Yukon Information & Privacy Commissioner

INQUIRY REPORT
File #s 10-021AR, 10-022AR, 10-025AR and 10-026AR

Michael McEvoy
Acting Information and Privacy Commissioner

Public Body: **DEPARTMENT OF JUSTICE**
ENERGY, MINES AND RESOURCES

Date: **May 22, 2012**

Summary:

The applicant requested a review of the decisions by the Department of Justice ("DOJ") and the Department of Energy, Mines and Resources ("EMR") to refuse access to information relating to legal advice that concerned him. EMR said the information was subject to solicitor-client privilege under s. 18(a) of the *Access to Information and Protection of Privacy Act* ("Act"). DOJ claimed the same provision and added that litigation privilege under s. 18(b) also applied.

The applicant argued that the privilege had been waived over all of the information because the government had already provided him part of his request; that being a copy of a legal opinion. The Acting Commissioner found that the information at issue all related to solicitor-client communications that was provided in confidence. He determined that neither of the two public bodies had provided him a copy of the legal opinion either voluntarily or unintentionally and neither body intended to waive the privilege that attached to the withheld information. Therefore solicitor-client privilege was not waived in this case and both EMR and DOJ were authorized to refuse access to the requested information.

Finding:	The Acting Information and Privacy Commissioner affirms under s. 57(2)(b)(ii) of the Act that the public bodies are authorized to refuse access to the requested information.
Statutes Considered:	*Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1, sections 18(a) and (b), 52, 57(2)(b)(ii).
Authorities Considered:	*S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* 1983 CanLII 407 (BCSC)
Authors Cited:	Hubbard, Robert W., Susan Magotiaux and Suzanne M. Duncan. *The Law of Privilege in Canada*. Aurora, Ont.: Canada Law Book, 2006, Chap. 11.10

I INTRODUCTION

[1] The applicant has been involved in a long standing dispute with the Yukon Government about land on which the Government says the applicant is "squatting."[1] Related to this, the applicant made two separate requests for information to the Department of Justice ("DOJ") on July 15, 2012. The first ("Request 1") asked for:

> …any and all information, emails, correspondence, briefing notes or other communications related to the December 18, 2007 Legal Opinion provided by Mike Winstanley to Lands Branch Re: [APPLICANT] FILE REVIEW.

[2] The second ("Request 2") sought:

> any and all information, emails, correspondence, briefing notes, or other communications related specifically to the legal advice requested in 2007 by the Lands Branch to Legal Services concerning the files of [APPLICANT].

[3] On the same day, the applicant made these same two requests for information to the Department of Energy, Mines and Resources ("EMR").

[4] DOJ and EMR responded somewhat differently to the requests.

[5] In response to Request 1, EMR provided three pages of emails with some information severed in each. They also provided a four page document described

[1] A colloquial term used to denote the unauthorized occupation of land.

as a legal opinion that except for a few initial words was completely withheld. In response to Request 2, EMR provided the same records it provided to Request 1, minus one of the email pages. EMR said as regards all the withheld information it was subject to solicitor-client privilege under s. 18(a) of the *Access to Information and Protection of Privacy Act* ("Act").

[6] As for DOJ, it withheld all of the information in the records it said were responsive to Requests 1 and 2. It also relied on s. 18(a) but in addition cited s. 18(b) of the Act as well, a provision that refers to litigation privilege.

[7] I will say more below about what I view is the overlapping nature of these records that DOJ and EMR report as being responsive to the applicant's request.

[8] The applicant filed a Request for Review of DOJ's decisions with the Office of the Yukon Information and Privacy Commissioner on July 21, 2010. He requested a review of EMR's decisions on August 18, 2010.

[9] Mediation did not resolve the issues between the applicant and either of the public bodies and the matters were referred to inquiry under s. 52 of the Act.

II INQUIRY PROCESS

[10] On September 30, 2010, the Commissioner issued separate Notices of Inquiry for Request 1 and Request 2 concerning DOJ.[2]

[11] On October 20, 2010, the Commissioner issued separate Notices of Inquiry for Requests 1 and 2 made of EMR.[3]

[12] Initial submissions related to the EMR requests were made by the applicant and EMR on November 5, 2010, with replies filed November 16, 2010.

[13] Initial submissions concerning the DOJ requests were made by the applicant and DOJ on October 21, 2010 and October 22, 2010 respectively, with replies filed November 5, 2010 and November 4, 2010. At this stage, the then Information and Privacy Commissioner, Tracy-Anne McPhee, ("Commissioner") found that the DOJ's reply submission contained material that should have formed part of its initial submission. As a result, she allowed the applicant to respond to the late material which he did on November 6, 2010.

[14] Following receipt of final submissions by the parties in all of the four inquiries noted above, the Commissioner determined there could be a reasonable

[2] File numbers #ATP10-021AR and #ATP10-022AR.
[3] File numbers #ATP10-025AR and #ATP10-026AR.

apprehension of bias should she conduct them. This was because the matters were closely related to one she had previously investigated in her capacity as Ombudsman. She therefore concluded that pursuant to s. 48(5) of the Act it was necessary to ask the Speaker of the Legislative Assembly to appoint an Acting Information and Privacy Commissioner ("Acting Commissioner") to dispose of the inquiries in order to avoid any question of bias and to safeguard the integrity of the Office. She officially did so on February 9, 2012. By letter from the Speaker of the Legislative Assembly, the Honourable David Laxton, dated February 24, 2012, I was appointed Acting Commissioner.

III SCHEDULE OF RECORDS AT ISSUE

Background

[15] It is necessary in most circumstances for a public body to produce the records at issue at inquiry in order to make a determination about them. However, as noted in Inquiry #08-008AR, where solicitor-client privilege is claimed over the records, the need to compel their disclosure, so that they can be fairly adjudicated, will be assessed on a case by case basis.

[16] In this case, EMR provided me, with one exception, severed copies of the withheld records. The exception was one email it disclosed to me in full. I am satisfied, based on EMR's submissions and affidavit evidence, that these records are sufficiently described to allow me to make a determination about them.

[17] For its part, DOJ did not provide any records to me but did supply a schedule describing them. The descriptions were sufficiently particular that, when I compared this schedule to the records provided or described with EMR's submissions, it became apparent the records were, with one exception, the same. The exception (and it does not form part of the DOJ schedule) is the record fully disclosed to me by EMR noted in the above paragraph.[4] Because of the almost complete overlap of the records that are disputed in this case, I have concluded that the most practical way to proceed is to join all four inquiries together and issue one Inquiry Report.

[18] I also need to clarify, as may be apparent from how the records are described, that EMR disclosed some information in the overlapping records that DOJ withheld. That being the case, it is only necessary that I focus this inquiry on the information that is withheld concurrently by EMR and DOJ.

[4] When I asked for more information about this record, the applicant expressed concern that this may not be fair, especially if I were to accept further affidavit evidence from EMR. That concern became moot when EMR simply provided the record itself.

[19] For the sake of convenience, when referring to the records, I will use the numbering system EMR employed in its response to the applicant's request in #ATP10-025AR. The records responsive to that request encompass all the information at issue in this inquiry report. I would also note there were many similarities in arguments made by the applicant and public bodies in all four inquiries. There were a few differences and where those were material I reference them below.

The Records

[20] In total, there are seven unique pages of records in dispute.

[21] Record 00021[5] contains a series of emails. The withheld portion is part of an email dated June 10, 2008, and is a communication between Mike Winstanley, the Legal Services Branch ("LSB") lawyer to Lyle Henderson, Director of the Lands Branch of EMR.

[22] Record 00041,[6] dated December 19, 2007, is also a communication from Mike Winstanley, the LSB lawyer to Lyle Henderson and John Cole, Acting Manager of Land Client Services.

[23] Record 00042[7] is an email dated December 19, 2007, from Lyle Henderson to Angus Robertson, a Deputy Minister and Jeff O'Farrell who I take from the submissions to be a government employee.

[24] Records 00044 to 00047[8] inclusive are described as a legal opinion.

IV DISCUSSION OF ISSUES

[25] EMR argued that s. 18(a) applied to the records, while DOJ argued both s. 18(a) and (b) of the Act applied to the records. I will first consider the s. 18(a) submission.

[5] The same as Record 00001 in #ATP10-026AR and described in the Schedule of Records of #ATP10-021AR & #ATP10-022AR under the June 10, 2008 email thread from Lyle Henderson to Mike Winstanley and then from Mike Winstanley to Lyle Henderson. The former exchange was disclosed by EMR so only the Mike Winstanley to Lyle Henderson email is in issue here.

[6] The same record as 00008 in #ATP10-026AR and described in the Schedule of Records of #ATP10-021AR & #ATP10-022AR under the December 19, 2007 email thread from Mike Winstanley to Lyle Henderson and John Cole.

[7] This is the record not found in #ATP10-026AR or described in the Schedule of Records of #ATP10-021AR & #ATP10-022AR.

[8] The same record as 00010-00013 in #ATP10-026AR and described in the Schedule of Records of #ATP10-021AR & #ATP10-022AR under the "Document Type" as "Attachment to email of December 19, 2007 – Memorandum."

[26] Section 18(a) of the Act gives a public body the discretion to withhold information that is subject to solicitor-client privilege. It states in part:

> **Legal advice**
>
> 18 A public body may refuse to disclose to an applicant a record
>
> (a) that is subject to solicitor client privilege; **...**

[27] A concise summary of solicitor-client privilege is expressed in *The Law of Privilege in Canada*[9]:

> Solicitor-client privilege protects the direct communications – both oral and documentary – prepared by the lawyer or client and flowing between them, in connection with the provision of legal advice. The communication must be intended to be made in confidence, in the course of seeking or providing legal advice, and must be advice based upon the professional's expertise in law.

[28] Records 00021 and 00041 are clearly confidential communications between solicitor and client related to advice and the seeking of advice concerning the applicant's squatter land application. Record 00042 is a confidential record "prepared" by the client in connection with the provision of the legal advice. It recites the legal advice Michael Winstanley proffered with a view to how the Ministry will conduct itself in relation to the applicant. Therefore, the information at issue meets the test for legal privilege.

[29] With respect to Records 00044 to 00047 there is no question, based on the affidavit evidence provided by Michael Winstanley attached to EMR's submission, that these documents constitute a legal opinion.[10] I am satisfied, based on this same evidence, the opinion was provided in confidence by the LSB lawyer to EMR. It is therefore privileged.

[30] The applicant has two arguments in respect to these privileged records. The first is that he is the client who exercises the right of privilege over these records. The second is that if the privilege does belong to the public bodies they waived their rights to exercise it.

[31] With regard to his first argument the applicant says that he, and not the public bodies, is the client in this case. He refers to a December 6, 2007 letter he

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[9] Hubbard, Robert W., Susan Magotiaux and Suzanne M. Duncan. *The Law of Privilege in Canada*. Aurora, Ont.: Canada Law Book, 2006, Chap. 11.10.

[10] In fact the applicant refers to it as such throughout his submission though in quotation marks.

received from the Deputy Minister of EMR, Angus Robertson. The letter attempts to clarify for the applicant his claim concerning a lot configuration. It states in part:

> However, on your behalf and as confirmed in Mr. Henderson's November 14, 2007 letter (attached), the Legal Services Branch has been requested to conduct a review of your files.

[32] The applicant did not provide me the November 14, 2007 attached letter. While this letter might be somewhat awkwardly worded, I do not take it to say that the applicant is in the position of the client given authority to provide instructions to counsel. Indeed, the letter indicates it is Lyle Henderson providing the instructions to counsel, a fact confirmed in EMR's reply submission. In my view, the intention of the letter was to assure the applicant that EMR had retained counsel to review the matter to insure the applicant's application was, from the government's standpoint, properly dealt with. For these reasons, I reject the applicant's assertion that he is the client in these circumstances.

[33] With respect to his second argument, the applicant says the government waived privilege when it provided a copy of the legal opinion to him in response to an earlier unspecified access request. The applicant appended to his submission a document purporting to be an unsevered version of the opinion. The applicant quotes a passage from the decision in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd*.[11] in support of his argument that waiver may occur in the absence of intention to do so where fairness and consistency so require. The applicant argues that because privilege was waived over the legal opinion (which he describes as "part of the communication"), privilege is now waived over all the information in dispute.

[34] The public bodies, for their part, deny providing the legal opinion in response to another access request and say it has no knowledge of how the applicant obtained what EMR calls "an unsigned copy of the legal opinion". Both EMR and DOJ deny any intention to waive privilege over the legal opinion.

[35] I noted above the applicant argues that a form of implicit waiver occurred here. In the *S. & K. Processors Ltd.* case, referred to by the applicant, McLachlin J. (as she then was) articulated succinctly the law relating to implied waiver:

> 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.

[11] 1983 CanLII 407 (BC SC).

> Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost *Rogers v. Hunter* 1981 CanLII 710 (BCSC), [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).
>
> …
>
> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Rogers v. Hunter*, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* reflex, (1979), 27 O.R. (2d) 395, 11 C.C.L.T. 49, 14 C.P.C. 247, 59 C.C.C. (2d) 87, 106 D.L.R. (3d) 340 (C.A.), it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.

[36] The applicant says the information was provided to him in response to an access request but I do find this submission compelling. He does not say which body provided the record or what date he obtained it. In this case the Ministry provides sworn evidence that it did not disclose the record to the applicant voluntarily or unintentionally, either in response to an access request or otherwise. In considering the applicant's submissions in relation to the more specific sworn evidence of EMR and DOJ, I conclude that the public bodies did not voluntarily or unintentionally disclose the opinion to the applicant. Unlike the *S. & K.* case, the public bodies have not partially disclosed the record. For this reason, there is no unfairness arising in this case that would dictate a finding that privilege is waived over all of the records in dispute. I conclude, therefore, that neither public body has explicitly or implicitly waived privilege either in whole or in part.

[37] DOJ also argued that the information was properly withheld because litigation privilege under s. 18(b) of the Act applied to it. It is not necessary for me to deal with this argument because of my finding under s. 18(a).

[38] In summary, I conclude that all of the information at issue in these inquiries is subject to solicitor-client privilege.

V FINDINGS

[39] For the reasons set out above, I affirm under s. 57(2)(b)(ii) of the Act that the public bodies are authorized to refuse access to the requested information.

VI APPLICANT'S RIGHT OF APPEAL

[40] Section 59(1)(b) gives the applicant the right to appeal to the Yukon Supreme Court when a determination is made under s. 57 of the Act that the public bodies are authorized to refuse access to the record.

May 22, 2012

ORIGINAL SIGNED BY

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Michael McEvoy
Acting Yukon Information and Privacy Commissioner

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