



Office of the
Yukon Ombudsman &
Information and Privacy
Commissioner

INQUIRY #08-013AR

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

INQUIRY REPORT

Yukon Information and Privacy Commissioner

Tracy-Anne McPhee

August 7, 2009

INQUIRY #08-013AR

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

INQUIRY REPORT

- Public Body:** Department of Finance
- Summary:** The Applicant requested a review of the decision of the Department of Finance to refuse access to one record, a two-page retainer letter for legal services. The Department of Finance claimed that section 18(a) of the Act (solicitor-client privilege) authorized it to refuse access to the record. The Applicant argued the Department of Finance had waived the privilege when the Premier, as the Minister of Finance, (the Minister) spoke publicly about the resulting legal opinion. The Commissioner found that the Department of Finance met the burden of proof mandated by section 54(1)(a) of the Act and that the Department of Finance was authorized to refuse access. The Commissioner found that the Minister's remarks did not constitute waiver of the privilege. However, the Commissioner found that some of the information in the record was not subject to solicitor-client privilege and pursuant to section 5(2) of the Act, the privileged portion of the record could be severed.
- Recommendation:** The Commissioner recommended that the Department of Finance sever the privileged portion of the record, allowing access to the remainder of the record.
- Statutes Cited:** *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1, sections 5(2), 18(a), 54(1)(a), 57(2)(b)(i).
- Authorities Cited:** *Maranda v. Richer*, 2003 SCC 67; *Solosky v. The Queen* 1979 CanLII 9 (S.C.C.); *Avoledo v. The Commissioner of the Yukon Territory and Government of Yukon as represented by the Public Service Commission*, 2003 YKSC 10; Adjudication Order #3 (March 13, 2003) available online at www.oipc.ab.ca ; Ontario IPC Order PO-1852; Ontario IPC Order P-1619, Ontario IPC Order MO-1172.
- Other Sources Cited:** *Solicitor-Client Privilege in Canadian Law*, Ronald D. Manes and Michael P. Silver, Butterworths, 1993; *Law of Privilege in Canada*, Robert Hubbard, Susan Margotiaus and Suzanne Duncan, Canada Law Book.

I BACKGROUND

- [1] In March 2008 the Applicant made a request to the Government of Yukon, Department of Finance for the following:
- ... a copy of the transmittal letter (i.e. the request for service) and a copy of the Government of Yukon contract that was entered into with Miller Thompson LLP of Vancouver, BC for the above mentioned legal opinion.”*
- [2] On April 15, 2008, the Records Manager responded by stating:
- The Department of Finance has refused access to your request for a transmittal letter (in this case instructions to Miller Thompson LLP). The refusal is in accordance with section 18(a) of the ATIPP Act which states: “A public body may refuse to disclose to an applicant a record (a) that is subject to solicitor client privilege;”*
- [3] The response went on to say:
- The contract with Miller Thompson LLP was not entered into by the Department of Finance, so the record is not in the custody of the Department of Finance. The Department of Justice is the contracting agency for outside counsel, so you need to submit a new request to that department.*
- [4] The Applicant requested a Review of the decision to refuse access to the single responsive record, stating that the Minister had waived any privilege by disclosing the substance of the opinion to the public through media reports.
- [5] Mediation was authorized but was not successful. I am therefore required by section 52 of the Act to conduct an Inquiry.

II INQUIRY PROCESS

- [6] On July 28, 2008 a Notice of Inquiry was issued.
- [7] On August 5, 2008 I granted the Department of Finance’s request for an extension of the time to make a written submission.
- [8] On August 6, 2008 a Notice of Extension was issued requiring initial written submissions by September 11, 2008 and reply submissions by September 26, 2008.

Interim Report - Factual Evidence Required

- [9] On June 12, 2009 I issued an Interim Report requesting that the Department of Finance provide the record at issue or evidence in the form of a sworn affidavit, to assist in my determination of the factual issue in this review.

- [10] Section 52(1) of the ATIPP Act authorizes me to decide all questions of fact and law arising in the course of the Inquiry. As a first step in deciding whether solicitor-client privilege is properly claimed in relation to the responsive record, I must make a factual determination of whether or not the privilege claimed applies to that record. Factual evidence is required for me to be able to determine if section 18(a) has been properly applied to the record.
- [11] In this case the Department of Finance did not provide a copy of the record. Its initial submission failed to provide sufficient factual information to allow me to make a determination that solicitor-client privilege was properly claimed in relation to the record it identified as responsive to the Access Request.
- [12] It is not sufficient for a public body to simply assert that an exception from the ATIPP Act applies to the record. Evidence must be provided to support the assertion. Each exception under the ATIPP Act has certain requirements which must be satisfied. When a public body is claiming an exception, it is important to provide evidence of each component of these requirements. If submissions are too general or if the necessary connections are not made by the public body, the representations will fail to establish that the exception applies.
- [13] Section 18(a) incorporates the common law of solicitor-client privilege. The Supreme Court of Canada in *Solosky v. The Queen* 1979 CanLII 9 (S.C.C.) (*Solosky*) established that the following elements must be made out for solicitor-client privilege to apply to a record:
- i. it is a communication between solicitor and client;
 - ii. it entails the seeking or giving of legal advice; and
 - iii. it is intended to be confidential by the parties.
- [14] In my request to the Department of Finance for more information, I posed a number of questions which were intended to solicit information required to apply the test set out in *Solosky*. This would assist me in verifying that the privilege has been properly claimed in relation to the responsive record without revealing the contents of the record. The questions posed were:
- Who is the lawyer's client whose privilege it is?
 - Is the client a party to this Inquiry?
 - What is the date of the record?
 - What type of record is it?
 - What is the purpose of the record (no content)?
 - Who is the author of the record (no names)?
 - Who is the recipient of the record (no names)?
 - Were any copies of the record distributed contemporaneously? If yes, to whom (no names)?

- Were any copies of the record distributed subsequently? If yes, to whom (no names)?
- Were there any attachments to the record? If yes, describe generally (no content).
- How many pages is the record and any attachments?
- Is the record related to a general retainer with the lawyer or a distinct retainer related to a specific matter?

[15] I also asked the Department of Finance to make a submission regarding the application of section 5(2) of ATIPP Act to the responsive record.

[16] On June 25, 2009 I received the following:

- an Affidavit sworn by the Director of Finance and Administration for the Department of Finance; and
- a document entitled “Submissions by the Department of Finance in Response to the Interim Report of the Information and Privacy Commissioner dated June 12, 2009”.

[17] A copy of the Affidavit and the submission was provided to the Applicant.

[18] The Department of Finance’s submission of June 12, 2009, also included additional legal argument regarding solicitor-client privilege and waiver of the privilege. The Department of Finance was not asked to make additional submissions on either of these issues. It was therefore not appropriate to do so. In fairness to the Applicant, in coming to a conclusion on those issues, I have only considered the material contained in the Department of Finance’s initial submission dated September 8, 2008 on solicitor-client privilege or waiver of the privilege. I did not consider the new information included in the subsequent submission.

III RECORDS AT ISSUE

[19] One record was identified by the Department of Finance as being responsive to the Applicant’s Access Request, namely a “retainer letter with Miller Thompson LLP.”

IV BURDEN OF PROOF

[20] In this Inquiry, the Department of Finance has the burden of proof pursuant to section 54 of the ATIPP Act. It must prove that solicitor-client privilege applies to the record in question.

V ISSUES

- [21] The issues to be determined in this Inquiry are:
1. Did the Department of Finance properly apply section 18(a) of the ATIPP Act to the record it refused to disclose?
 2. Does section 5(2) of the ATIPP Act operate in relation to the record?
 3. If the record is subject to solicitor-client privilege, did the Minister of Finance waive the privilege?

VI DISCUSSION OF ISSUES

Did the Department of Finance properly apply section 18(a) of the Act to the record it refused to disclose?

- [22] The Department of Finance claimed section 18(a) of the ATIPP Act to support its refusal to provide access to the withheld record.

- [23] 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;*

- [24] The Applicant did not make a submission on the application of solicitor-client privilege to the record.

- [25] In its submission dated September 8, 2008, the Department of Finance described the record as “a copy of a retainer letter with Miller Thompson LLP.”

- [26] Relying on the majority decision in *Maranda v. Richer*, 2003 SCC 67, the Department of Finance argued that solicitor-client privilege is a substantive rule of law that protects communications between lawyers and clients. It went on to say:

The retainer letter in question is exactly that: a communication between the government client and a lawyer for the purpose of seeking legal advice and which sets out the context and boundaries of the legal advice being sought.

- [27] While I agree with the Department of Finance’s statement of the law, it must provide evidence to support the assertion that all of the elements identified by the Supreme Court of Canada in *Solosky* are present with respect to the record in issue. The Affidavit sworn by the Director of Finance and Administration gave additional details of the record at issue without revealing its contents. In the

affidavit, the Director deposed to having "direct knowledge" of the facts. The Affidavit described the record as a two-page letter which:

- was addressed to a specific lawyer at Miller Thompson, Barristers & Solicitors, Robson Court, 1000 - 840 Howe Street, Vancouver, BC V6Z 2M1;
- was written on Yukon Justice, Legal Services Branch letterhead and signed by the Assistant Deputy Minister;
- asked to retain the named recipient as counsel for the purposes of obtaining legal advice;
- set out the terms of the retainer and named the individual authorized to instruct the lawyer recipient regarding the conduct of the matter; and
- was copied to the individual identified as authorized to instruct the lawyer.

[28] The Affidavit also stated the intention that at all material time, the information in the letter was confidential.

[29] The Affidavit included sufficient factual details of the record for me to ascertain that the record in question is a communication between a solicitor and a client, that it entails the seeking of legal advice and that it was intended to be confidential by the parties. As such it meets the test for solicitor-client privilege set out in *Solosky*.

[30] I am satisfied the Department of Finance has met the burden of proof and I conclude that section 18(a) was properly applied by the Department of Finance to the record at issue.

Does section 5(2) of the ATIPP Act operate in relation to the record?

[31] Section 5 of the ATIPP Act sets out an applicant's right of access to information in a record as follows:

Right to information

5(1) A person who makes a request under section 6 has a right of access to any record in the custody of or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information that is excepted from disclosure under this Part, 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.

[32] The Department of Finance submitted that the entire record is subject to solicitor-client privilege.

[33] The operation of section 5(2) of the ATIPP Act has been considered by the Yukon Supreme Court in *Avoledo v. The Commissioner of the Yukon Territory and Government of Yukon as represented by the Public Service Commission*, 2003 YKSC 10 (*Avoledo*).

[34] In that case Mr. Justice Veale describes the operation of section 5(2) as follows:

I am of the view that the ATIPP Act makes no provision for non-disclosure on a blanket basis for a particular type of record or information. Section 5(1), in fact, creates a right of access to any record unless it can be excepted from disclosure under section 5(2). Section 5(2) is quite explicit in stating that if such excepted information can be reasonably separated or obliterated from the record, the applicant has a right of access to the remainder of the record. In my view, section 5 sets out the procedure to be followed in any of the sections of Part 2 of the ATIPP Act, which includes both sections 19 and 25.

[35] Section 18(a) is an exception to disclosure contained in Part 2 of the Act. The *Avoledo* decision confirms that section 5(2) applies to records falling within section 18(a). This provision imposes a duty to sever those portions of a record which do not contain information for which an exception is claimed and which can be reasonably severed without disclosing the excepted information. Having said that, I agree it must be applied to solicitor-client communications in a manner that recognizes the extent of the privilege. This requires that there be no reasonable possibility that any solicitor-client communication could be revealed by the information disclosed.

[36] The Department of Finance conceded in its submission that:

... it could have provided a copy of the 2 page document with everything blacked out except the letterhead portion, recipient law firm address and signature block. As the Public Body was of the view that this information was not responsive to the Applicant's request it was not done.

[37] I disagree that the letterhead, recipient information and signature block, in this case are not responsive to the Access Request. This information forms part of the transmittal letter which was identified as the responsive record.

[38] In my view, the Department of Finance should have done exactly what it suggested it could have done:

... provided a copy of the 2 page document with everything blacked out except the letterhead portion, recipient law firm address and signature block.

[39] By the Department of Finance's own admission, the record includes some information over which solicitor-client privilege is not claimed. The privileged information should be severed from the record and the remainder of the information disclosed as required by section 5(2) of the ATIPP Act.

If the record is subject to solicitor-client privilege, did the Minister of Finance waive the privilege?

[40] The ATIPP Act does not stipulate who bears the burden of proof when waiver is claimed. The Department of Finance referred to a number of cases that conclude the burden of proof rests with the party asserting the waiver of privilege.

[41] This issue has been dealt with in the context of an access to information request under the Alberta *Freedom of Information and Protection of Privacy Act*. In external Adjudication Order #3, dated March 13, 2003, Mr. Justice McMahon concluded that where the FOIP Act is silent, the common law prevails and the burden of proof rests with the party asserting waiver of privilege.

[42] I agree that the Applicant bears the burden of proving the Minister waived the privilege in the record.

[43] In a brief submission which formed part of the Request for Review, the Applicant did not dispute that the record in question is subject to solicitor-client privilege. Rather the Applicant argued the privilege attaching to the record was waived:

It is my understanding that when the substance of a legal opinion is made public the privilege that exists between client and solicitor is deemed to have been waived.

[44] In support of the position that the Minister had disclosed the substance of the legal opinion to the public, the Applicant provided the following quotes from the Minister, as reported in the media:

'The auditor general's report is an opinion on the matter. But I can tell you there are other opinions out there, of legal in nature, that state otherwise.' (Dennis Fentie, Yukon News, February 8, 2008)

'The auditor general's report is an opinion on the matter but I can tell you there are other opinions out there of legal in nature that state otherwise, but we're not going to bother with getting into a debate on which legal opinion is correct or incorrect. That's a waste of time.' (Dennis Fentie, CBC Radio, February 8, 2008)

[45] The Applicant also referred to a statement made during debate in the Legislative Assembly and reported in Hansard as follows:

Frankly, legal opinions on this matter do differ. The Department of Finance presented that and fully disclosed that publicly weeks ago. We all understand that.' (Dennis Fentie, Hansard, March 26, 2008)

[46] The Applicant did not bring to my attention any case or legal authority on the issue of waiver.

[47] I note that the public comments referred to as evidence of a waiver refer to the legal opinion obtained and not the retainer letter which is the record at issue. Although this argument was not expressly made, I assume the Applicant was suggesting that if privilege is waived in relation to the opinion, then it was waived on all related materials.

[48] The Department of Finance argued that the public comments referred to do not constitute either an expressed or implied waiver of the privilege. In its submission, the Department of Finance referred to a passage in *Solicitor Client Privilege in Canadian Law* by Ronald Manes and Michael P. Silver which states at p. 188 what is required to constitute a waiver:

The difference between express and implied waiver is sometimes a fine distinction and although it is often made, in the end result, a waiver is a waiver. It is clear that the court will only find a waiver, whether express or implied, where it is of the view that an objective consideration of the client's conduct demonstrates an intention to waive privilege.

[49] The Department of Finance went on to say:

A mere statement outside the context of an active adjudication is not grounds for an implied waiver. ... the only time when a bare oral statement can result in waiver is in written submissions or during deposition or testimony in the context of litigation. There is no case law to support the proposition that a verbal public statement about the fact of receiving legal advice is sufficient to amount to a waiver of privilege over the retainer between the client and the lawyer.

[50] The Department of Finance also referred to *Law of Privilege in Canada* by Robert Hubbard, Susan Margotiaux and Suzanne Duncan in support on this same point:

Implicit or involuntary waiver can be made by disclosing inadvertently the privileged communications in the delivery of written productions, or by testifying about them on discovery or cross-examination. Implicit waiver can also be made by reliance on privileged communication, in a pleading or otherwise. For example, if a party relies on legal advice sought and received as evidence of good faith or a lack of bad faith or acting in the public interest, then privilege over that legal advice will generally be waived. A statement that legal advice was received and relied upon, without any information about the nature or substance of the advice in most cases will not be sufficient to waive privilege.

[51] The Department of Finance submitted that the Minister's statements are merely "that legal advice on the topic of asset backed commercial paper was received and there is no implied waiver of the solicitor client privilege regarding the retainer letter."

- [52] Orders under the Ontario *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* have considered whether statements similar to those made by the Minister can be said to be a waiver of the privilege.
- [53] In Order P0-1852 the Appellant argued that the Ministry had waived its ability to rely on solicitor-client privilege based on the fact that Ministry representatives had disclosed the Ministry's legal position on a matter to the local media. The Appellant had provided a copy of a newspaper article reporting the Ministry representatives having publicly announced that they intended to proceed in a certain manner based on legal advice.
- [54] The Adjudicator in that case was of the view that the newspaper article was "at best a general discussion of the Ministry's legal position and concluded that this was not sufficient to constitute waiver of any solicitor client privilege."
- [55] In Order P-1619 the Appellant argued that government officials had waived their ability to rely on solicitor-client privilege having "consistently indicated in legislative debates that they decided to seek an ex parte injunction to end the occupation of Ipperwash Provincial Park on an urgent basis on legal advice."
- [56] The Adjudicator concluded that "an objective consideration of the Ministry's conduct with respect to these exempt records does not demonstrate an intention to waive privilege ..."
- [57] In Order MO-1172 the Adjudicator found that disclosing the "bottom line" of a legal opinion did not constitute an express or implied waiver of solicitor-client privilege. In coming to this conclusion she stated in part:

In my view it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case, this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication.

The Adjudicator concluded that the disclosure also did not constitute an implied waiver.

- [58] I agree with this reasoning. It might be said that the Minister's comments stating "*there are other opinions out there, of legal in nature that state otherwise*" or "*The auditor general's report is an opinion on the matter but I can tell you there*

are other opinions out there of legal in nature that state otherwise” give the bottom line of a legal opinion. However, these small disclosures do not constitute waiver, either express or implied, of the solicitor-client privilege that attaches to the record.

VII CONCLUSIONS

- [59] I find that the Department of Finance was authorized to withhold from the Applicant the part of the record which is subject to solicitor-client privilege, pursuant to section 18(a) of the ATIPP Act. However, it failed to consider the application of section 5 of the ATIPP Act, which requires the Department of Finance to give access to the part of the record not subject to solicitor-client privilege.
- [60] I find that the evidence does not support the Applicant’s claim that the Department of Finance waived the solicitor-client privilege in relation to the responsive record.

VIII RECOMMENDATION

- [61] I recommend that, pursuant to section 57(2)(a) of the ATIPP Act, the Department of Finance is neither authorized nor required to refuse access specifically to the letterhead portion, recipient law firm address and signature block in the letter and should therefore give the Applicant access to those specific parts of the record to which he is entitled.
- [62] I confirm that the Department of Finance should continue to refuse access to the remainder of the record.

IX PUBLIC BODY’S DECISION AFTER REVIEW

- [63] Section 58 of the Act requires the Public Body to decide, within 30 days of receiving this report, whether to follow my recommendation and to give written notice of its decision to me and the persons who were given a copy of my report. In order to meet this requirement, the distribution list below identifies the persons who were given a copy of this report.
- [64] If the Public Body does not give notice of its decision within the time required, the Public Body is deemed to have refused to follow the recommendation.
- [65] If the Public Body does not follow my recommendation, it must inform the Applicant, in writing, of the right to appeal that decision to the Yukon Supreme Court.

X. APPLICANT'S RIGHT OF APPEAL

[66] Section 59(1)(a) gives the Applicant the right to appeal to the Yukon Supreme Court if the Public Body does not follow my recommendation to give access to a part of the record.

[67] Section 59(1)(b) gives the Applicant the right to appeal to the Yukon Supreme Court my determination that the Public Body is authorized to refuse access to that part of the record which is subject to solicitor-client privilege.



Tracy-Anne McPhee
Yukon Information and Privacy Commissioner

August 7, 2009

Distribution List:

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