REPORT **FI-04-25**

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 records related to the Maintenance Enforcement Program.

REVIEW OFFICER: Darce Fardy

REPORT DATE: November 18, 2004

ISSUE: Whether Section 16 (Solicitor-Client Privilege) supports the decision of the Department to deny the Applicant records related to those responsible for the Maintenance Enforcement Program; whether other related records are exempt from disclosure because Section 32 of the Maintenance Enforcement Act prevails over the FOIPOP Act.

In a Request for Review in accordance with the **Freedom of Information and Protection of Privacy Act**, the Applicant asked that I recommend to the **Department of Justice** that it disclose all of the records he asked for.

The Applicant filed his application for access in January 2004. He asked for copies of all records related to eight matters concerning a dispute he is having with those responsible for the Maintenance Enforcement Program (the MEP).

The Applicant was provided with: A briefing note from the Director of the Maintenance Enforcement Program to the Deputy Minister of Justice regarding the Applicant's

complaint against the MEP, dated November 2, 2000, with severing; an e-mail dated August 8, 2000; a briefing note prepared for the Minister of Justice, dated July 28, 2003, with severing; a letter to a third party from the Minister, dated September 10, 2003; a letter from a third party to the Minister, dated August 22, 2003; and a severed briefing note, dated October 13, to the Acting Deputy Minister of Justice. Some of the records requested were said not to exist in the files of the Department of Justice.

In its letter of decision the Department referred the Applicant to **Section 4(A)(2)** of the **FOIPOP Act** which lists legislation that prevails over this Act. Included is Section 32 of the Maintenance Enforcement Act which reads:

> 32(1) Information received by the Director pursuant to this Act (MEP) is confidential and shall not be disclosed except
>
> (a) for the purpose of this Act or enforcing a maintenance order filed with the Director.

The remainder of the records, or parts of records, were denied under exemptions found in **Section 14(1)** and **Section 16.**

S.14 reads:

> 14(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.
>
> (2) The head of a public body shall not refuse pursuant to subsection (1) to disclose background information used by the public body.
>
> (3) Subsection (1) does not apply to information in a record that has been in existence for five or more years.

S.16 reads:

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

Background information:

Some background information may be useful. The Applicant had been ordered by the Court to pay child maintenance to his former wife. Later his former wife had the maintenance order registered with the government's MEP. The Applicant believes he was not properly treated by the MEP and has been lodging complaints for some time. One of the briefing notes provided to the Applicant revealed that the Court Services Division of the Department had concluded there was no evidence of wrongdoing on behalf of the MEP.

The Applicant's submission:

The Applicant did not accept the response he got from the Department to his request for records related to work a third party, representing his former wife, may have done for the MEP. The Department had told him there were no records on this matter in the files of the Department of Justice and that if they were in the files of the MEP they were not accessible under the **FOIPOP Act** [S.4(A)(2)]. During this Review, I sought and received written confirmation from the Director of the MEP that some of the records sought are in the restricted files. The Applicant says he has evidence that the third party provided advice to the MEP.

The Applicant believes that the purpose of the **FOIPOP Act**, found in **Section 2,** requiring public bodies to be fully accountable to the public to ensure fairness in government decision making, supports his request for records.

The Applicant also believes the records contain his personal information and that he is entitled to them. He again refers to Section 2, which gives individuals the right to access to their own personal information.

He disagrees with the Department's position on s.4(A)(2) and contends that this bars access by the "public at large" not by individuals like himself who are parties to the matter.

With respect to s.14(1) he believes this exemption should not apply because the briefing to the minister and other information about him within the Department is not true. He also believes his own personal information held by the Department is background information and must be disclosed to him.

The Department's submission:

The Department reaffirms the position it took in its decision on the Application, with respect to s.4(A)(2):

> The records which have been excluded under Section 4(A)(2) of this Act are records which contain information gathered by the Director, Maintenance Enforcement Program and her staff for the purpose of enforcing the maintenance order.

The Department cited a finding of mine found in Report FI-99-04 in which I wrote:

> "If the Director (of the MEP) complied with a request under this Act (FOIPOP) the Director would be in violation of Section 32 if no court order is obtained, unless it is disclosed 'for the purposes of this Act (the *MEA*) or enforcing a maintenance order filed with the Director.'"
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> When there's conflict between two pieces of legislation the rules of statutory interpretation would apply. Ordinarily it is presumed

> that the latter statute amends or appeals the operation of the former statute to the extent required to resolve the conflict . . . However the Applicant still has a remedy available to him, to apply to the courts."

With respect to s.14(1), the Department points out that this provision in the **Act** is "intended to protect candor in the giving of advice and formulation of proposals, analyses, recommendations and related alternatives for potential courses of action." The Department agrees with my view, expressed in other Reviews and supported in the Courts and by other provincial and territorial Information and Privacy Commissioners, that a record must contain more than mere information to qualify for exemption under s.14(1). It must contain a suggested a course of action, which most advice and recommendations do.

The Department addressed the issue of severing records to which Section 16 is attached:

> "...solicitor-client privilege applies to all the records severed under Section 16 in this application and that to disclose any portion of the records, including disclosing the nature of the forms of communications would amount to a waiver of solicitor-client privilege. This office cannot agree to any waiver of this right and disclose the records in full or in part."

In support of its position that severing cannot occur on a s.16 record without a complete waiver of the solicitor-client privilege, the Department of Justice cited *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 726. The department provided a different citation but it is the same case. However, that case has been overturned on appeal by the British Columbia Court of

Appeal in *College of Physicians of British Columbia v. British Columbia Information and Privacy Commissioner* 2002 BCCA 665.

In the Court of Appeal decision the Court specifically overturns the lower Court's finding on waiver. The Court says: "In my opinion, however, in finding that the College had waived its privilege, the chambers judge misconstrued the facts and made a clear error of law."

The lower court decision relied upon by the Department of Justice is no longer good law on the waiver issue.

The Department also goes on to explain why it concluded that the records fit the s.16 exemption. Since the criteria for solicitor-client privilege have been aired many times, and because I take no issue with the Department's view on the criteria, I will not repeat them here. (See Manes and Silver: *Solicitor-Client Privilege in Canadian Law* (1993) pg.7)

Mediation was not possible between the public body and the Applicant.

Conclusions:

Some of the issues raised by the Applicant are not within the purview of the **FOIPOP Act** to address, particularly the third party's activities with bodies that are not subject to this **Act**. I am satisfied that s.4(A)(2)(j) makes clear that the maintenance enforcement files in the custody of the MEP are not subject to the **FOIPOP** Act. The Applicant has recourse to the court.

I am satisfied that the records and parts denied under s.14(1) contain advice and do not contain background information.

The Review Officer's differences with the Department in this case are confined to the Department's views and practices with respect to the severing of unprivileged portions of privileged records. I do not accept the position of the Department that a s.16 record cannot be severed because to do so would mean privilege is thereby waived on the entire record.

Some of the severed records provided to the Applicant included enough of the record to allow the Applicant to learn what kind of information was being denied. Those were severed under s.14. However, for the four records denied under s.16 only blank pages, some a dozen or more, were given the Applicant.

The contents of all of the records were, of course, provided to the Review Officer.

It is this Office's considered view, supported by case law, that, in the context of access legislation, severing records which may be protected under s.16 does not amount to a waiver of that privilege.

Not only does the **Act** give individuals the right of access to records, it also gives individuals the right of access to the remainder of a record when exempted information "can reasonably be severed." Section 5(2) makes no exception for records denied under solicitor-client privilege.

The Department recognizes that s.16 is a discretionary exemption but its assertion above suggests it will not be using its discretion when considering the severing of records which contain only some information exempt under s.16. The Department is saying it will not consider disclosing information which, if it stood outside the s.16 records, would not be

privileged; or information it might consider disclosing if not for the fear that waiving privilege on part would mean waiving privilege on the whole.

Supporting cases:

In *Nova Scotia (Attorney General v. Royal and Sun Alliance Insurance*) the Government argued that it had not waived privilege when it released records to the Auditor General, and the Court agreed:

> There was certainly no express waiver given when it did so (provide records to the Auditor General) nor does an objective consideration of its conduct demonstrate any intention to waive privilege. Having inspected the subject documents, I find it inconceivable that there was any intention on the part of the Province to waive solicitor-client privilege in releasing the documents as it did. Fairness is said to be the touchstone and the touch of fairness here defeats the argument it implied waiver of privilege over these documents. [(2000) N.S.J. No. 404 S.H. No. 149142]

The Federal Court, Trial Division, in *Stevens v. Canada (Privy Council)*, 144 D.L.R. (4th) 553, said there were circumstances in which disclosing a part of a communication does not constitute waiver:

- if the record deals with separate subject matter; and
- if disclosure is considered under access legislation:

> Certainly, in the context of disclosure under the Access to Information Act, the partial disclosure of privileged information cannot be taken as an attempt to cause unfairness between parties or to mislead an applicant or a court, nor is there any indication that it would have that effect.

The Court found that disclosure of portions of solicitor/client privilege did not constitute a waiver of solicitor-client privilege.

The Federal Court of Appeal, in *Stevens v. Canada (Privy Council),* 161 D.L.R. (4th) affirming the lower court decision, said:

> The question of whether or not people have waived their right to privilege, absent explicit waiver, is one which must be judged according to all circumstances.

In my view, Section 5(2) of this **Act** authorizes the severing of privileged information. The Federal Court, in *Stevens v. Privy Council* describes such authorization as

> ..an attempt to balance the rights of individuals to access to information, on the one hand, while maintaining confidentiality where other persons are entitled to that confidentiality on the other hand. It would be a perverse result if the operations of Section 25 of the Act were thereby to abrogate the discretionary power given to the government under section 23 of the Act.

The Federal Court of Appeal, in *Sheldon Blank & Gateway Industries Ltd. v Canada (Minister of the Environment)* 2001 FCA 374 supports partial disclosure of privileged records under access to information legislation. The Court said the severance rule applies to solicitor-client privilege.

> "If a document contains a communication that is within the scope of the common law solicitor-client privilege and also contains information that is not within the scope of solicitor-client privilege, the Minister cannot refuse to disclose the latter."

The Blank case is also interesting because it recommends the procedure to be followed when reviewing solicitor-client records under access legislation.

The Court talks about the instances in the case before it in which partial disclosure was ordered. The Court observed they fell into two categories.

> In one category, disclosure was ordered of certain statements in the communication that were purely factual . . . In the second

> category are letters and memoranda in which disclosure was ordered of the part of the document showing what I would characterize as general identifying information: the description of the document (for example, the "memorandum" heading and internal file identification), the name, title and address of the person to whom the communication was directed, the subject line, the generally innocuous opening words and the closing words of the communication, and the signature block. The partial disclosures in this category enable the appellants to know that a communication occurred between certain persons at a certain time on a certain subject, but no more.
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> There may be instances in which such general identifying information might be subject to solicitor-client privilege. However, the Minister has provided no evidence upon which I can conclude that this is such a case. Strictly speaking, therefore, the Judge could and should have ordered the disclosure of general identifying information for every letter or memorandum containing a privileged communication. As a practical matter, however, the most important identifying information is already found in the list of particulars.

The Federal Court of Appeal is establishing that there can be partial disclosure of solicitor-client records and disclosure of general identifying information in solicitor-client records without losing privilege over the whole record.

Since the B.C. Supreme Court case, relied on by the Department, has been overturned on appeal, the Federal Court cases are even more persuasive. In addition the Blank case outlines a standard process to be followed when reviewing s.16 records - and that is to provide a list of particulars or list of the records which gives the general identifying information on each record unless there is specific evidence that such information might be subject to solicitor-client privilege.

I conclude from these recent cases that when processing a FOIPOP request decisions a Department cannot be said to have waived solicitor-client privilege on an entire record if it disclosed a part on which privilege did not apply or did not need to apply.

During the Review process this Office met with the Department's co-ordinator and a Department solicitor to discuss the waiver issue. I was asked during the meeting whether I believed that there should be a distinction made between solicitor-client privilege within this **Act** and outside it.

I expressed my view that no exemption in this **Act** can be read in isolation, ignoring the purpose of the **Act**, which holds public bodies to be "fully accountable" to the public by providing the "right of access" to government records. That distinction is made by the Federal Court in the cases above and as cited by McNairn and Woodbury, *Government Information: Access and Privacy* (on pgs 3-42 and 3-43).

Recommendations:

(For ease of reference, we have numbered the records)

- that the Department provide identifying information to the Applicant for each record denied in its entirety under s.16;
- that the Department disclose to the Applicant record #3, after severing hand-written notations.
- that the Department disclose to the Applicant record #12 in its entirety

Section 40 of the Act requires the Department 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 Justice is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this November 18, 2004.

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Darce Fardy, Review Officer