REPORT **FI-03-42**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF JUSTICE** to deny access to a report dealing with the Applicant's suspension from their job.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **October 20, 2003**

ISSUE: Whether the disclosure of an incident report of this kind can be denied under **Section 16** - solicitor-client privilege.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act**, dated May 21, 2003, the Applicant asked the Department of Justice (the Department) for a copy of a report related to a five-day suspension he received from his job at the Department.

The Department denied access citing the exemption found in **Section 16** of the **Act**:

> **Solicitor-client privilege**
>
> 16 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.

The record in dispute is a single-page report into an incident which led to charges being laid against the Applicant, and his subsequent suspension. It is signed by the Applicant's supervisor and by the head of the Justice Centre.

Background Information:

The Applicant was charged with Criminal Code offences by the police. The Applicant advised his employer (the Department) of the charges and an incident report was completed by his supervisor.

Two months after the incident report was completed, the Applicant was suspended without pay. A union grievance was filed with the Department when the Applicant was suspended. The grievance passed through its three stages (the immediate supervisor, the Director and the Deputy Minister) without resolution. The matter will go to arbitration this Fall.

To gather information for this Review I contacted the Applicant, his union, the official who signed the incident report, and the Department.

The Department of Justice's submission:

In a four-page submission to the Review Officer, the Department said the incident report was prepared for a dual purpose: as a prelude to discipline, and in "contemplation of litigation", and is therefore privileged. The submission cites the three criteria that must be met in order for a record to satisfy solicitor-client privilege as set out in *Solicitor Client Privilege in Canadian Law,* Manes and Silver:

1. The record must have been prepared in contemplation of litigation;

2. While the record may be prepared for more than one purpose, the predominant purpose must be in contemplation of litigation; and

3. While the litigation need not have commenced at the time the record was created, there must be a reasonable expectation that litigation will occur.

In the same submission the Department looked for support for its decision in a number of Orders by the Information and Privacy Commissioners of Ontario and British Columbia.

The Department argues that incident reports are not always prepared for discipline cases alone. It said "it is also our understanding that if these reports are prepared, it is for a dual purpose: for disciplinary purposes and for use in the grievance/arbitration process with the Nova Scotia Government Employees' Union (NSGEU) if disciplinary decisions are appealed". It is also the Department's understanding that "the vast majority of disciplinary decisions of NSGEU are grieved, and hence the practice of preparing reports that although used for discipline, primarily envision use in preparation for and during the arbitration process." The Department goes on to explain that the report may or may not be disclosed during the arbitration process and, if it isn't, privilege is not waived. The Department concluded that it was not certain that the incident report would be disclosed during the arbitration hearings.

The NSGEU's oral submission:

The Union agrees that the suspension of one of its members is normally followed by a grievance and, more often than not, by arbitration. It said it had been provided with incident reports in the past and finds it unusual that the Department would refuse to show the Applicant a report about his own activities.

With respect to the Department's claim of solicitor-client privilege, the union says there is evidence to refute the assertion that the report was prepared for the "dominant purpose" of preparing for litigation. It noted that the letter of discipline the Applicant received from an acting Executive Director of the Department, made it clear that in making its decision to suspend the Applicant, the Department had relied on the incident report.

The Applicant's oral submission:

While the Applicant didn't address the claim of solicitor-client privilege, he said he needs to see the incident report so he can prepare the case for arbitration. The Applicant makes the point that the report contains his own personal information.

Conclusions:

There are two branches to solicitor client privilege:

1. Common law solicitor-client privilege (communications between a client and solicitor for the purpose of asking for or providing advice); and

2. Solicitor-client privileges claimed on records created in contemplation of or for use in litigation.

In this case, the Department is arguing Branch 2.

While the Commissioners' Orders cited by the Department can be helpful, descriptions of the records dealt within the British Columbia and Ontario cases are clearly significantly different from those relevant to this case.

For this Review the issue is whether the Department has offered convincing evidence to support its view that the "dominant purpose" of the incident report was for litigation

which was reasonably contemplated at the time the incident report was prepared.... Or was it's dominant purpose to help the Department decide whether disciplinary action was warranted.

In my recent Review - FI-03-44 - I also cited Manes and Silver who, on page 93, said a "dominant purpose" test "really consists of three elements, each of which must be met":

1. It must have been produced with contemplated litigation in mind. The document cannot have existed before and merely obtained to provide to a solicitor;

2 The document must have been produced for the dominant purpose of receiving legal advice or as an aid to the conduct of litigation; and

3. There must be "a reasonable contemplation of litigation".

Manes and Silver expects more than a "general apprehension of litigation".

In *Varga v. Huyer* (1989), 37 C.P.C. (2d) 197, the Court rejected the proposition that a mere occurrence of a motor vehicle accident raises the prospect of litigation. To paraphrase the court's view for this particular case: litigation cannot be predicted by the mere occurrence of an act that may lead to a suspension.

I have confirmed that the Applicant was told, in the letter of discipline dated October 24, 2002, that the Executive Director relied on the incident report in making his decision. In fact the applicant was told this in the first sentence of the letter.

In my view, there can be no doubt that the "dominant purpose" of the incident report was to determine the appropriateness of "discipline". At the time the report was prepared the Department could have no more than what Manes and Silver describe as a "general apprehension of litigation". It appears to me that the Department attached privilege to the report

"just in case" it was needed for litigation, and the Orders cited by the Department to support its decision make it clear that this is not acceptable.

Recommendations:

That the Department disclose to the Applicant the copy of the Incident Report dated October 1, 2002.

Section 40 of the Act requires the Department of Justice to make a decision on these recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of that decision.

Dated at Halifax, Nova Scotia this 20th day of October, 2003.

Darce Fardy, Review Officer