



**INQUIRY REPORT  
File ATP11-029AR**

**Pursuant to section 52 of the  
*Access to Information and Protection of Privacy Act***

**Diane McLeod-McKay  
Information and Privacy Commissioner (IPC)**

**Public Body: ENERGY, MINES AND RESOURCES**

**Date: August 14, 2013**

**Summary:** The Applicant made a request under the *Access to Information Protection of Privacy Act* to Energy, Mines and Resources for access to all communications resulting from a letter written to the Minister of Energy Mines and Resources about a specific land disposition. Energy, Mines and Resources provided some of the records in their entirety but severed information in others citing the solicitor client privilege exception under section 18 (a) of the Act for the severing.

**Statutes Considered:** *Access to Information and Protection of Privacy Act* RSY 2002 c.1 section 18 (a).

**Cases Cited:**

*Calgary (City) (Re)*, 2013 CanLII 32052 (AB OIPC) citing *Canada v. Solosky* 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821.

*Canada (Information Commissioner) v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 877.

*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815.

## I. BACKGROUND

- [1] Energy, Mines, and Resources (EMR) received a request from the Applicant under the *Access to Information and Protection of Privacy Act* (Act) for

*"..any and all information, emails, correspondence, briefing notes, or other communications related specifically to an August 3, 2011 letter to the Minister of EMR Patrick Rouble RE: [REDACTED] [REDACTED]."*

- [2] EMR responded to the access request by providing the Applicant with 21 pages of records, which they numbered 0001 to 00021.<sup>1</sup> Records 0001, 0007 and 00011 to 00021 were released in full to the Applicant. Some information in record 0002 and all the information in records 0003 to 0006 was found by EMR to be non-responsive to the access request and was severed. EMR also severed some information from records 0008, 0009 and 00010 citing the discretionary solicitor client privilege exception under section 18 (a) of the Act as the reason.
- [3] The Applicant filed a request for review of EMR's decision to sever information from the records with this office.
- [4] Mediation did not resolve the issue of the information severed from records 0008 through 00010 under section 18 (a) of the Act and the matter proceeded to inquiry under section 52 of the Act.

## II. INQUIRY PROCESS

- [5] On February 2, 2012, a Notice of Inquiry was issued to the parties. Initial submissions were received from the Applicant and the Public Body on March 5, 2012. Both parties provided a reply submission.

## III. JURISDICTION

- [6] I have jurisdiction in this matter because the EMR is a "public body" as defined in the Act and the information that is the subject of this inquiry is contained in a "record" as defined in the Act.

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<sup>1</sup> For convenience when referring to the records, I will use the numbering system employed by EMR in its response to the Applicant's Access Request # A-3623.

#### **IV. BURDEN OF PROOF**

- [7] Section 54 of the Act establishes the burden of proof on the parties in this inquiry. Under section 54 (1), where access to information in the record has been refused it is up to the public body to prove that the Applicant has no right of access to the record or part of the record.

#### **V. THE RECORDS**

- [8] The records at issue in this inquiry, records 0008, 0009 and 00010, are emails.
- [9] Record 0008 contains a string of emails. The first, appearing at the top of record 0008, is an email from Mr. McDowell to Mr. Cole. The date of this email is August 22, 2011; the time is 1:51 PM. The second is an email from Mr. Cole to Mr. McDowell. The date of this email is August 22, 2011; the time is 1:26 PM. The third email is from Mr. Winstanley to Mr. Cole. The date of this email is August 22, 2011; the time is 7:55 AM.
- [10] Record 0009 contains a portion of the third email between Mr. Cole and Mr. Winstanley that is continued from record 0008. Below the severed portion of the contents of the email is a signature block which states *"Michael Winstanley, Legal Counsel, Natural Resources and Environmental Group..."* Appearing below the signature block it states:

*"The contents of this e-mail communication is subject to legal privilege and should not be disclosed to anyone outside of the Yukon Government without appropriate authorization and legal advice. This includes any disclosure in relation to any legal proceeding that the Yukon Government may be involved in and to any request for information received under the Access to Information and Protection of Privacy Act...."*

- [11] Record 10 contains the original email between Mr. Winstanley and Mr. Cole that appears at the end of record 0008 and continues on record 00009.

## **VI. PRODUCTION OF RECORDS**

- [12] In most circumstances it is necessary for a public body to produce the unsevered records at issue in order to allow me to make a determination about them. However, as decided by my predecessors in Inquiry #08-008AR and Inquiry #10-021AR, where solicitor client privilege is claimed over the records, the need to compel their disclosure, so that they can be fairly adjudicated, will be made on a case by case basis.
- [13] In this case, EMR provided me with severed copies of the withheld records. EMR also provided affidavit evidence from Michael Winstanley describing the records.

## **VII. ISSUE**

- [14] The Notice of Inquiry dated March 26, 2012, identified one issue in this inquiry:

*Does the discretionary section at section 18 (a) apply to the records?*

## **VIII. DISCUSSION OF ISSUES**

*Does the discretionary section at section 18 (a) apply to the records?*

- [15] Section 5 (1) of the Act provides a person the right to access records in the custody or control of a public body. Section 5 (2) of the Act states that "*the right of access to a record does not extend to information that is excepted from disclosure under this Part [2], but if that information can reasonably be separated or obliterated from a record an applicant has the right of access to the remainder of the record.*"
- [16] Part 2, Section 18 (a) of the Act gives a public body the discretion to refuse to disclose a record to an applicant if the record contains information that is subject to solicitor client privilege. Section 18 (a) reads as follows:

*Legal advice*

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

[17] In order to properly apply the section 18 (a) exception, EMR must establish that the information severed from records 0008, 0009 and 00010 is subject to solicitor client privilege and that it exercised its discretion in deciding not to disclose this information.

[18] The test for determining whether solicitor client privilege applies to a record is set out in *Canada v. Solosky* 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821 (Solosky). According to Solosky, a record is subject to solicitor client privilege if it is a communication between solicitor and client, which entails the seeking or giving of legal advice and which is intended to be confidential by the parties.<sup>2</sup>

[19] For the exception under section 18 (a) of the Act to apply to the information in records 0008, 0009 and 00010, EMR was required to meet all three parts of the Solosky test:

- a. The information severed from the records must involve a communication between a solicitor and a client.
- b. The nature of the communication between the solicitor and client was the seeking or giving of legal advice.
- c. The communication was intended to be confidential.

[20] In *Canada (Information Commissioner) v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 877, Justice Gleason stated the following about the application of solicitor client privilege where the lawyer works in-house:

*“Legal advice privilege may exist between a lawyer employed as in-house counsel and the corporation which employs the lawyer or between a government lawyer (who would often be a member of the DOJ in the case of the federal government) and the department or other governmental entity to which the lawyer gives advice .... Not all communications between a lawyer and his or her client are privileged. For example, provision of purely business advice by in-house counsel or purely social interactions between counsel and their clients will not constitute privileged communications (see e.g. Campbell at para 50).”<sup>3</sup>*

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<sup>2</sup> *Calgary (City) (Re)*, 2013 CanLII 32052 (AB OIPC), at para 221.

<sup>3</sup> *Ibid.*, at para 17.

- [21] EMR submits that the severed information in records 0008, 0009 and 00010 qualifies under section 18 (a) as solicitor client privilege.
- [22] EMR provided its submission in the form of an affidavit sworn by Mr. Winstanley. In the affidavit, Mr. Winstanley provided that:
- a. He is a lawyer employed by Yukon Government in the Legal Services Branch of Justice.
  - b. John Cole is the Manager of Lands Client Services, a section of the Land Management Branch. Colin McDowell is the Director of the Land Management Branch.
  - c. Mr. Cole and Mr. McDowell had historic involvement with the Applicant and knew him to be litigious. They recognized that correspondence to the Applicant could be used in a legal action against Yukon Government. Consequently, Mr. Cole and Mr. McDowell adopted a practice of seeking legal advice from him regarding correspondence from the Applicant.
  - d. He was contacted by Mr. Cole on August 19, 2011, who sought his legal advice regarding correspondence he received from the Applicant, which had been copied to two members of the New Democratic Party.
  - e. Record 00010, which is dated August 22, 2011, 7:55 AM, is an email between him and Mr. Cole. This email was a confidential communication containing legal advice pertaining to the correspondence.
  - f. A copy of this email is contained partially in records 0008 and 0009.
- [23] The Applicant submits that the information severed from records 0008, 0009 and 00010 is not subject to solicitor client privilege. In support of his argument he states:

*"[i]t appears that Mr. Cole and Mr. McDowell were clearly not "seeking legal advice from Mike W. regarding any correspondence to or from [the Applicant]." As Mr. Winstanley swears in his November 30<sup>th</sup>, 2011, Affidavit at paragraph 9. Mr. Cole and Mr. McDowell were as Mr. Cole states: "setting up a meeting with Mike W." "to sit down with Mike W. and review all files together, and, maintain our current strategy to deflect ■ issues to Legal Services for reply."*

- [24] I take the Applicant's submission to mean that the subject matter of the communication was about setting up a meeting rather than the giving or receiving of legal advice.
- [25] In his submissions, the Applicant suggested that Mr. Winstanley's affidavit evidence describing the information in this email is contradictory and that errors exist.
- [26] While I agree that the exhibit to Mr. Winstanley's affidavit is not properly marked and the references to page numbers of the records referenced in the affidavit do not correlate to records appended, there is enough detail provided with each reference that I am able to clearly identify the evidence that he is referencing to.
- [27] The Applicant also submitted that the purposes of the Act are important when considering interpreting the discretionary exceptions in the Act. I agree. The purposes of the Act are stated in section 1 (1) as:

*Purposes of this Act*

*1(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*

- (a) giving the public a right of access to records;*
- (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
- (c) specifying limited exceptions to the rights of access;*
- (d) preventing the unauthorized collection, use, or disclosure of personal information by public bodies; and*
- (e) providing for an independent review of decisions made under this Act.*

*(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public independently of this Act.*

- [28] The Act identifies that individuals have a right to access records in the custody and control of a public body subject to certain exceptions, one of which is the solicitor client privilege exception set out in section 18 (a) of the Act.

- [29] Based on the affidavit evidence provided by Mr. Winstanley, I find that the information severed from records 0008, 0009 and 00010 is subject to solicitor client privilege under section 18 (a) of the Act for the following reasons:
- a. The information severed from records 0008, 0009 and 00010 is a communication between Mr. Winstanley, who was acting in his capacity as legal counsel, and a client, Mr. Cole a Manager with Yukon Government.
  - b. The nature of the communication between Mr. Cole and Mr. Winstanley was the giving and seeking of legal advice in relation to the correspondence received from the Applicant.
  - c. This communication was intended to be confidential as deposed to by Mr. Winstanley and as evidenced by the confidentiality statement appearing below Mr. Winstanley's name on records 0009 and 00010.
- [30] As I have found that EMR has established that the information severed from records 0008, 0009 and 00010 qualifies for the solicitor client privilege exception in section 18 (a) of the Act, I must now review EMR's exercise of discretion in deciding not to disclose the severed information.
- [31] As the solicitor client privilege exception under section 18 (a) of the Act is a discretionary exception evidenced by the word "may" appearing in the section, EMR must establish that it exercised its discretion in deciding whether to release to the Applicant the information it determined was subject to solicitor client privilege.
- [32] The Applicant submitted that in deciding whether to disclose information subject to solicitor client privilege, EMR must consider the public interest.
- [33] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CLA), the Supreme Court of Canada (SCC) had occasion to consider the exercise of discretion associated with solicitor client privilege under Ontario's *Freedom of Information and Protection of Privacy Act* (FIPPA).
- [34] In CLA, a request for access to information was made to the Minister of the Solicitor General and Correctional Services (subsequently changed to the Minister of Community Safety and Correctional Services) for the Minister to disclose records. The Minister refused to disclose certain records citing section 14 the law enforcement



exception and section 19 (a) the solicitor client privilege exception of FIPPA as the reason. Section 19 (a) of FIPPA states:

*Solicitor-client privilege*

*19. A head may refuse to disclose a record,  
(a) that is subject to solicitor-client privilege...*

- [35] Ontario's Assistant Information and Privacy Commissioner (AIPC) found that sections 14 and 19 applied to certain records and upheld the Minister's decision to refuse to disclose these records without reviewing the Minister's exercise of discretion.
- [36] The SCC examined whether the AIPC was required to review the Minister's exercise of discretion in deciding to refuse to disclose the records to which the exceptions in sections 14 and 19 (a) of FIPPA applied.
- [37] The SCC indicated that the exceptions in sections 14 and 19 (a) of FIPPA are discretionary as evidenced by inclusion of the word "may" in the exemptions. The SCC identified that an exercise of discretion under FIPPA involves two steps:

*"First, the head must determine if the exemption applies. If so, whether having regard to all the relevant interests, including the public interest in disclosure, disclosure could be made."<sup>4</sup>*

- [38] The SCC identified that the AIPC's role in reviewing discretion also involves two steps:

*"First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable."<sup>5</sup>*

- [39] The SCC identified that with respect to the section 14 law enforcement exception, the exercise of discretion involves balancing the interests, including the public interest, against the risks of interfering with a law enforcement matter.

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<sup>4</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815, at para 66.

<sup>5</sup> *Ibid.*

[40] On the nature of the exercise of discretion as it relates to solicitor client privilege, the SCC indicated that in deciding whether to disclose information subject to solicitor client privilege, the considerations are different. In this regard, the SCC states the following:

*“The purpose of the exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship...*

*The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions.”<sup>6</sup>*

[41] The SCC also stated that solicitor client privilege does not involve a balancing of interests on a case by case basis as may be required by other discretionary exceptions in FIPPA. Rather, the protection afforded to solicitor client privilege *“will only yield in certain clearly defined circumstances.”<sup>7</sup>*

[42] Based on the facts and interests at stake in CLA, the SCC determined that the interests at stake in that case would not outweigh the protection afforded to solicitor client privilege. Despite finding that the AIPC did not review the Minister’s exercise of discretion as was required, the SCC decided not to send the information severed from the records under section 19 (a) of FIPPA back to the AIPC for reconsideration noting that to do so would not result in disclosure of the information.

[43] In the submissions received from EMR there is no evidence as to EMR’s exercise of discretion in deciding to refuse disclosure of the severed portions of records 0008, 0009 and 00010, which I have already found to be subject to solicitor client privilege. While I have authority under subparagraph 57 (1)(b)(i) of the Act to require EMR to reconsider its decision to refuse to disclose the information severed from records 0008, 0009 and 00010 on the basis of exercising its discretion, I do not find this to be necessary in this case.

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<sup>6</sup> *Ibid.*, para 53.

<sup>7</sup> *Ibid.*, para 75.

- [44] Given the facts and interests involved in this case, in my view the nature of the protection afforded to solicitor client privilege will not be outweighed by the interests raised by the Applicant in this case. Therefore, I will not exercise my authority under subparagraph 57 (1)(b)(i) of the Act to recommend EMR reconsider their decision to refuse to disclose the information severed from records 0008, 0009 and 00010 in this case given that a reconsideration by EMR will not change the outcome.
- [45] The Applicant raised additional issues in his submission, namely, peculiarities with the attachments to the affidavit in the form of stickers, notes on an email and binder holes, money spent on legal costs, and his view that the words chosen to describe him amount to “character assassination”. These issues are not relevant to this inquiry. As such, I have not addressed these issues.

#### **IX. FINDING**

- [46] I find that EMR has met the burden of proof in this case for refusing to provide the Applicant with the information severed from records 0008, 0009 and 00010 for the following reasons:
- a. EMR has established that the information severed from records 0008, 0009 and 00010 is subject to solicitor client privilege and may refuse to disclose this information to the Applicant in accordance with section 18 (a) of the Act.
- [47] Further, I find that due to the nature of the protection afforded to solicitor client privilege and the interests at stake in this case, the outcome will not change if I recommend that EMR reconsider its decision and exercise its discretion in deciding whether to provide the Applicant with access to the information in records 0008, 0009 and 00010 that is subject to solicitor client privilege.
- [48] For the foregoing reasons, I affirm that EMR should continue to refuse to provide the Applicant with access to the information severed from records 0008, 0009 and 00010.

#### **X. RECOMMENDATION**

- [49] Given my findings in paragraphs 46 and 47, I have no recommendations.

## **XI. PUBLIC BODY'S DECISION AFTER REVIEW**

- [50] Section 58 of the Act requires EMR to decide, within 30 days of receiving this report, whether to follow my recommendations. EMR must give written notice of its decision to me and the parties who received a copy of this report, noted on the distribution list below.
- [51] If EMR does not give notice of its decision within 30 days of receiving this report, it is deemed to have refused to follow my recommendations.
- [52] If EMR does not follow my recommendations, it must inform the Applicant, in writing, of the right to appeal that decision to the Yukon Supreme Court.

## **XII. APPLICANT'S RIGHT OF APPEAL**

- [53] Section 59 (1) (a), gives the Applicant the right to appeal to the Yukon Supreme Court when the EMR does not follow my recommendation to give access to part of the record.
- [54] Section 59 (1) (b) gives the Applicant the right to appeal to the Yukon Supreme Court when a determination is made under section 57 that EMR is authorized to refuse to give access to part of the record.

ORIGINAL SIGNED BY

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Diane McLeod-McKay  
Yukon Information and Privacy Commissioner

Distribution List:

- Energy, Mines and Resources
- Applicant
- Records Manager