protect the Report from disclosure.

f) Would the disclosure of the Report be reasonably expected to harm the economic interest of the Government of the Northwest Territories or a public body or the ability of the Government to manage the economy. In particular, is this financial, commercial, scientific, technical or other information in which the Government of the Northwest Territories or a public body has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value? If so, has the public body exercised its discretion in refusing disclosure pursuant to section 17(1)(b)?

I am satisfied, based on the information contained in the Report that the outcome of the NEB hearings would/will have potential financial consequences for the Government of

the Northwest Territories and that it was essential for them to create a strategy and a strong position with respect to the issue of polling methodologies. Whether or not the NEB hearings had completed the evidentiary portion of the hearings, the basis of the GNWT's argument is contained in the Report and argument was still, apparently, not completed. In my opinion, section 17(1)(b) would apply to this record such as to give the public body a discretionary exemption with respect to the record.

2. Memoranda and E-mails involving Legal Counsel

g) Are these communications properly the subject of solicitor-client privilege and, if so has the public body exercised its discretion pursuant to section 15 of the Act?

The e-mails are clearly communications between solicitors and their client and the subject line of the e-mails relate to a legal issue. That does not, however, determine the issue. As noted above, in *Solosky v. The Queen,* the Supreme Court of Canada stated that solicitor-client privilege must be claimed document by document.

Furthermore, each document must meet the three criteria for determining if it is privileged:

(i) it must be a communication between solicitor and client;
(ii) it must entail the seeking or giving of legal advice; and
(iii) it must be intended to be confidential by the parties.

Although the first criteria is there, the others are not. There is nothing in body of the emails which entails the seeking or giving of legal advice. There are attachments which are the subject of privilege as set discussed above, but the body of the e-mails are not. I am at a loss to understand why the e-mails themselves could not be disclosed without the attachments. I therefore recommend that these e-mails be disclosed (but not the attachments). I would note in passing that it would be difficult to suggest that any record exchanged by means of e-mail between two parties could be considered to be intended to be confidential unless the e-mail communication is encrypted. E-mail

correspondence is notoriously insecure and I would suggest that documents of great sensitivity should be exchanged only by encrypted e-mail or by other, more secure means.

With respect to the Memorandum, this record is merely a list of five documents and, without more, I fail to see how it might be considered subject to any kind of privilege. The list, in and of itself, does not constitute legal advice and I am not convinced that it meets the "dominant purpose" test to attract a litigation privilege. It is merely a list of documents. I recommend that this record be disclosed.

3. Desk Review of Pipeline Harmonization File" and associated e-mail

h) Would the disclosure of the "Desk Review" be reasonably expected to 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)(a))?

In order to be protected from disclosure under section 14(1)(a), the record in question must

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action.

I am satisfied, based on the submissions of the public body and my review of the record in question that this document meets all three criteria. It was prepared at the direction of the Deputy Minister having responsibility to oversee the government's presentations before the NEB. The document clearly provides advice with respect to the formulation of policies and positions before the NEB, and the advice was made to someone who had the responsibility for implementing the action. The public body therefore had a discretion to refuse disclosure of the record and they actively exercised that discretion. Because I do not have the necessary technical background to fully understand the

technical discussion in this record, it is difficult for me to say whether parts of this record might be outside of the protection of section 14(1)(a). Some of it does appear to be simply a statement of historical background and that portion of the record would not be protected from disclosure. I would therefore recommend that the public body review this record a second time, with a view to determining whether or not there are portions of it which can be disclosed simply as background information. I refer specifically to those pages marked as "Appendix A", Attachment "1 ", Appendix "2", and Appendix "3".

i) Would the disclosure of these records be reasonably expected to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council (section 14(1}(b))?

Again, having read the record in question and considered the submissions of both the public body and the Applicant, I am satisfied that at least part of these records, including the relevant e-mails, do contain the essence of consultations and deliberations involving officers and/or employees of the public body with respect the NEB hearings. Again, however, I think that maybe there are parts of the Desk Review itself, as indicated above, that could more accurately be described as historical background which are not protected by Section 14(1)(b).

j) Would the disclosure of these records be reasonably expected to reveal information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision (section 14(1)(g))?

My comments with respect to subsection 14(1)(a) and 14(1)(b) apply to this section as well. Although I am satisfied that significant portions of these records are protected from disclosure pursuant to this section 14(1)(g), those portions that might be more accurately described as historical background perhaps should be disclosed and I recommend that the public body take another look at those sections of the record.

k) Does section 14(2) apply to these records?

Subsection (2) of section 14 provides that none of the exemptions set out in subsection (1) apply to information that is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal. Although neither of the parties referred to this section, I think that the circumstances require that it be discussed, if only briefly. On this issue I would simply say that, with the exception of those portions of the Desk Review that I have already identified as possibly being more properly described as historical background, it is impossible to sever from the body of the record as a whole those parts that might be "the result of background research of a scientific or technical nature" as those things are inextricably intertwined with the advice and recommendations. Except as discussed above, therefore, I do not think that section 14(2) applies to these records.

l) Would the disclosure of these records be reasonably be expected to impair relations between the Government of the Northwest Territories and the Government of the Yukon and, if so, has the public body exercised its discretion pursuant to section 16(1)(a) of the Act, keeping in mind subsection 16(2)?

My comments with respect to this section as they relate to the Report are equally applicable to the Desk Review. The public body has not met the onus of establishing that this section applies to these records such that they should be protected from disclosure pursuant to section 16(1).

m) Would the disclosure of these records be reasonably expected to harm the economic interest of the Government of the Northwest Territories or a public body or the ability of the Government to manage the economy. In particular, is this financial, commercial, scientific, technical or other information in which the Government of the Northwest Territories or a public body has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value? If so, has the public body exercised its discretion in refusing disclosure pursuant to section 17(1)(b)?

My comments with respect to the application of this section to the Report are applicable here as well. Once again, however, those sections of the records which constitute historical and other background information do not enjoy the same protection and, as noted above, the refusal to disclose those portions of the record should be reconsidered.

n) Would the disclosure of these records constitute the disclosure of financial, commercial, scientific, technical or labour relations information obtained in confidence, explicitly or implicitly, from a third party, or that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement, thereby prohibiting its disclosure pursuant to section 24(1)(b)?

For the same reasons as discussed above in connection with the Report, in my opinion section 24(1)(b) does not apply so as to protect these records from disclosure.

4. Cabinet Information Item entitled "Pipeline Harmonization"

o) Would the disclosure of this record reveal advice, proposals, requests for directions, recommendations, analyses or policy options prepared for presentation to the Executive Councilor the Financial Management Board (Section 13(1)(a)) or briefings to members of the Executive Councilor the Financial Management Board in relation to matters that have been before, or are proposed to be brought before, the Executive Council or the Financial Management Board (section 13(1)(d)(l))?

In discussing the equivalent of section 13(1)(d) of the Alberta legislation, Commissioner Clark, as he then was, made the following observations about what might constitute a cabinet document in Order 97-010 (October 29, 1997):

> Generally, a memorandum presenting proposals to Cabinet will be signed by the minister recommending the action proposed. However, this is not always so. Memoranda may be signed by the Secretary to the Cabinet or

by a Secretary to a committee of Cabinet and still be a Confidence. Drafts of memoranda are also Confidences. Thus, a draft memorandum which was created for the purpose of presenting proposals and recommendations to Cabinet but which was never actually presented to Cabinet is still a Confidence. Equally a memorandum in final form is a Confidence even if it has not been presented to Cabinet. This is consistent with the Treasury Board of Canada Policy Manual -Access to Information Volume, Part 2- Guidelines, Chapter 2-6 dealing with confidences of the Queen's Privy Council for Cabinet .

There appear to be three versions of this record, the first two being drafts and the last being the final version of the record. It also appears that the original was signed by the Minister. I am satisfied from my review of these records that they summarize the analysis, conclusions and options set out in the Report and the Desk Review and that they were prepared for the purpose of briefing members of the Executive Council for the purpose of obtaining cabinet approval of the course of action recommended therein. As such, it enjoys the protection of section 13(1)(d) of the Act and disclosure is prohibited.

p) Would the disclosure of this record be reasonably be expected to impair relations between the Government of the Northwest Territories and the Government of the Yukon and, if so, has the public body exercised its discretion pursuant to section 16(1)(a) of the Act, keeping in mind subsection 16(2)?

Because this record appears to contain a cabinet confidence and its disclosure is, therefore, prohibited, there is no need to address this issue. That having been said, my comments with respect to the application of section 16 for the other portions of this review are applicable here as well. In my opinion, the public body has not met the onus of establishing that the disclosure of this record would impair relations between the Government of the Northwest Territories and any other provincial or federal government.

q) Would the disclosure of this record be reasonably expected to harm the economic interest of the Government of the Northwest Territories or a public body or the ability of the Government to manage the economy? In particular, is this financial, commercial, scientific, technical or other information in which the Government of the Northwest Territories or a public body has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value? If so, has the public body exercised its discretion in refusing disclosure pursuant to section 17(1)(b)?

Again, because of my conclusion that these records constitute cabinet confidences, I do not intend to comment in detail with respect to this submission except to say that I am satisfied that much of the information in this set of records is sensitive information, the premature disclosure of which could be reasonably expected to harm the economic interest of the Government of the Northwest Territories or the ability of the government to manage its economy. What would constitute "premature" disclosure is difficult to determine based on my limited knowledge of the regulatory process. My inclination, however, would be to suggest that until the NEB has completed it's hearing process and made its decision on the issue of tolling methodologies, it is not unreasonable for the public body to take the position that disclosure would be premature, at least in the circumstances of this particular project.

r) Would the disclosure of this record constitute the disclosure of financial, commercial, scientific, technical or labour relations information obtained in confidence, explicitly or implicitly, from a third party, or that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement, thereby prohibiting its disclosure pursuant to section 24(1)(b)?

Again, without going into detail, I do not believe that these records would fit the criteria for protection from disclosure pursuant to section 24(1)(b) of the Act as the information in question was not obtained from the Third Party government.

5. Generally

s) Was the public body justified in refusing, in the first instance, to provide this office with the responsive records for the purpose of this review process?

Because this issue was eventually resolved, I do not intend to make detailed comments with respect to the position taken by the public body. I would say only that section 34 of the Act provides as follows:

> Notwithstanding any other Act or any privilege available at law, the Information and Privacy Commissioner may, in conducting a review under this Division, require the production of and examine any record to which this Act applies that is in the custody or under the control of the public body concerned.

The case law which the public body referred me to in suggesting that this provision should be interpreted narrowly arises out of legislation which does not have the very straight forward and clear wording set out above. I would suggest that if independent oversight is the purpose of having an Information and Privacy Commissioner, it makes sense that he/she should have the ability to see relevant records to assess whether any particular exemption being claimed does, in fact, apply.

Although the issue was resolved in this instance by the Information and Privacy Commissioner providing an undertaking as a lawyer to keep the records confidential and to return them upon the completion of the review, in my respectful opinion it is inappropriate for a public body to demand or require such an undertaking. The legislation itself provides for the disclosure of any record to which the Act applies to the Information and Privacy Commissioner and similarly provides that the Information and Privacy Commissioner is prohibited from disclosing the record or the substance of the record to any other person. I would think that the provisions of the Act would be sufficient to satisfy any concerns as to confidentiality.

Although I am pleased that the matter was eventually resolved, I do not anticipate that I will be asked to provide a solicitor's undertaking with respect to my review of records in

future reviews, no matter how sensitive the information might be considered by the public body. Rather, I anticipate that all public bodies will respect the office of the Information and Privacy Commissioner and accept that the oath of office taken by the Commissioner and the provisions of the legislation by which the Commissioner is bound are sufficient to ensure that the substance of records received for the purpose of review will not be improperly disclosed by him/her.

SUMMARY AND RECOMMENDATION

Having reviewed all of the relevant records, I am satisfied that the public body properly refused to disclose the records listed above, with the following exceptions:

a) the Memorandum
b) the body of the e-mail "Bergner to Fulford" dated June 1,2005 (2:46 PM)
c) the body of the e-mail "Matthews to Bergner" dated August 9,2004 (1 :58 PM)
d) the Appendices and Attachments to the Desk Review

It is my recommendation that these four items be disclosed (without the items attached to the e-mails).

Elaine Keenan Bengts
Information and Privacy Commissioner