**REPORT** **FI-05-55**

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

A **REQUEST FOR REVIEW** of a decision of **ACADIA UNIVERSITY** to deny access to records showing the amount of fees paid by the University to a law firm.

**REVIEW OFFICER:** Darce Fardy

**REPORT DATE:** November 7, 2005

**ISSUE:** Whether Solicitor-Client privilege can be attached to the fees the University paid to a law firm over a defined period of time.

In a Request for Review, dated August 2, 2005, under the **Freedom of Information and Protection of Privacy Act** (*FOIPOP*), the Applicant asked that I recommend to Acadia University that it disclose the legal fees he requested.

The Applicant asked for a record showing the legal fees paid by the University to a named law firm for the period July 2003 to June 2004. The request was turned down under the exemption found in **Section 16** of *FOIPOP* which allows a public body to "refuse to disclose to an applicant information that is subject to solicitor-client privilege."

In his request for review the Applicant elaborated on his application. He said he wanted only the dollar value of the legal fees paid.

*Submission of Acadia:*

Acadia submits that solicitor-client privilege, which it describes as "a recognized substantive right in common law," applies here because the ultimate cost of a solicitor's advice is "central to the solicitor-client relationship between the University and legal counsel."

Acadia also notes that the Applicant represents the other party to "a dispute surrounding collective agreement negotiations, related allegations and a strike and, to that extent, (the Applicant) would be an adversary on the issues that were the subject matter of the legal advice being sought."

Acadia also believes that, to some degree, the Applicant's request is analogous to an earlier Review Report of this Office (FI-01-86), in which I agreed with the University of Cape Breton that refusing to disclose legal expenses incurred during negotiations with its faculty association was in accordance with Section 16 of *FOIPOP*.

*The Applicant's submission*:

> We request only the dollar value of the fees paid. We recognize that billing information (which was party to a communication, the reason for communication, etc.) is protected by solicitor-client privilege, but reporting the amount paid by a public institution for services rendered violates no one's confidence or privilege.

**Conclusions:**

In FI-01-86, the public body, the University of Cape Breton, (University College of Cape Breton at the time) conceded that "<u>legal expenses constitute a normal part of the operation of public institutions and therefore would normally be subject to full disclosure</u>," but added that

"circumstances with respect to labour relations . . . outweigh the intentions of the notion of freedom of information." (Emphasis added)

Under the circumstances I agreed the University of Cape Breton (UCB) had exercised its discretion to refuse disclosure.

While new case law and new legal opinions have surfaced since I issued that Review Report, it is also clear to me that the records in dispute in this case are different. The application in the UCB case was for information related to legal fees for a defamation suit, and legal fees related to a labour dispute. The requested records were, in fact, part of a communication from a solicitor to a client.

In the decision under review at this time the Review Office is examining a different record which, I would argue, is not a communication.

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McNairn and Woodbury's *Government Information Access and Privacy* wrote, on page 3-43:

> While the actual amount of a solicitor's fees is sheltered by solicitor-client privilege, that is simply a presumption which can be rebutted if it is evident that disclosure of the amount will not reveal, directly or indirectly, any communication protected by the privilege.
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> The figure requested in this case would not reveal a protected communication.

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The Court of Appeal of Ontario, in a decision dated March 14, 2005, supported an order of the Ontario Assistant Information and Privacy Commissioner to the Attorney General to disclose payments made by the Attorney General to four lawyers who had acted for an accused person

in an appeal of a murder conviction. (*Ministry of the Attorney General v. Assistant Information and Privacy Commissioner*, (2005) C42504)

The Ontario Court cited the British Columbia Court of Appeal which concluded:

> If there is a reasonable possibility that the assiduous inquirer, aware of the background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on client/solicitor privilege. (Emphasis added) (*Legal Services Society v. Information and Privacy Commissioner of British Columbia,* 2003, 226 D.L.R. (4th) 20 at 43-44 B.C.C.A.)

The Ontario Court of Appeal concluded that, in the Ontario case, it saw no possibility that any client/solicitor communication could be revealed to anyone by the information that the (Ontario Assistant Commissioner) ordered disclosed.

In my view the same is true about the information at issue in this case.

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The opinion of the British Columbia Information and Privacy Commissioner, in his decision F05-03, is reflected in the decision made by Acadia. The Commissioner's comfort with the opinion that legal fees were privileged was such that he decided not to proceed to an inquiry. In that decision he found support in three British Columbia court cases which arrived at the same conclusion. The Commissioner was ruling on a decision related to a request for "the details of the costs involved."

No details are requested in this application. In fact the Applicant recognized details are privileged.

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The Alberta Information and Privacy Commissioner, in Order F2004-017, turned down an appeal from an Applicant looking for records showing the legal costs incurred by the Alberta Government in proceeding with a case known as *Reference Re: Firearms Act*. He concluded that the legal costs "are communications between a solicitor and client which entail the seeking or giving of legal advice."

The legal costs alluded to by the Alberta Commissioner may have been a communication, but in my view, the total amount paid to a legal firm by Acadia is not a communication between the solicitor and client. It is instead, in my opinion, an accounting of expenses.

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In *Stevens v. Canada (Prime Minister*) C.A. (1998) which has been cited in support of solicitor-client privilege, the Applicant had been provided with over 336 pages of legal accounts but denied records containing "narrative portions of the bills of account."

The request related to this Review is for a total figure only. There are no narrative portions.

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In Order MO-1465 the Ontario Commissioner cited the Supreme Court of Canada which described the privilege as

> . . . all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys

> the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship . . . [*Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618]

Although the figure at issue here emerges from a solicitor-client relationship, it is not a communication between Acadia and its solicitor and the figure was not provided to "obtain legal advice."

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In Order P-1551, the Ontario Commissioner wrote:

> Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.

As asserted earlier, the record at issue here is not a communication between Acadia and its solicitor and does not contain information intended as professional legal advice.

To sum up, the record in dispute here provides neither communications nor information between solicitor and client. The record was created by Acadia for its own purposes.

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In Review FI-04-25 I wrote that no exemption in *FOIPOP* can be read in isolation, ignoring the purposes of the Nova Scotia *FOIPOP* legislation. In *O'Connor v. Nova Scotia* (2001) N.S.C.A. 132, the Nova Scotia Court of Appeal noted that the Nova Scotia Act expects more from public bodies than any other Freedom of Information legislation in the country because it requires them to be "fully accountable" to the public. [**Section 2(a)**]. Justice Saunders wrote:

> Thus, it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access . . .

Give my responses to the issues raised by the courts, the Information and Privacy Commissioners and Acadia, coupled with the ruling of Justice Saunders, it's my view the total expense figure cannot be denied under solicitor-Client privilege.

**Recommendations:**

That Acadia disclose to the Applicant the final figure in the left-hand column identified as "Total Expenses."

**Section 40** of the Act requires Acadia University 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, Acadia University is deemed to have refused to follow these recommendations.

**Dated** at Halifax, Nova Scotia this 7th of November 2005.

Darce Fardy, Review Officer