Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner
Catherine Tully

REVIEW REPORT 18-09

October 31, 2018

Department of Justice

Summary: The purpose for the advice or recommendations exemption is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice. In this case, the Commissioner determines that the Department of Justice properly applied this exemption to a discrete piece of policy advice. The Department also withheld portions of the records under the solicitor-client privilege exemption. The Commissioner applies the test for legal advice privilege to the withheld records and determines that all four requirements are met. She determines therefore that the records were appropriately withheld under the solicitor-client privilege exemption.

Statutes Considered: *Access to Information Act*, RSC 1985, c A-1; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 3, 14, 16, 45; *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.0, s. 25.

Authorities Considered: **Alberta:** Order F2018-27, 2018 CanLII 66362 (AB OIPC); **British Columbia:** Orders F13-17, 2013 BCIPC 22 (CanLII); F18-38, 2018 BCIPC 41 (CanLII); **Newfoundland:** Report A-2018-017, 2018 CanLII 67634 (NL IPC); **Nova Scotia:** Review Reports FI-97-75 & 76, 1998 CanLII 3725 (NS FOIPOP); FI-98-37, 1998 CanLII 1580 (NS FOIPOP); FI-10-71, 2015 CanLII 60916 (NS FOIPOP); 18-02, 2018 NSOIPC 2 (CanLII); **Ontario:** Order MO-3580, 2018 CanLII 27463 (ON IPC); **Prince Edward Island:** Orders FI-16-009, 2016 CanLII 94001 (PE IPC); FI-17-004, 2017 CanLII 19225 (PE IPC).

Cases Considered: *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 (CanLII); *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII); *R. v. McClure*, [2001] 1 SCR 445, 2001 SCC 14 (CanLII).

Other sources considered: Manes, Ronald D. & Silver, Michael P., *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworth-Heinemann, 1993); Wigmore, John Henry, *Evidence in Trials at Common Law*, vol. 8, McNaughton Revision (Boston: Little, Brown & Co., 1961).

INTRODUCTION:

[1] In response to an access to information request for records relating to a meeting regarding the garnishment of the applicant's workers' compensation, the Department of Justice (Department) withheld a portion of the records citing solicitor-client privilege and claiming that some of the information revealed advice or recommendations to the Department.

ISSUES:

[2] There are two issues under review:

1. Is the Department authorized to refuse access to information under s. 14 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) because disclosure of the information would reveal advice or recommendations?
2. Is the Department authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?

DISCUSSION:

Background

[3] The applicant's compensation from the Workers' Compensation Board was garnished by the Family Maintenance Enforcement Program (FMEP), a program within the Department of Justice. The applicant objected to the amount of compensation that was being garnished. He believed that, as part of the FMEP investigation into his complaint, a meeting was held sometime between January 1, 2015 and June 4, 2015. He sought records relating to that meeting. In response, the Department provided partial access to the records, but withheld eleven pages as being subject to solicitor-client privilege and partially released one page claiming that a portion of the information revealed advice to the Department. The Department also originally claimed that a portion of one page contained "non-responsive" information, but in the course of the informal resolution process with this office, agreed to release that information to the applicant.

Burden of Proof

[4] The Department bears the burden of proving that the applicant has no right of access to a record.[1]

Is the Department authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice or recommendations?

[5] The purpose of this exemption is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice.[2]

[1] *FOIPOP* s. 45.

[2] As I stated in NS Review Report 18-02. This summary of purpose is also frequently stated in decisions of adjudicators at the Office of the Information and Privacy Commissioner for British Columbia. For example, Order F13-17 at para 26.

[6] In Canada, the leading case on the meaning of the policy or recommendations exemption is *John Doe v. Ontario (Finance)*.[3] In Review Report 18-02, I conducted a review of *John Doe* and numerous recent decisions evaluating and applying the advice or recommendations exemption and summarized the general guidance about advice or recommendations exemptions as follows:[4]

- The exemption is intended to protect the deliberative or evaluative process.
- The exemption is intended to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue.
- Evidence of an intention to communicate is not required for the exemption to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.
- The exemption covers earlier drafts of material containing advice or recommendations even if the content of a draft is not included in the final version. Advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by the exemption.
- Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.
- Advice must have a distinct meaning from "recommendations" and includes the views or opinions of a public servant as to the range of policy options to be considered by the decision-maker even if he or she does not include a specific recommendation on which option to take.
- Advice includes an opinion that involves exercising judgement and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.
- Advice or recommendations may be revealed in two ways:
    1. The information itself consists of advice or recommendations.
    2. The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.
- Advice involves an evaluative analysis of information.

[7] The process for determining whether s. 14(1) applies involves three steps:

1. It is first necessary to establish whether disclosing the information would reveal advice or recommendations developed by or for a public body or a minister.
2. If so, it is then necessary to consider whether the information at issue is excluded from s. 14(1) because it falls within any of the categories of information listed in ss. 14(2)-(4).
3. If s. 14(1) is found to apply, the final step is to determine whether the head of the public body has exercised his or her discretion lawfully.

[3] *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII). [*John Doe*].
[4] NS Review Report 18-02 at para 14.

Would disclosing the withheld information reveal advice or recommendations developed by or for a public body or minister?

[8] The withheld information is made up of a portion of one sentence. It can accurately be characterized as an opinion that involved the exercise of judgement and skill on a matter which the public body was required to make a decision about. I am satisfied on that basis that the withheld information qualified as advice within the meaning of s. 14.

If so, it is then necessary to consider whether the information at issue is excluded from s. 14(1) because it falls within any of the categories of information listed in ss. 14(2)-(4)

[9] I have carefully reviewed all of the exclusions set out in ss. 14(2) and 14(3). Under s. 14(2), a public body cannot withhold information under s. 14 if it qualifies as background information. The definition of "background information" can be found in s. 3(1) and includes such things as any factual material, final reports on the performance of a public body or a report of an external task force. None of these exclusions apply to the withheld information. Section 14(3) provides that information cannot be withheld under this exemption if it has been in existence for five or more years. The information at issue here was only a few months old when it was requested by the applicant. Section 14(4) does not apply in this case. Therefore, I find that s. 14(1) applies to the withheld information.

If s. 14(1) is found to apply, the final step is to determine whether the head of the public body has exercised his or her discretion lawfully

[10] The Department noted that it had no information to indicate whether or not the option withheld was acted upon and so the head exercised his or her discretion to apply the exemption. This is a reference to a decision of the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.[5] In that decision, the Court confirmed that discretionary decisions under privacy and access legislation must not be made in bad faith or for an improper purpose, must not take into account irrelevant considerations and must take into account relevant considerations. It also stated that one of the relevant considerations when the applied exemption is the policy advice exemption, is whether the decision to which the advice or recommendations relates has already been made.

[11] Other considerations in this case could have included such things as the importance of the information to the applicant and any past history with respect to similar matters. Given the passage of time since the original request, the Department could consider passage of time as a factor supporting exercise of discretion in favour of disclosure. However, given that in this case the Department considered a relevant factor and there is no evidence that it made its decision in bad faith or for an improper purpose, I am satisfied that discretion was appropriately applied in this case.

[12] On that basis, I find that s. 14 was properly applied to the withheld information.

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

Is the Department authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?

[13] The Department's submissions on this issue mix references to Wigmore's conditions for new professional privileges,[6] portions of the test for litigation privilege[7] and references to legal advice privilege.[8] The Department does not cite the legal tests for legal advice privilege nor for litigation privilege and does not make submissions on the application of these tests to the specific records at issue here. It appears that it generally asserts both types of privilege apply to all of the withheld information. It notes that there was a potential lawsuit at the time the information was requested in June/July 2015.

[14] On October 27, 2015, the Department provided this office with copies of the responsive records and copies of correspondence related to the processing of the access to information request. Within that correspondence was a memo from FMEP to the Department that indicated that the records were created in contemplation of litigation and a document was provided in support of this position. The applicant has indicated that there is no longer any outstanding litigation in this matter.

[15] Nova Scotia's exemption for solicitor-client privilege encompasses two types of privilege found at common law: legal advice privilege and litigation privilege. Because of the nature of the records in this case, I need only examine the application of legal advice privilege.

Legal advice privilege

[16] In Review Report FI-10-71, I reviewed in detail the test for legal advice privilege. I noted that the test had been applied by previous review officers and that other Canadian information and privacy commissioners also consistently apply the four elements of the test cited. I will not repeat the discussion from Review Report FI-10-71, but I will apply the principles set out in that case here.[9] I also note that a review of recent decisions across Canada confirms that the legal advice privilege test set out below continues to be applied in relation to access to information exemptions in Ontario, Prince Edward Island, Newfoundland and Labrador, Alberta and British Columbia.[10]

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[6] The submissions reference NS Review Reports FI-97-75 & 76, decisions of former Review Officer Fardy, where he cited Wigmore's four fundamental conditions for privilege (Wigmore, *Evidence in Trials at Common Law*, vol. 8, McNaughton Revision [Boston: Little, Brown & Co., 1961] at para 2285). Those conditions are in relation to establishing new forms of professional privileges. See Manes & Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworth-Heinemann, 1993) at p. 2. Such a discussion is only relevant to exemptions such as s. 25 of the *Freedom of Information and Protection of Privacy Act* of Prince Edward Island which provides: The head of a public body may refuse to disclose to an applicant information that is subject to <u>any type of legal privilege</u>, including solicitor-client privilege (emphasis added). Nova Scotia's *FOIPOP* does not include such a provision. PEI's commissioner refers to Wigmore's four fundamental conditions for privilege as the test to create non-traditional categories of "legal privilege" (PEI Order FI-16-009) at para 54.

[7] The submissions then reference pp. 8 and 9 of Manes & Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworth-Heinemann, 1993). That reference is in a section discussing contemplated litigation privilege.

[8] The discussion relating to the continuum of communication, the reference to NS Review Report FI-98-37 both relate to the legal advice branch of solicitor-client privilege.

[9] NS Review Report FI-10-71 at paras 15-22.

[10] Ontario: Order MO-3580 (March 27, 2018) at para 29; Prince Edward Island: Order FI-17-004 (March 8, 2017) at para 12; Newfoundland: Report A-2018-017 (July 24, 2018) at para 18; Alberta: Order F2018-27 (July 5, 2018) at para 11; British Columbia: Order F18-38 (September 27, 2018) at para 21.

[17] In order to decide if legal advice privilege applies, the record at issue must satisfy the following elements:

1. There must be a communication, whether oral or written;
2. The communication must be of a confidential nature;
3. The communication must be between a client (or his agent) and a legal advisor; and
4. The communication must be directly related to the seeking, formulating or giving of legal advice.

[18] I have reviewed the eleven pages of records that were wholly withheld. One of the challenges of these types of files is that, while I would like to give sufficient information so that the basis for my decision is clear, I am limited as to how much information I can disclose. The eleven withheld pages all, in my view, satisfy the four elements of legal advice privilege.

[19] With respect to the first and third requirement, the withheld records are communications between client employees and legal advisors. Some of the communications include a confidentiality notice, but it is the content of the records themselves that make clear that the communications are intended to be confidential. Finally, while the content of the records does not always contain legal advice or requests for advice, it does all directly relate to the seeking, formulating or giving of legal advice.

Exercise of discretion

[20] Section 16 is a discretionary provision. This means that even where the technical requirements of the exemption are met, the head of the public body must consider whether, in all the circumstances, the information should nevertheless be disclosed. The head of the public body must exercise his or her discretion lawfully and the commissioner may return the matter to the public body for reconsideration if the discretion was exercised in bad faith, for an improper purpose or if the head took into account irrelevant considerations or failed to take into account relevant considerations.[11]

[21] In a recent decision, *Minister of Public Safety*,[12] the Federal Court of Appeal considered the application of solicitor-client privilege in the context of the federal *Access to Information Act*.[13] After determining that the first three paragraphs of an agreement were subject to solicitor-client privilege and the remaining fourteen were not, the Court then went on to consider the exercise of discretion. Factors the Court highlighted for the consideration of the public body in the exercise of discretion were:

- Might disclosure bolster in the eyes of the public the credibility and soundness of the documentary procedures the RCMP and Department of Justice are following?
- Might there now be a greater public interest in disclosing the paragraphs?

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[11] BC Order F18-38 at para 52.
[12] *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 (CanLII), at paras 47-49. [*Minister of Public Safety*].
[13] *Access to Information Act*, RSC 1985, c A-1.

- Are there still important considerations that warrant keeping the information confidential?
- Discretion should be exercised mindful of all of the relevant circumstances of the case and the purposes of the *Act*.

[22] The Office of the Information and Privacy Commissioner of Ontario lists a number of considerations that may be relevant to the exercise of discretion in relation to a claim of solicitor-client privilege noting that not all of those considerations listed will necessarily be relevant and that additional unlisted considerations may be relevant:[14]

- the purposes of the Act, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[23] In contrast, a recent decision by Prince Edward Island's information and privacy commissioner provides the following observation:[15]

> I agree with the Public Body that proof of a balancing of interests is not necessary to determine whether discretion was exercised properly to withhold information on the basis of solicitor-client privilege. The finding of solicitor-client privilege is enough. The decision of the Supreme Court of Canada, in *R. v. McClure*, [2001] 1 SCR 445, 2001 SCC 14 (CanLII) at page 459, sets this out succinctly:
>
> > However, solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case- by-case basis.
>
> I find that the head of the Public Body properly applied subsection 25(1) of the *FOIPP Act* in deciding to refuse the Applicant access to the records at issue, on the grounds that they contain information subject to solicitor-client privilege.

[14] Ontario Order MO-3580 at para 48.
[15] PEI Order FI-17-004 at paras 55-56.

[24] In its submissions, the Department states that it considered the fact that there is nothing in the records that would inform the public about government operations in a way that would facilitate public participation in policy-making decisions or ensure fairness in government decision-making. The records are clearly staff seeking legal advice on a specific subject. There is no clear public interest in releasing the documents.

[25] These considerations are not the only considerations. The fact that litigation is no longer a reasonable prospect, the passage of time and the importance of the information to the applicant would all be other relevant considerations in the exercise of discretion. However, I am satisfied that the Department took into account relevant considerations in the exercise of its discretion.

[26] I find that s. 16 applies to all of the withheld information.

FINDINGS & RECOMMENDATIONS:

[27] I find that s. 14 and s. 16 apply to the withheld information.

[28] As noted above, the Department agreed to disclose a small portion of text it had previously withheld as non-responsive on page 16 of the records.

[29] Aside from disclosing the previously agreed to text as noted above, with respect to the information at issue here, I recommend that the Department take no further action.

October 31, 2018

Catherine Tully
Information and Privacy Commissioner for Nova Scotia