REPORT
Nova Scotia Freedom of Information and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-08-104

Report Release Date: April 21, 2011

Public Body: Service Nova Scotia and Municipal Relations

Issues: Whether Service Nova Scotia and Municipal Relations ["Service NS"] appropriately applied the *Freedom of Information and Protection of Privacy Act* ["*Act*"] and, in particular:

1. Whether the withheld information fits the definition of solicitor-client privilege.
2. If yes, whether Service NS has properly exercised its discretion to apply it.
3. Where it is found that the solicitor-client exemption fits and discretion has been properly exercised, whether some of the information can be severed from the Record and the Applicant provided with the remainder.

Record at Issue: Pursuant to s. 38 of the *Act*, Service NS has provided the Freedom of Information and Protection of Privacy ["FOIPOP"] Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff.
The Record that remains at issue consists of 30 documents (totalling 35 pages) that have been severed in full under s. 16 of the *Act.*

Summary: An Applicant made an Application for Access to a Record held by Service NS that related to the Applicant's human rights complaint. The Applicant's human rights complaint alleged discrimination as a person of Acadian descent because French schools were financially disadvantaged as they received no municipal supplement. Service NS refused access to part of the Record based on the s. 16 solicitor-client privilege exemption.

Findings: The Review Officer made the following Findings:

1. I find that litigation privilege applies to the two pages [pages 27 and 28 of the Record] because that portion of the Record meets the dominant purpose test – information in relation to or in anticipation of litigation which remains a live legal matter.
2. I find Service NS has not provided any arguments to make its case for the exemption to fit the remainder of the Record. In the absence of information, I do not find a discretionary exemption fits.
3. I find Service NS appropriately exercised its discretion to rely on the solicitor-client exemption for the two pages that have been found to be subject to litigation privilege.
4. I find it would be reasonable for Service NS to withhold other privileged information that is found in the Record, once it has re-examined each document for privilege applicability.
5. I find that there are parts of the Record that cannot meet the exemption's requirements and therefore must be released.
6. I find that the exemption has been applied in a blanket format and the *Act* requires Service NS to apply the exemption in a limited and specific manner, even where there is privilege in the Record.
7. I find there was no rationale to consider Service NS's Representations in-camera as the Representations neither revealed the contents of the Record nor disclosed any information subject to solicitor-client privilege.

Recommendations: The Review Officer made the following Recommendations to Service NS:

1. I recommend Service NS confirm its original decision to withhold pages 27 and 28 of the Record under s.16 of the *Act*.
2. I recommend Service NS re-examine all pages of the remaining part of the withheld Record line-by-line, and re-consider the application of the s. 16 exemption, using the guidance outlined in this Report. Thereafter, Service NS should confirm its original decision for that information in the Record that fits the criteria for the solicitor-client privilege exemption and release the remaining information to which the exemption does not apply. This will be done in a newly redacted Record to the Applicant. The decision will outline the decision making-process including how and why the exemption applies and how and why discretion was exercised to apply it.
3. I recommend that Service NS put itself on notice that this is being presented as a one-time opportunity and if solicitor-client privilege is at issue in any future Review, it must provide full and appropriate Representations.

4. I recommend that Service NS put itself on notice that this is being presented as a one-time opportunity and that in future any request to go in-camera must be made to the Review Officer in advance of and separate and apart from its Representations and it should not be assumed that they will be accepted in-camera just because it is demanded.

Key Words: Acadian, administrative, blanket exemption, complaint, continuum of communications, decision, demand, discretion, dominant purpose, education, failure to advise, French language, human rights, in-camera, litigation privilege, municipal, public interest, reasons, request, schools, sever, solicitor-client privilege, waiver.

Statutes Considered: *Freedom of Information and Protection of Privacy Act, ss. 2, 5(2), 7, 14(1), 14(3), 16, 37(1), 37(3)(b).*

Case Authorities Cited: *NS Review Reports FI-03-42, 02-58, 08-06, 07-60(M), 05-08, 05-25, 03-12, 97-75, 97-76, 99-42; ON PO-2954; BC Order F11-04; Blank v. Canada (Minister of Justice), [2006] 2 S.C.R. 319, 2006 SCC 39; General Accident Assurance Co. v. Chrusz 1999 CanLII 7320 (ON C.A.), (1999), 45 O.R. (3d) 321 (C.A.); R. v. Fuller, 2003 NSSC 58 (CanLII), (2003), 213 N.S.R.(2d) 316; Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority, 2011 BCSC 88; Stevens v. Canada (Prime Minister), [1998] 4 F.C. 89; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.*

Other Cited: *Colin H.H. McNairn and Christopher D. Woodbury, Government Information: Access and Privacy (Thompson Canada Limited: 1992).*

REVIEW REPORT FI-08-104

BACKGROUND

On November 3, 2007, the Applicant filed an Application for Access to a Record with Service Nova Scotia and Municipal Relations ["Service NS"]. During the course of the Review, the scope for this file became:

> *Documents internal to SNSMR [Service Nova Scotia and Municipal Relations] relating to [the Applicant's] Nova Scotia Human Rights Complaint ["NSHRC"] case.*

In its original decision of May 16, 2008 [Decision #1], Service NS stated:

> *. . .we did in fact find correspondence with your name on the documents, these documents do reference your Human Rights case, however, they are subject to Section 16, of the Freedom of Information and Protection of Privacy Act, which provides for exemption from disclosure because of solicitor-client privilege.*
>
> *As noted above, although we did find correspondence referencing you and your case, these are protected under solicitor-client privilege.*

As a result of an informal resolution, Service NS revised its disclosure decision on January 21, 2010 [Decision #2] and released part of the Record to the Applicant in full while continuing to withhold other parts in full, under s. 16 of the *Freedom of Information and Protection of Privacy Act* ["*Act*"]. In the decision letter, Service NS stated:

> *It is our understanding that this file is currently at the Case Review Analysis Stage. As requested by the Review Office, we have once again reviewed the documents concerning your personal information, originally exempted under Section 16, Solicitor-client privilege, and agree that some relevant points and case law do apply. We are in agreement that some of the documents can be released to you.*
>
> *Since the nature of the issues involved are predominantly legal, much of the correspondence and documents in the file are in the context of the giving, receiving, or formulating of legal advice. The Freedom of Information and Protection of Privacy Act (Act) by way of subsection 5(2), authorizes a public body, i.e. Service Nova Scotia and Municipal Relations, to refuse or withhold access to a record, either in whole or in part, where it meets exemption provisions of the Act. With respect to your request, access to a record is withheld in whole or in part by way of one or more of the following provisions:*
>
> - *Section 14(1), Advice to public body or Minister – based on the confidentiality of the information in that it is considered advice, opinion, and recommendations; or*
> - *Section 16, Solicitor-client privilege – since the information is communication between a solicitor and his/her client.*

During the Review, Service NS released the two documents that had been withheld under s. 14 of the *Act.* Therefore, that exemption is no longer at issue.

During the Investigation stage, it was discovered that some of the responsive Record had not been included in those considered for disclosure to the Applicant. On September 23, 2010, Service NS made a further disclosure [Decision #3] specifically addressing these remaining documents. With a view to sorting out what had and had not been released to the Applicant and provided to the Review Office, Service NS assisted by including an updated Documentation List when it issued its last decision, with copies going to both the Applicant and the Review Office. As of October 13, 2010, the issue as to what constituted the contents of the complete Record was settled and search is no longer an issue. The only issue in this Review is the withholding of information related to the Applicant's human rights complaint, under one exemption - s. 16 of the *Act.*

On December 17, 2010, the Review Office provided Service NS with a list of specific questions to be answered as part of the Investigation. The Review Office posed the questions in order to assist Service NS in preparing its Representations with respect to the solicitor-client exemption. The questions included:

1. Who is the client(s) in this relationship?
2. Who is the solicitor(s) in this relationship?
3. What was the nature of the retainer?
4. Is there a common or joint interest relationship with any other body?
5. When did possible litigation become known?
6. What is the nature of the litigation?
7. When did litigation start?
8. Is litigation over?
9. Is there any appeal avenues available regarding the litigation?
10. Is there any related litigation pending or expected?

The above questions relate to the matter in general terms. On a document-by-document basis, the Review Office requested answers to the following:

11. Where is the advice sought or given (i.e. show the advice)?
12. Is it actual legal advice or is it another form of advice, such policy, strategic or executive, or is it non-legal responsibilities such as administration functions?
13. Was this document intended to be confidential?
14. If yes (to #13), what evidence is there to support this?
15. Why was this document created (i.e. dominate purpose of creation)?
16. What evidence is there to support this?
17. Has any of the privileged information been disclosed to someone outside of the solicitor-client relationship?
18. If yes (to #17), to whom and by whom?
19. Has any of the same information been disclosed elsewhere?

At no point did Service NS answer the questions provided by the Review Office even though it was reminded when the matter moved to formal Review and it received the request for final Representations. Service NS also did not provide Representations with respect to if and

how it could sever the Record. This is unfortunate because the responses to these questions and the issue of severing would have been very helpful if not essential in understanding Service NS's position on the s. 16 exemption.

Whether the human rights matter forming the subject matter of the Record is still a live legal proceeding is relevant to this Review. Through my own investigation, I have been able to determine that there are two human rights complaints involving one complainant and two Respondents, one of which is Service NS. The Nova Scotia Human Rights Commission ["Commission"] appointed one Board of Inquiry to hear both complaints. The other Respondent took the matter to the Nova Scotia Supreme Court where the Commission's decision to appoint a Board of Inquiry was quashed. The NS Court of Appeal overturned that decision and reinstated the Commission's authority to appoint a Board of Inquiry. The other Respondent has appealed to the Supreme Court of Canada who will hear the matter in October of 2011. The Chair adjourned the Board of Inquiry pending the outcome of the case before the Supreme Court of Canada.

RECORD AT ISSUE

Pursuant to s. 38 of the *Act*, Service NS has provided the Freedom of Information and Protection of Privacy ["FOIPOP"] Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff.

The Record that remains at issue consists of 30 documents (totalling 35 pages) that have been severed in full under s. 16 of the *Act.*

APPLICANT'S REPRESENTATIONS

On February 15, 2010 the Applicant provided the following Representation to the Review Office:

> *As per my conversation with you today I wish to continue with this review request as on February 11, 2010 the Supreme Court of NS – Court of Appeal has re-enforced the NS Human Rights Commission right to initiate a formal Board of Inquiry on the issues for which my request for information was initiated.*
>
> *I was not surprised at the amount of information that had been excluded under various sections and I would appreciate a clarification as to what is the retention period for withholding information for all sections that were referred to. As I understand there is a time limit for various sections. Once I have this information I will review each exclusion and where appropriate provide you with rationale for continuing my request to release the information. Thank you for your attention in this matter.*

On February 23, 2010, the Applicant provided a second Representation to the Review Office, similar to correspondence s/he sent to Service NS on the same date, which stated, in part:

My understanding of Section 14 of the FOIPOP Act is that the exemption does not apply to records that have been in existence for five or more years unless another exemption applies. The Public Body has severed the above without making any reference to other exemptions therefore I believe I am entitled to full disclosure of these records.

I look forward to receiving these records.

Although s. 14 of the *Act* exemption is no longer in issue, this history raises an important point. The improper reliance on s. 14 by Service NS was rectified by the subsequent further release of this part of the Record. The error in relying on s. 14 where a Record is older than five years is noted as a reminder to public bodies in processing Applications for Access to a Record to consider the age of a record as part of its decision regarding release of information. The Applicant was correct in his/her interpretation of s. 14 of the *Act.*

The Applicant's Representation on February 23, 2010 continued:

With respect to records severed under Section 16, it is difficult for me to tell whether these records are correctly severed as the entire record is withheld and non-identifiable. I would appreciate your opinion as to whether these records are subject to the solicitor-client privilege.

PUBLIC BODY'S REPRESENTATIONS

On October 21, 2009 Service NS provided a Representation to the Review Office which states, in part:

This case is currently active at the Human Rights Commission (HRC). The file was going to a Board of Inquiries but before proceedings began [the other Respondent] filed application to stay the Board of Inquiries with a number of grounds. There was a Supreme Court Decision on this and [they] won their case. The HRC filed an appeal and it is our understanding there is an [sic] *hearing in December 2009 on whether or not this case will proceed to the Court of Appeal.*

Trust this provides explanation of the requirement of Section 16, Solicitor-Client Privilege.

The reference to the other Respondent in the above Representation does not refer to winning the human rights complaint. To ensure a clear understanding, [they] were successful in having the NS Supreme Court quash the Commission's decision to convene a Board of Inquiry to hear the human rights complaint, not in winning the human rights complaint. The Commission appealed the decision as to whether or not it had the authority to decide if a matter should proceed to a Board of Inquiry.

After considerable delay, on March 14, 2011 Service NS provided its final Representations. The Review Office had made it clear to Service NS in its December 17, 2010 correspondence that unless specifically requested otherwise, all Representations may be shared with the Applicant. Service NS stated:

Thus we state explicitly that this response is to be held "in camera".

In response to the ***request*** for the Representations to be received in-camera, because the sole remaining exemption is solicitor-client privilege ***and*** the matter is still before the Courts, out of an abundance of caution, I have considered the Representations in-camera.

It appears mediation was not offered in this Review for two reasons. On the one hand, Service NS had already made an effort to revise its original decision by releasing an additional portion of the Record, which is to be commended. On the other hand, Service NS was not responsive to the Review Office's questions seeking more information about how it reached its decision about the portion of the Record it continued to withhold.

ISSUES UNDER REVIEW

1. Whether the withheld information fit the definition of solicitor-client privilege.
2. If yes, whether Service NS has properly exercised its discretion to apply it.
3. Where it is found that the solicitor-client exemption fits and discretion has been properly exercised, whether some of the information can be severed from the Record and the Applicant provided with the remainder.

DISCUSSION

This Review, and a related Review that was resolved through mediation, have undergone many stages since the Applicant's original Request for Review was received on August 24, 2009. Issues with respect to fees, records withheld by Service NS under the s. 14 exemption, and search have been resolved and will not be discussed in this Report other than to make it clear these matters are no longer at issue.

Solicitor-Client Privilege

There are two recognized "branches" under the umbrella of this exemption – communication privilege and litigation privilege. Both are forms of solicitor-client privilege. Communication privilege exists to enable clients to feel free and protected to be frank and candid with their lawyers with respect to their affairs so the legal system can function – basically to protect the relationship**.** Litigation privilege exists to protect the adversarial system of justice by ensuring a zone of privacy for counsel and his/or her client while preparing a case for litigation and/or during the litigation – basically to protect the process.

Litigation Privilege

In 2003 the Review Officer reviewed the decision of a public body to deny access to a report dealing with the Applicant's suspension from his/her job. The Review Officer laid out the "dominant purpose" test as follows:

> *. . . from Manes & 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".
[FI-03-42] [Refer also to FI-08-06]

In order to determine whether the litigation privilege applies to any of the Record, it is important to understand the nature of the litigation. A summary of the history is as follows:

- In June 2003 the Applicant filed a human rights complaint against a municipality and two provincial departments with the Nova Scotia Human Rights Commission ["the Commission"]. The Applicant's human rights complaint alleged discrimination as a person of Acadian descent because French schools were financially disadvantaged as they received no municipal supplement.
- On April 8, 2005 the Commission recommended the appointment of a Board of Inquiry. A one-person Board of Inquiry was appointed. One of the Respondents applied to the Nova Scotia Supreme Court to quash the Commission's decision to appoint a Board of Inquiry.
- On January 14, 2009 the Nova Scotia Supreme Court issued a decision that the Commission did not have the statutory jurisdiction to proceed with the Applicant's human rights complaint. This decision was appealed by the Applicant and the Commission.
- On February 11, 2010 the Nova Scotia Court of Appeal set aside the lower court's order and reinstated the Board of Inquiry. The other Respondent has appealed the Nova Scotia Court of Appeal decision to the Supreme Court of Canada. The case is expected to be heard in October 2011. The parties in the case are a municipality, the Commission, the Applicant and Her Majesty the Queen in Right of the Province of Nova Scotia [for Departments of Education and Service NS].

Based on my investigation into the ongoing litigation, I find that litigation privilege applies to the two pages [pages 27 and 28 of the Record] because that portion of the Record meets the dominate purpose test – information in relation to or in anticipation of litigation which remains outstanding. The Supreme Court of Canada stated,

. . . the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.
[Blank v. Canada (Minister of Justice), [2006] 2 S.C.R. 319, 2006 SCC 39]

Communication Privilege

The Review Officer has often relied upon the guidance of Colin McNairn and Christopher Woodbury, in *Government Information: Access and Privacy* which speaks to the nature of solicitor-client privilege. This definition has been cited frequently in Review Reports

[Refer to FI-02-58, FI-07-60(M) and FI-08-06]. In *Government Information, Access and Privacy,* McNairn and Woodbury describe solicitor-client privilege as:

> *a substantive rule for the exclusion of evidence in legal proceedings. A person who is privy to matters that originated in privileged circumstances is entitled to resist disclosure of those matters. Information protected by the privilege includes confidential communications, passing both ways, between a lawyer and his or her client that took place in the course of a professional relationship, whether or not in contemplation of litigation. However, the communications must be in the context of the client seeking legal advice from the solicitor*.

Additionally, in Review *FI-05-08*, the former Review Officer stated four conditions, all of which must be established in order for a document to be considered subject to solicitor-client privilege:

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

Confidentiality is an essential component of the privilege. Therefore, a public body must demonstrate that the communication was made in confidence, either expressly or by implication. *[Refer to General Accident Assurance Co. v. Chrusz 1999 CanLII 7320 (ON C.A.), (1999), 45 O.R. (3d) 321 (C.A.)]*

Not all communications by a solicitor are privileged. In *NS Review Report FI-07-60(M),* I discussed a Supreme Court of Nova Scotia case, *R. v. Fuller, 2003 NSSC 58 (CanLII), (2003), 213 N.S.R.(2d) 316*:

> *The Nova Scotia Supreme Court has made it clear that not everything done by a lawyer will be protected as privileged but that the privilege is equally available for lawyers within government:*
>
> > *[35] However, only to the extent that a document reveals that legal advice was sought or given, from the named legal counsel, will that document be found to be privileged under s. 16 of the FOIPOP Act. Solicitor client privilege at common law as defined in Mitsui, supra, and for the purposes of s. 16 of the FOIPOP Act, includes the privilege that attaches to confidential communications between solicitor and client for the purpose of obtaining and giving legal advice.*
> >
> > *[36] As noted above, because legal advice privilege protects the relationship between solicitor and client, the key question to consider is whether the communications is* [sic] *made for the purpose of seeking or providing legal advice, opinion or analysis. Legal advice type privilege arises only where a solicitor is acting as a lawyer, and giving legal advice to a client. Therefore, in each instance where such privilege is claimed herein,* ***the question should be "was the named government lawyer acting as a lawyer and providing legal***

advice when he/she received, commented on or initiated a document or correspondence?"

[37] In R. v. Campbell, 1999 CanLII 676 (S.C.C.), [1999] 1 S.C.R. 565 the Supreme Court of Canada at para 50 commented:

> *"it is, of course, not everything done by a government (or other) lawyer that attracts solicitor client privilege."*

[38] The Court went on to state:

> *Whether or not solicitor client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.*

[Emphasis added]

With respect to the other portion of the remaining Record, Service NS was asked specific questions by way of guidance as to what was required in order to meet the solicitor-client exemption for the remaining 33 pages it has withheld in full. The failure to answer the questions [reproduced above] and the decision to instead give a Representation on the importance of solicitor-client more generally has left its Representations deplete. This is unfortunate.

I have considered Service NS's in-camera Representation and I find it has not provided any arguments to make its case for the exemption to fit. In the absence of information, I cannot find a discretionary exemption fits. I have great respect for solicitor-client privilege and I feel that if Service NS had made proper arguments, I could have found that there are pages within the Record that fall within the definition of solicitor-client privilege and could have been properly withheld [for examples only - see pages 18, 19, 24 of the Record]. That being said, I cannot make Service NS's arguments for it. Because of that, I have chosen to approach this Report a little differently. One of my recommendations is for Service NS to go back and revisit the Record while referring to the guidance found below.

Implementing the Recommendation

Further to the Recommendation above, I make the following observations to assist Service NS in reconsidering how it determined the exemption applies to the remaining portion of the Record that has been withheld:

1. Continuum of communication

I would find it reasonable for Service NS to consider parts of the Record to qualify for the solicitor-client exemption if the information falls within a "continuum". That is a sequence or progression of communications in the milieu of litigation or seeking advice or related steps such as mediation, as stated in Review Reports *FI-97-75* and *FI-97-76*:

> *On pages 8 and 9 of Solicitor-Client Privilege in Canadian Law, by Robert D. Manes and Michael P. Silver (1993), it says: ". . . privilege depends not upon the content of the*

communication, but upon the purpose for which it was obtained. As a result, contemplated litigation is the hallmark of the determination as to whether the derivative communication is privileged."

> *Manes and Silver also discuss the extent of privilege as follows:*
> *It is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice.*
> *[FI-97-75 and FI-97-76]*

In a 1999 Review Report, this was expanded upon:

I am aware that the authors of Solicitor-Client privilege in Canadian Law (Manes and Silver) have said that it is not necessary that a document specifically request or offer legal advice, "as long as it can be placed within the continuum of communication in which the solicitor tenders advice." In my view one would have to cast a wide net to bring this document into the area of privilege.

The Ontario Divisional Court warned that public bodies could not use solicitor-client privilege to avoid the disclosure of other documents, simply because those documents contain information which may have also been communicated to and from legal counsel. [Ontario (Freedom of Information and Protection of Privacy Co-ordinator, Ministry of Finance) v. Ontario (Assistant Information and Privacy Commission) (14 April, 1997)] [FI-99-42]

A 2011 BC Supreme Court decision provides a thorough review of a number of aspects of solicitor-client privilege, including "continuum of communication." Although not defined, it makes it clear that all communication from the point when the client decides to retain a lawyer regarding a matter is included. Everything that happens "in-between" should be protected so not to accidentally disclose any of the legal advice. The Court states in para. 46:

Disclosing one part of a string of communications gives rise to the real risk that privilege might be eroded by enabling the applicant for the communication to infer the contents of legal advice. Thus, in No. 1 Collision Repair and Painting (1982) Ltd. v. Insurance Corporation of British Columbia 1996 CanLII 2311 (BC S.C.), (1996), 18 B.C.L.R. (3d) 150, Henderson J., at para. 5, said:

> *Moreover, I am satisfied that a communication which does not make specific reference to legal advice is nevertheless privileged if it falls within the continuum of communication within which the legal advice is sought or offered: see Manes and Silver, supra, p. 26. If the rule were otherwise, the disclosure of such documents would tend in many cases to permit the opposing side to infer the nature and extent of the legal advice from the tenor of the documents falling within this continuum. Thus the intent of the rule would be frustrated.*

[Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority, 2011 BCSC 88]

The subject documents must still fit the other criteria: in confidence and between a client and his/her/its lawyer; it is only the "provide advice" requirement that is not present in the withheld information. In this regard, the *Camp Development* decision states:

> *[42] The recognition that privilege attaches broadly to the "continuum of communications and meetings" that underlie legal advice is widely accepted. In Blood Tribe, at para. 26, the Alberta Court of Appeal, relying on Balabel v. Air India, [1988] 2 All E.R. 246 at 254, confirmed the claim of privilege over a range of minutes of meetings, e-mails and correspondence between the Department of Justice and the Department of Indian and Northern Affairs. The court considered that all such documents were made in confidence and were part of the necessary exchange of information between solicitor and client for the purpose of providing legal advice.*
>
> *[43] Similarly, in Currie the court held that solicitor-client privilege attached to the factual and financial information provided to legal counsel for the purpose of obtaining legal advice. Ferrier J., at para. 46, said:*
>
> > *It is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communications in which the solicitor tenders advice. The privilege applies when a lawyer negotiates a commercial transaction (such as a share of structuring agreement), draws up contracts or communicates with the client in the course of the transaction.*

In a recent Ontario Order, the Commissioner found the privilege applies to "a continuum of communications" between a solicitor and client:

> *. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)]*
> *[PO-2954]*

In applying the continuum test to the responsive Record, the Ontario Commission went on to find:

> *The majority of the records for which the university claims section 49(a), in conjunction with the solicitor-client privilege exemption at section 19, are emails and other correspondence between the university's external legal counsel and internal legal counsel and/or other university staff. Having considered the representations of the university and information contained in the records themselves, in my view, all of it falls squarely within the type of information for which section 19(c) applies. I find that the records were prepared by or for counsel employed or retained by the university and has been passed from counsel or client to the other as part of the continuum of communications aimed at keeping both informed for the purpose of seeking and providing legal advice with respect to the two incidents to which the records relate. While many of the records are explicitly marked "privileged" or "confidential," based*

on the types of information that the records contain and the submissions of the university, I accept that even those records which bear no such markings were implicitly intended to be kept in confidence by the parties and were treated in that manner. I am satisfied that there has been no waiver of privilege with respect to these communications.
[PO-2954]

With respect to following the Recommendation in this Review, Service NS can look to the following pages of the Record that may be examples that fall within the continuum category [for examples only - see pages 11, 12, 15 of the Record].

I would find that it is reasonable for Service NS to withhold portions of the Record that relate to the matter even where the document is not marked confidential or where legal advice is not actually sought or given but only where the communication is between the solicitor and his/her client. This will be documents that, by virtue of their contents, indicate that there is clearly an expectation of confidentiality in communication between solicitors and clients. In this case, the litigation including the pending Supreme Court of Canada hearing and any subsequent Board of Inquiry are not finalized.

With respect to following the Recommendation in this Review, Service NS can look to the following pages of the Record that may be examples that fall within a definition of solicitor-client privilege [for examples only – see pages 24, 25, 26 of the Record].

2. Waiver of Privilege

As with any client, it is open to government as a client to choose to waive privilege. This means that in a situation even where the exemption clearly applies, Service NS could choose to waive privilege as the client. In a Federal Court case, the Judge specifically found that:

[I]t is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so.
[Stevens v. Canada (Prime Minister), [1998] 4 F.C.89]

With respect to following the Recommendation in this Review, Service NS should turn its mind to recognizing this is an option. The *Act* recognizes this by making s. 16 a discretionary exemption – meaning that even if it is privileged information, the exemption does not have to be applied. If it were intended to never be waived, it would be a mandatory exemption.

3. Severing of Part of the Record

Service NS can sever part of the Record and not jeopardize the portion to which privilege attaches. In a 2007 Review Report, I found:

It is wholly appropriate for a public body to consider whether or not to release a record notwithstanding that it may contain privileged information pursuant to an Application for Access to a Record. Alternatively, it is appropriate for a record to be severed and in doing so the privilege is not jeopardized in the severed portion of the Record:

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.
[FI-04-25]
[FI-07-60(M)]

In the same Review, I went on to say:

In this sixth document, there is a small reference in the minutes that can be characterized as falling under solicitor-client privilege. The remainder of the Record does not reveal a legal opinion or discussion of potential litigation that could be protected by s. 476 of the MGA. One or two sentences that fall under the solicitor-client privilege protection cannot cast a shadow over the whole of the document. Indeed, under access to information legislation, the exact opposite holds true. The Municipality is to make every effort, as is required by the MGA, to provide access to as much information as possible relying only on limited and specific exceptions to that right to justify withholding any of the Record. The Municipality should have provided this portion of the Record to the Applicant, at the very least in severed form. By severing out the small reference of privileged information and providing the remainder to the Applicant, the Municipality would not be jeopardizing the privileged portion.
[FI-07-60(M)]

In a 2008 Review Report, I discussed how residual privilege will attach to that part of the Record withheld:

Courts have supported the residual privilege attaching to information that is not disclosed, even where a portion of the record is disclosed, and particularly where the disclosure is by government.

*. . . **By disclosing portions of the accounts the Government** was merely exercising its discretion in that regard. As I mentioned earlier, **a government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable;** but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients.*
[Stevens v. Canada (Prime Minister), [1997] 2 F.C. 759 (Fed. T.D.)]
[Emphasis in original]
[FI-08-06]

Partial disclosure was also discussed in another Federal Court decision, where Mosley J states:

The applicant is entitled to general identifying information such as the description of the document (for example, the "memorandum" heading and the 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 closing words of the communication, and the signature block.
[Blank v. Canada (Minister of Justice), 2005 FC 1551, at para. 49]

To assist in following the Recommendation in this Review, Service NS can look to the following pages of the Record as examples that may not contain any or only some privileged information that can be severed while the remaining portions are not privileged and can be released [for examples only – see pages 1, 9, 42D-F of the Record].

4. Administrative Communiqués Regarding Proceedings

In November 2009, the Review Office corresponded with Service NS with respect to parts of the Record involving communications between parties.

Some records, such as the 2005 Supreme Court Ruling and the document on filing a human rights complaint, are not confidential communications created by the solicitor or client and therefore do not satisfy the elementary requirements of the privilege.

Additionally, there are several records addressed from [solicitor] to Assistant to Investigations for the Nova Scotia Human Rights Commission. These are ***inter-party*** *communications that do not contain confidential legal advice: rather, the letters from [solicitor] to [name] concern the case's factual background, scheduling, updates, and other procedural matters. As stated in Solicitor-Client Privilege in Canadian Law, "communications between opposing parties cannot be privileged, even if they form part of the solicitor's brief" (Manes and Silver, 114).*
[Emphasis in original]

Simply because one of the parties to a communication happens to be a solicitor can in no way be viewed as reason to characterize something as falling within the solicitor-client privilege exemption. This approach is very common amongst public bodies and is not appropriate.

With respect to following the Recommendation in this Review, Service NS can look to the following pages of the Record that are likely examples of information that does not fall within a definition of solicitor-client privilege [for examples only – see pages 1, 9, 10 of the Record].

Exercise of Discretion

Once it has been determined that a discretionary exemption fits, a public body must turn its mind to whether or not to apply it. In other words, it must go through the exercise of discretion.

Again I find that Service NS has provided very little information by way of the Representations to demonstrate how this exercise took place. Nonetheless, in relation to the two

documents [pages 27 and 28 of the Record] which I have found fit the exemption because of litigation privilege, I find Service NS properly exercised its discretion to rely on the solicitor-client exemption.

Because I have conducted a line-by-line review of the entire Record and reviewed the in-camera Representation for a number of documents, I find it would be reasonable for Service NS to withhold some of the Record, which contains solicitor-client privileged information.

It must be noted, however, that there are also parts of the Record where the information does not meet the criteria for solicitor-client privilege and, therefore, must be released; the exercise of discretion is not necessary because the s. 16 exemption has no application.

I encourage Service NS to take all relevant factors into consideration when exercising discretion with respect to following the Recommendations, and in future Reviews. In particular, public interest is a very important relevant factor when a public body is exercising its discretion. Regarding a situation where the Applicant has requested a document of public interest that qualifies as a solicitor-client communication, the former Review Officer stated:

> *In many of my Reviews I have urged public bodies not to use s.16 as a blanket denial of all communications it has with solicitors. Public bodies are reluctant to waive privilege, one of the purposes of which is to ensure the advice is freely given. But in the context of the FOIPOP Act, which obliges public bodies to be "fully" accountable to the public, it would, in my view, be appropriate for public bodies to weigh the accountability factor with the exemption in matters of particular public interest…There is no question, and the Applicant would not argue otherwise, that the records denied enjoy solicitor-client privilege, and TPW* [Department of Transportation and Public Works] *can refuse to disclose them if it wishes to.*
> *[FI-05-25]*

In Decision #1, Service NS acknowledged that the Record contains information that reference the Applicant's human rights case. The Applicant is entitled to as much information as s/he is entitled to under the *Act.* Section 16 of the *Act* provides for the solicitor-client exemption as a *discretionary* exemption that a public body may choose to rely on or not. It provides as follows:

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

The problem that remains is that it appears Service NS has applied the solicitor-client exemption to the remaining 33 pages as a blanket exemption. There is no evidence Service NS has done a line-by-line review to ensure the Applicant received all the parts of the Record where the exemption clearly does not apply. Public bodies must remain cognizant of the statutory requirement that access is only to be curtailed by exemptions that are limited and specific *[Refer to s. 2(b) of the Act]*. An added advantage is that where a public body severs in line with the statute and provides an applicant with all that s/he is entitled to with privileged information removed, an applicant will have a better understanding and appreciation for why portions of the Record have been redacted.

In-Camera Representations

On March 14, 2011 Service NS made a request for its Representations to be held "in-camera." This request by Service NS is worded as a demand rather than a request to the Review Officer. Section 37(1) of the *Act* provides as follows:

> ***The Review Officer may*** *conduct a review in private.*
> ***[Emphasis added]***

It should be noted that in correspondence to Service NS on December 17, 2010 the Review Office advised Service NS that the decision to accept a Representation "in-camera" would be up to the Review Officer during the formal Review and restricted to "some information that is relevant but cannot be shared with the Applicant." [Emphasis added]

A public body may make a request to the Review Office to go in-camera at any time during a Review. Whether that request is accepted is wholly within the discretion of the Review Officer. Common sense would dictate that it would be advisable for public bodies to ***request*** the opportunity to be heard in-camera in a mode outside of its actual Representations. To proceed as Service NS did risks that I will find no reason to go in-camera and exercise my discretion to make the Representations known in the Review Report. This is particularly the case where, as here, the Representations did not contain anything that could in any way whatsoever compromise the continuing legal proceedings or disclose the content of the Record.

Section 37(3)(b) goes on to provide:

> ***The Review Officer may*** *decide . . .*
>
> *(b) whether a person is entitled . . . to comment on representations made to the Review Officer by any other person.*
> ***[Emphasis added]***

Again, the statute makes it clear who is the decision-maker about who gets to see what. It is for the Review Officer to decide if Representations from one party are to be shared with another. It is not for a public body to dictate to the Review Officer that its Representations are to be kept secret from the Applicant. I find it is certainly open to Service NS to ***request*** to go in-camera or for its Representations not to be shared with the Applicant but at the end of the day the Review Officer will decide.

In this case, Service NS did not contact the Review Office directly on its preference to submit a Representation on an in-camera basis. As a best practice, I strongly urge public bodies to made direct contact with the Review Office with respect to a request to have any Representations they want considered "in-camera." Inevitably, the information may be highly sensitive and will require a delicate approach. This can be best achieved through one-on-one discussions in advance followed by a formal written request.

It is important for a public body to give reasons for its decision to an applicant in its decision as stated by L'Heureux-Dubé in *Baker v. Canada*:

> *Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review . . . Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given.*
> *[Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at para 39]*

It is also important for a public body to give reasons for its decision to the Review Office through its Representations. Presenting blanket in-camera Representations puts the Review Officer in a position where I may not be adequately able to justify my findings and recommendations. *[Refer to BC Order F11-04 at para 66]*

To be clear, in-camera should only be used where disclosure of the very information that is being withheld must be referred to in the Representations and therefore sharing this information publicly or with an applicant would cause it to become known, or where disclosure would cause demonstrable harm. In-camera would only apply to those portions of the Representation that would disclose information in the Record, not necessarily the entire Representation. This was not the case in this Review, but again out of respect for Service NS, in this instance only, its Representations have not been reproduced in this Review Report.

FINDINGS

1. I find that litigation privilege applies to the two pages [pages 27 and 28 of the Record] because that portion of the Record meets the dominate purpose test – information in relation to or in anticipation of litigation which remains a live legal matter.
2. I find Service NS has not provided any arguments to make its case for the exemption to fit the remainder of the Record. In the absence of information, I cannot find a discretionary exemption fits.
3. I find Service NS appropriately exercised its discretion to rely on the solicitor-client exemption for the two pages that have been found to be subject to litigation privilege.
4. I find it would be reasonable for Service NS to withhold other privileged information that is found in the Record, once it has re-examined each document for privilege applicability.
5. I find that there are parts of the Record that cannot meet the exemption's requirements and therefore must be released.
6. I find that the exemption has been applied in a blanket format and the *Act* requires, even where there is privilege in the Record, Service NS to apply the exemption in a limited and specific manner.
7. I find there was no rationale to consider Service NS's Representations in-camera as the Representations neither revealed the contents of the Record nor disclosed any information subject to solicitor-client privilege.

RECOMMENDATIONS

1. I recommend Service NS confirm its original decision to withhold pages 27 and 28 of the Record under s.16 of the *Act*.
2. I recommend Service NS re-examine all pages of the remaining part of the withheld Record line-by-line, and re-consider the application of the s. 16 exemption, using the guidance outlined in this Report. Thereafter, Service NS should confirm its original decision for that information in the Record that falls squarely within the criteria for the solicitor-client privilege exemption and release the information remaining to which the exemption does not apply. This will be done in a newly redacted Record to the Applicant. The decision will outline the decision-making process including how and why the exemption applies and how and why discretion was exercised to apply it.
3. I recommend that Service NS put itself on notice that this is being presented as a one-time opportunity and if solicitor-client privilege is at issue in any future Review, it must provide full and appropriate Representations.
4. I recommend that Service NS put itself on notice that this is being presented as a one-time opportunity and that in future any request to go in-camera must be made to the Review Officer in advance of and separate and apart from its Representations and it should not be assumed that they will be accepted in-camera because it is demanded.

Respectfully,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia