FILE NO. – 2003/059

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, dated August 14, 2003 to Saskatchewan Industry and Resources whereby he requested the following:

> "Total amount and break down of expense related to the civil Spudco lawsuit, money spent to date. Please indicate amount spent on outside legal advice."

[2] Saskatchewan Industry and Resources forwarded the response to Sask Water (the "Respondent") who replied by letter dated September 15, 2003 which stated, in part:

> "Be advised that we are denying your request on the basis that such records are exempt from access by virtue of Section 15(1)(d) and Section 22 of *The Freedom of Information and Protection of Privacy Act*. The records you request contain information the release of which would be injurious to a government institution in the conduct of existing legal proceedings."

[3] The Applicant then submitted a Request for Review dated September 17, 2003, as a result of which I wrote to the Respondent on September 23, 2003 as follows:

> "I am in receipt of a Request for Review from the above named Applicant, and enclose herewith the yellow copy of same.
>
> I hereby advise you of my intention to conduct a review in this matter and would ask that you forward to me copies of the records in question together with your reasons for denying the applicant access to same.
>
> I make this request pursuant to the provisions of The Freedom of Information and Protection of Privacy Act. If you have any questions in this connection, kindly do not hesitate to contact the writer."

[4] The Respondent replied to my request by letter dated October 15, 2003 which states as follows:

> "I am responding to your September 23, 2003 correspondence directed to myself requesting the records requested by [redacted] under *The Freedom of Information and Protection of Privacy Act*, (the '*Act*') and the Corporation's reasons for denial of access.
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> . . .
>
> The basis of our denial of the request for access to these records is that they are subject to solicitor client privilege and accordingly are exempt from the access requirement pursuant to section 22 of the *Act*. Additionally, the records requested contain information that would "be injurious to the Government of Saskatchewan or a government institution in the conduct of existing or anticipated legal proceedings" and are accordingly exempt pursuant to section 15(1)(d).
>
> We respectfully refer you to the decision in *Stevens v Canada* [1997] 2 F.C. affirmed [1997] 4 F.C. 89, wherein both the lower Court and the Federal Court of Appeal canvassed at length the issue of whether solicitors' accounts were protected by solicitor client privilege and were accordingly exempt from disclosure under section 23 of the *Access to Information Act*, R.S.C. 1985, c. A-1. Section 23 states:
>
> > 23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.
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> In carefully considered reasons both the lower Court and the Court of Appeal examine the historic underpinnings and societal importance of the solicitor client privilege and conclude without hesitation that solicitors' accounts are privileged under the common law as communications between solicitor and client, and this regardless of the detail or lack of detail contained therein. The Courts conclude that the legislation incorporates "holus bolus" the common law principles of solicitor client privilege in the exemption.
>
> We refer you as well to the case of *Municipal Insurance Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner).* (1996) 143 D.L.R. (4th) 134 wherein the British Columbia Supreme Court held that a one page lump sum interim invoice was subject to solicitor client privilege and therefore disclosure could be refused under section 14 of the *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, c. 61.

Section 14 reads, "The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege." At paragraph 44 Holmes J., quotes Mr. Justice Lowry in *Legal Services Society v British Columbia)(Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 at p.p. 379:

> Section 14 is paramount to the provisions of the statute that prescribe the access to records that government agencies and other public bodies must afford. It was enacted to ensure that what would at common law be the subject of solicitor-client privilege remain privileged. There is absolutely no room for compromise.

We respectfully submit that the principles applied by and the conclusions of the Federal Court of Appeal and the British Columbia Supreme Court are equally applicable to section 22 of the *Act* which provides in subsection 22(a) that "A head may refuse to give access to a record that . . . contains information that is subject to solicitor-client privilege". The records fall as well within subsection 22(b) and (c).

Although it is our position that the secondary grounds are not necessary to sustain the denial of access, they arise under section 15(1)(d) and are related. The disclosure of this privileged information may result in a great deal of strategic information becoming public to the detriment of the Corporation in the litigation. Justice Holmes comments on the issue at paragraph 48 of *Municipal Insurance Assn. supra,*

> Knowledgeable counsel, given the information as to his opponent's legal costs, could reach some reasonably educated conclusions as to detail of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated.

Pursuant to your September 23, 2003 correspondence and in accordance with section 54 of the *Act,* we are enclosing a sealed envelope containing all records requested being copies of all statements of account rendered by private counsel to the Corporation in *Judith River Farm & Water Limited Partnership et al v The Government of Saskatchewan and Sask Water Corporation*, Q.B. No. 1211 of 2000 and *Mark Langefeld et al v The Government of Saskatchewan and Sask Water Corporation*, Q.B. No. 3534 of 2000 and accounts submitted directly by a consultant to the Corporation engaged by and under the direction of legal counsel in the litigation. In doing so we do not waive privilege. While we do not purport to limit your jurisdiction to obtain and review the records, which is clearly stated, we

> respectfully request that you consider the comments of Holmes J. in *Municipal Insurance Assn.* supra at paragraph 10 wherein he states,
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> > I am of the view that where privilege is claimed over a document it ought not to be viewed by the Commissioner or the Court unless evidence and argument establishes a necessity to do so to fairly decide the issue. I am not in favor of automatically viewing the document as that in itself weakens the sanctity of privilege.
>
> Regardless of your decision in that regard we request that these records, which contain considerable sensitive information, be returned to us uncopied and unimaged on completion of the review."

[5] I wish to first deal with the last point made by the Respondent suggesting that the documents should not be automatically reviewed by the Commissioner to establish privilege. Pursuant to my powers under *The Freedom of Information and Protection of Privacy Act*, it is very clearly my duty to review documents to which a government institution has refused access and for which a request for review has been made. Without such a review, I cannot possibly determine whether the government institution has properly applied the exemptions under the Act. During my tenure as Commissioner, government institutions have frequently purported to deny access to documents based on solicitor-client privilege pursuant to section 22(a). On numerous occasions, this exemption has been invalidly or improperly applied by the government institution. If a government institution claims solicitor-client privilege and then expects this office to accept that claim without any review of the documents, my office's purpose would be defeated and my powers under the Act rendered ineffective.

[6] In *Municipal Insurance Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner)*, Mr. Justice Holmes indicated that a Commissioner viewing the document in itself weakened the sanctity of the solicitor-client privilege. With respect, I disagree. I am bound to keep all information that I receive in my office confidential pursuant to section 46 of *The Freedom of Information and Protection of Privacy Act* which states:

"46(1) The commissioner shall not disclose any information that comes to the knowledge of the commissioner in the exercise of the powers, performance of the duties or carrying out of the functions of the commissioner pursuant to this Act.

(2) Subsection (1) applies, with any necessary modification to the staff of the commissioner.

(3) Notwithstanding subsection (1), the commissioner may disclose:

(a) in the course of a review pursuant to section 49, any matter that the commissioner considers necessary to disclose to facilitate the review; and

(b) in a report prepared pursuant to this Act, any matter that the commissioner considers necessary to disclose to establish grounds for the findings and recommendations in the report.

(4) When making a disclosure pursuant to subsection (3), the commissioner shall take every reasonable precaution to avoid disclosure, and shall not disclose:

(a) any information or other material if the nature of the information or material could justify a refusal by a head to give access to a record or part of a record; or

(b) any information as to whether a record exists if the head, in refusing to give access, does not indicate whether the record exists.

(5) Notwithstanding subsection (1), the commissioner may disclose to the Attorney General for Saskatchewan or the Attorney General of Canada information that relates to the commission of an offence against:

(a) an Act or a regulation; or

(b) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada;

by an officer or employee of a government institution if, in the opinion of the commissioner, there is evidence of the commission of the offence."

Section 47 further provides that the Commissioner is not compellable to give any evidence in a court or judicial proceeding about any of the information that comes to his knowledge. I am therefore bound by the statute to keep whatever I learn from reviewing documents and material

confidential and I take that duty very seriously. My viewing of the documents does not in any way weaken the privilege. I have therefore unsealed the Respondent's envelope and thoroughly reviewed its contents as that is the only way I can fulfill my duties under the Act.

[7] The documents provided by the Respondent consist of copies of all accounts rendered by the solicitor to the Respondent, correspondence from the solicitor to the Respondent relating to the accounts and the invoices of a consultant engaged to provide consulting services concerning the two civil actions.

[8] As stated in its letter, 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:
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> (a) contains information that is subject to a solicitor-client privilege;
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> (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."

[9] I agree with the Respondent that 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.

[10] 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 is virtually identical to section 22(a) of the Saskatchewan statute.

[11] 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.

[12] 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.

[13] 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.

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.

[14] All of the documents provided by the Respondent clearly relate to its legal accounts with respect to the conduct of the two civil actions. They are therefore all subject to solicitor-client privilege and exempt from disclosure.

[15] Because I have found the documents are exempt from disclosure under section 22(a), I do not need to address whether the documents are also exempt under either section 15(1)(d) or the remaining subsections of section 22.

[16] For the reasons outlined above, it is my view that the Respondent was justified in denying access to the documents and I would accordingly recommend that the Respondent continue to deny access to the Applicant to the information requested.

[17] Dated at Regina, in the Province of Saskatchewan, this _____ day of October, 2003.

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