

**THE NOVA SCOTIA FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT**

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF EDUCATION** to claim solicitor-client privilege on a record requested by an applicant.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **May 25, 2004**

ISSUE: Whether the Department's decision to refuse to identify the client and its solicitor is supported by the solicitor-client privilege exemption in **Section 16** of the Act.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act (FOIPOP)**, received December 29, 2003, the Applicant asked that I recommend to the Department of Education (the Department) that it disclose the names of the solicitor and the client in the record which was denied under Section 16, the solicitor-client exemption.

The Applicant's application for access to the records, dated November 1, 2003, was broader than the subject of his Request for Review. He had asked the Department for copies of all records concerning him, his business and the Cosmetology Association of Nova Scotia created from May 1 to October 31, 2003. He was provided with a copy of the "2003 School Inspection Report" prepared by the Cosmetology Association of Nova Scotia as well as a copy of the letter which accompanied it when it was sent to the Manager, Private Career

Colleges by the Administrative Assistant of the Association. The Department denied access to a two-page record which it claimed was exempt from disclosure under Section 16 of the **Act**, which reads:

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.

It was clear from his Request for Review, that the Applicant was not asking for a review of the decision of the Department to claim solicitor-client privilege over the two-page record which it denied. Instead he asked for a review of the decision not to tell him who the client and solicitor are.

When this Office's mediation efforts proved unsuccessful the Department was asked to make a submission to the Review Officer.

The Department's submission:

Much of the Department's submission dealt with a defence of its decision to claim s.16 on the two-page record. Since this is not at issue here I will not repeat the arguments in that part of the submission.

With respect to the decision not to disclose the identities of the client or the solicitor, the Department saw the Applicant's request as "an attempt to find out anything further on the nature of the communication between the solicitor and the client."

I am not in a position to provide all of the details of the submission without disclosing information the Department has decided to withhold.

The Department believes that disclosing the name of the solicitor could reveal the kind of service this lawyer provided. It gave what it called a “fictitious but parallel example, if an individual’s lawyer was a divorce lawyer, and the fact that the lawyer had been retained by the individual was disclosed, it would not be unreasonable to deduce that the individual was contemplating divorce proceedings.”

Conclusions:

The Supreme Court of Canada, in *Slavutych v. Baker* (1975) 55 D.L.R. (3d) 224 at 228 (S.C.C.) adopted what are known as *Wigmore’s* four conditions for establishing privilege (*Wigmore on Evidence*, McNaughton, 1961). The second condition requires that “confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties” and condition four expects injury (harm) from disclosure. The Department provided no evidence to show that disclosing the identities of the solicitor and the client would affect the legal matter between them. The claim of the Department that disclosing the identities would reveal the kind of service provided by the solicitor may be described as “fanciful” given the Department’s history with this particular applicant.

In Solicitor-Client Privilege in Canadian Law, 1993, Manes and Silver state that “the general rule is that the identity of a client is not privileged.” (p.140). They go on to explain: “Where the identity of a client has not been communicated to the solicitor by the client in order to obtain legal advice, and/or the name is not so closely identified with the legal advice that it forms the crux or essence of the communication, the client’s name is not privileged and must be disclosed.” (p.142)

An example given by Manes and Silver of a case where a client's name was privileged was a case where a hit and run driver consulted a lawyer and confidentially disclosed his identity to the lawyer.

In its submission the Department says it recognizes that Section 16 is a discretionary exemption but says, "the Department does not examine a valid solicitor-client record with a view of severing; when the Department engages Section 16 it is in relation to the entire document." The Department cites McNairn and Woodbury, Government Information: Access and Information (p.3-42), "the privilege, and hence the disclosure exemption, extends to the communication as a whole if the overall purpose was to obtain or provide legal advice." What the Department did not cite are the sentences immediately following which read:

"However, this does not preclude severance wherever solicitor-client privilege is involved since a single record may combine a communication for the purpose of obtaining or providing legal advice and a communication for another distinct purpose. In that event, the institution with custody or control of the record will be obliged to sever the record and disclose the latter communication."

Also on this same page in McNairn and Woodbury the authors say this about the rationale for the disclosure exemption:

"The government's right to insist on solicitor-client privilege in response to a court order for the production of documents, or a question from opposing counsel, would be very hollow indeed if the same information could be extracted through an access request; hence, the disclosure exemption for information protected by the privilege. Since the client, in this case the government, can always waive the privilege, the exemption is discretionary."

In other Reviews I have noted the importance of maintaining solicitor-client privilege while at the same time urging public bodies not to devalue this important privilege by applying it where it is not necessary and not supported.

Recommendations:

That the Department disclose to the Applicant the names of the department to which the solicitor is attached and the name of the Government client.

Section 40 of the Act requires the Department of Education 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. If a written decision is not received within 30 days, the Department of Education is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 25th day of May, 2004.

Darce Fardy, Review Officer