FILE NO. – 2003/004

REPORT WITH RESPECT TO THE APPLICATION FOR REVIEW OF [redacted] IN RELATION TO INFORMATION REQUESTED FROM SASK WATER

[1] [redacted] (the "Applicant") forwarded an Access to Information Request Form an undated Access to Information Request form to Sask Water (the "Respondent") whereby he requested the following:

> "How much was spent in legal fees by Sask Water in the litigation over the claim by IPSCO?"

[2] By letter dated January 23, 2003 the Respondent replied as follows:

> "We have received and processed your request for information under *The Freedom of Information and Protection of Privacy Act* concerning how much Sask Water spent in legal fees in the litigation over the Ipsco [sic] claim.
>
> Be advised that Saskatchewan Water Corporation is denying your request on the basis that the information is exempt from access by virtue of section 22 of *The Freedom of Information and Protection of Privacy Act* as the records contain information that is subject to solicitor-client privilege.
>
> If you wish to have this reviewed, you may do so within one year of this notice. To do so, please complete a "Request for Review" form which is available at all provincial government offices and public libraries throughout the province. Your completed request form should be sent to the Information and Privacy Commissioner at 208 – 2208 Scarth Street, Regina, Saskatchewan, S4P 2J6,
>
> Yours truly,
>
> [redacted]
> Access Officer"

[3] The Applicant then forwarded to me a Request for Review dated January 28, 2003 as a result of which I wrote to the Respondent on January 30, 2003 as follows:

"Sask Water
Victoria Place
111 Fairford Street East
Moose Jaw, Saskatchewan
S6H 7X9

Attention: [redacted] Access Officer

Dear [redacted]

RE: [redacted]
Your File Reference: SWC [redacted]
File Reference: F 2003/004 RPR

I am in receipt of a Request for Review from the above named Applicant, and enclose herewith the yellow copy of same.

Pursuant to the provisions of *The Freedom of Information and Protection of Privacy Act* I hereby inform you of my intention to conduct a review.

I will wish to examine the record that contains the documentation that is the subject of the access request. If these documents are not too voluminous, I would request that you copy same and forward them to me.

If the documents are too numerous for this to be practical, please advise me and I will arrange to attend at your office to examine the documents.

In your reply, if you wish to expand on the grounds relied upon by your Department for declining to produce the documentation I would be pleased to receive these representations.

I look forward to hearing from you in this regard.

Yours truly,

Richard P. Rendek, Q.C.
Acting Freedom of Information
and Privacy Commissioner
Province of Saskatchewan."

[4] The Respondent replied to my request by letter dated February 27, 2003 which states as follows:

> "We enclose the records requested by you for review for the appeal by [redacted] relating to Access Request [redacted] The original request was for records that would indicate legal fees paid but did not indicate that narratives of accounts were being requested. As a practical matter in responding to such a request given the way it was asked, should access have been provided, we would simply have provided a number total rather than copying the bills of account and deleting the narrative portions, even the *Act* does not compel the creation of records not in existence. However, for the purposes of your review we have undertaken that task given that these are the originating records from which any information the subject of the request would be determined. In addition we would not provide information on 2002 until after tabling of our annual report for 2002.
>
> With respect to our claim of privilege pursuant to section 22 of *The Freedom of Information and Protection of Privacy Act* we have identified that we believe that bills of account and all the information contained therein are subject of solicitor-client privilege and therefore not subject to access under the *Act*.
>
> The case of *Re Stevens v Prime Minister of Canada*, 161 D.L.R (4th) 85 (FCA) dealt with the issue of solicitor's bills of account under the federal *Access to Information Act* but the principles discussed, we would suggest, are equally applicable to this situation. The language of the provisions dealing with records subject to solicitor-client privilege in the federal and provincial statutes is virtually identical. In that case after a very detailed analysis of solicitor-client privilege, its societal and historical import and the application of that doctrine to the federal *Access to Information Act*, the federal Court of Appeal stated clearly that bills of account are privileged as solicitor-client communication. The facts of that case are that total billings seem to have been provided but no narrative from the bills of accounts were provided to an applicant under the *Act*. The case came before the Federal Court of Appeal to deal with the appeal of the refusal to provide narratives. The Trial Decision dismissed the appeal and held that solicitors' bills of accounts were privileged.
>
> The Court of Appeal even though the actual billing amounts were not being withheld went into extensive detail to review the issue of bills of accounts in their totality. They reviewed and analysed extensive authority on solicitor

client privilege. In that vein the Court at page 97 stated that "section 23 of the *Act* incorporates holus-bolus the common law of solicitor-client privilege" Their conclusion was clearly that bills of accounts which include tasks performed and the time spent as well as costs are central to the solicitor client relationship and are privileged under the solicitor-client heading as they need to be immune from intrusion if they are worth protecting (page 100). The Court then went on to close the loop and hold that if bills of accounts in their totality are privileged communications than they cannot be accessible under legislation which precludes access to records that contain information subject to solicitor-client privilege.

For ease of reference we enclose both the Federal Court Trial Division and Federal Court of Appeal decisions in *Re Stevens v. Prime Minister of Canada*.

It is our respectfully submission that this case makes it clear that solicitors' bills of accounts are privileged solicitor-client communication in their entirety including amounts and they were not accessible under the federal *Act*. The law surrounding solicitor-client privilege stated in the *Stevens* case is equally applicable in Saskatchewan. Section 22(a) of *The Freedom of Information and Protection of Privacy Act* provides that any record which contains information subject to solicitor-client privilege is exempt from access. Accordingly we therefore submit that the appeal should be denied on this basis alone.

We would also submit that the provisions of sections 22(b) and (c) of *The Freedom of Information and Protection of Privacy Act* would also provide a sufficient basis for denying access to the records requested. Bills of accounts contain information prepared by legal counsel in relation to a matter involving the provision of advice or other services by legal counsel. We would submit that bills of accounts are records which contain correspondence in relation to the provision of advice or other legal services by legal counsel."

[5] By letter dated March 4, 2003 I forwarded a copy of the Respondent's letter to the Applicant and providing him the opportunity to make any further representations or submissions and I forwarded a further letter to him dated March 17, 2003 inquiring if he had any further submissions to make with respect to his application. I have received no response to these letters.

[6] The Respondent's position is that the information requested was subject to solicitor/client privilege and thus exempt from disclosure under Section 22 of *The Freedom of Information and Protection of Privacy Act* which reads as follows:

> 22 A head may refuse to give access to a record that:
> (a) contains information that is subject to a solicitor-client privilege;
> (b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel; or
> (c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.

[7] This issue has been determined by the Federal Court of Appeal in *Stevens v. Canada*, [1998] 4 F.C. 89. This action arose when Sinclair Stevens applied for disclosure of all legal accounts incurred by the federal government with respect to an inquiry convened to investigate business dealings of the applicant when he was a cabinet minister. The applicant wished to prove that the inquiry's counsel had written the report instead of the inquiry's commissioner. The Prime Minister's Office responded to the request by providing the accounts with virtually everything blacked out other than the amount. The edits to the documents were made on the basis that the blacked out information was subject to solicitor-client privilege. The federal Information Commissioner found that the information was properly withheld from disclosure. His decision was upheld by both the Trial Division and the Court of Appeal.

The Court of Appeal found that the information was subject to the privilege and exempt from disclosure pursuant to section 23 of the federal *Access to Information Act* which states:

> The head of a governmental institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

This section is virtually identical to section 22(a) of the Saskatchewan statute.

The Federal Court of Appeal followed *Canadian Jewish Congress v. Canada*, [1996] 1 F.C. 268 (T.D.), in finding that since there was no definition of "solicitor-client privilege" in the Act, the common law definition should be followed. The Court adopted the definition of solicitor-client privilege formulated by the Exchequer Court in *Susan Hosiery Ltd. v. Minister of National Revenue* [1969] 2 Ex. C.R. 27, as follows:

> (a) all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged; and
>
> (b) all papers and materials created or obtained specifically for the lawyer's "brief" for litigation, whether existing or contemplated are privileged.

The Court also adopted the rationale for solicitor-client privilege as enunciated by Mr. Justice Lamer (as he then was) in *Descoteaux v. Mierzwinski* , [1982] 1 S.C.R. 860, as follows:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

The Court found that Mr. Justice Lamer advocated a very liberal approach to the scope of the privilege by extending it to include all communications made "within the framework of the solicitor-client relationship.

The Court held that whether the client is an individual, a corporation or a government body, there should be no distinction in the degree of protection offered by the rule. A government is not granted any less protection by law of solicitor-client privilege than any other client. But because it is a public body, it may have a greater incentive to waive the privilege.

The solicitor's bills and the terms and amounts of the retainer are at the heart of the solicitor-client relationship. Since the privilege protects the integrity of the solicitor-client relationship, the solicitor's accounts including the types of services rendered and their cost should be protected and privileged. The statement of account is integral to the seeking, formulating and giving of legal advice.

The Court noted that there was a line of cases in which the accounts were not found to be entirely privileged. But on examination, the Court found that the information actually disclosed in these cases was records of trust accounts and other accounting records that are not privileged. The cases have consistently held that a statement of account is not "an accounting record of a lawyer" and is thus still covered by solicitor-client privilege.

The Court also addressed the issue of the relationship between the solicitor-client privilege rule and the intent of the *Access to Information Act* to allow disclosure wherever possible to promote transparency. The court held:

> The rule is logical because it is consistent with the intention of Parliament. The Act does not contain any special definition of solicitor-client privilege. It was fully within the power of Parliament to insert a provision whereby these items would be specifically excluded from the ambit of privilege's protection. The expenses of government bodies, pertaining to legal fees or otherwise, are always of interest to the public. It is public money that is being spent. In so far as the intent of the Act is generally to promote the transparency of government

> activity, the incorporation of the common law doctrine of solicitor-client privilege indicates that it was meant to be excluded from the operation of the Act. This same privilege, when considered by Parliament in the context of the *Income Tax Act*, led to recognition that in the interests of collecting revenue, the privilege that might otherwise protect some solicitor's financial records, was dispensable. Parliament did not make that same determination in enacting this Act.

Among the decisions that the Federal Court of Appeal followed are two British Columbia decisions in which the orders of the Information and Privacy Commissioner Officer to release legal accounts were reversed on the basis that the entire accounts were privileged (See *Re Legal Services Society and Information and Privacy Commissioner of British Columbia* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.); and *Re Municipal Insurance Association Of British Columbia and Information and Privacy Commissioner of British Columbia* (1996), 143, D.L.R. (4th) 134 (B.C.S.C.)).

In reviewing the information that was disclosed by the Prime Minister's Office, the Court noted that more was disclosed than was legally necessary. The Court emphasized that the entire account is privileged and therefore the government did not have to release any of it, with or without the deletions.

[8] For the reasons outlined above, it is my view that the Respondent was justified in denying access on the basis of solicitor/client privilege and I would accordingly recommend that the Respondent continue to deny access to the Applicant to the information requested.

[9] Dated at Regina, in the Province of Saskatchewan, this 31st day of March, 2003.

RICHARD P. RENDEK, Q.C.
Acting Commissioner of Information
and Privacy for Saskatchewan