MARCH 24, 2005 FILE NO. – 2004-017

SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2005 – 002

Saskatchewan Justice

Summary:

The Applicant sought records from Saskatchewan Justice with respect to estimates of the Saskatchewan government's financial liability concerning certain litigation in which the government was involved. Justice refused to acknowledge whether responsive records existed and further, denied access on the basis of section 22 (solicitor-client privilege) and section 18 (injury to economic and other interests). The Commissioner found that Justice should have acknowledged whether responsive records exist. The Commissioner further found that access should be denied on the basis of the section 22 exemption that was well-founded.

Statutes Cited:

The Freedom of Information and Protection of Privacy Act [S.S. 1990-91, c. F-22.01 as am] s. 22(a); *Access to Information Act* R.S. 1985, c. A-1; *Freedom of Information and Protection of Privacy Act* [R.S.O. 1990, c. F.31 as amended, section 24(3)]; *Freedom of Information and Protection of Privacy Act* [R.S.A. 2000, c. F-25, section 9(1)]; *Freedom of Information and Protection of Privacy Act* [R.S.B.C. 1996, c. 165 as amended, section 8(2)]; *Freedom of Information and Protection of Privacy Act* [S.P.E.I. 2001, c. 37 as amended, section 10(2); *Freedom of Information and Protection of Privacy Act* [S.M. 1997, c. 50, section 12(2)]

Authorities Cited:

Saskatchewan IPC Reports 2004-003,94/005, 2003/059, 2003/004; Bell v. Smith [1968] S.C.R. 664; IBM Canada Ltd. v. Xerox of Canada Ltd [1978] 1 F.C. 513; R. v. Campbell [1999] S.C.J. No. 16; Syncrude Canada Ltd. v. Babcock & Wilcox Canada Ltd. (1992), 10 C.P.C. (3d) 388 (Alberta C.A.); Western Canadian Place Ltd. v. 'Con-Force; Products Ltd. (1997), 50 Alta. L.R. (3d) 131 (Q.B.); Adjudication Order #3, March 13, 2003, available online at www.oipc.ab.ca; Bouline v. Flynn, [1970] 3 O.R. 84 (H.C.J.) at 88-89; Allied Signal Inc. v. Dome Petroleum Ltd. (1995) 28 Alta. L.R. (3d) 70 (Q.B.); R. v. Box, 102 Sask R. 230; Bell v. Smith [1968] S.C.R. 664.

Other Materials:

Government Information: Access and Privacy, McNair, Colin H. and Woodbury, Christopher D., 1992 Thomson Canada Limited; The Law of Evidence in Canada, Sopinka, Lederman and Bryant, 2nd ed.;

I BACKGROUND

[1] The Applicant made an access request to the Departments of Justice and Finance for "*…any estimates of (or predictions about) the Saskatchewan Government's financial liability concerning members of the Klassen family and others wrongfully accused of sexually assaulting children…*". The Departments received the access request on or about January 12, 2004.

[2] Certain members of two Saskatchewan families were charged with abusing several foster children in the early 1990s. Charges were stayed on the eve of the trial. Subsequently, the individuals who had been charged commenced action against various justice and government officials for malicious prosecution.

[3] In the malicious prosecution action, there had been a lengthy trial on the question of liability. In December of 2003 the trial judge found that certain of the defendants in the action, including a prosecutor employed by the Department of Justice, a social worker on contract to the Department of Social Services (as it then was) and a member of the Saskatoon Police Service had maliciously prosecuted the plaintiffs. That decision is under appeal to the Court of Appeal but was deferred until the damages phase of the trial had been completed. The Department of Justice represented the prosecutor and the social worker in the liability portion of the trial.

[4] A trial on the damages issue was scheduled for the fall of 2004. The Department had received records from the Plaintiff demanding compensation and citing specific sums.

[5] By letter dated January 9, 2004 Saskatchewan Finance transferred the request it had received to Saskatchewan Justice pursuant to subsection 11(1) of *The Freedom of Information and Protection of Privacy Act.* From that point forward the only government institution with responsibility under the Act was the Department of Justice ("Justice")

[6] By letter dated February 11, 2004, Justice advised the Applicant that:

> *Any records containing information of this kind would be exempt under clauses 22(a) and (b) of the Act, in that they would be prepared by legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the legal counsel, and would contain information subject to solicitor-client privilege. They would also be exempt under clauses 18(1)(d) and (e) of the Act, since they could reasonably be expected to disclose information, the disclosure of which could reasonably be expected to interfere with the negotiations of the government, and positions developed for the purposes of negotiations on behalf of the government.*
>
> *As the type of information you are requesting would be exempt from access, we are also refusing to confirm or deny that the records exist or ever did exist pursuant to subsection 7(4) of the Act.*

[7] On February 13, 2004 the Applicant submitted a Request for Review to our office.

[8] His request was accompanied by a note from the Applicant in which he stressed that he was only requesting a financial figure and not the department's legal advice.

[9] In discussions with our office the Applicant has also raised the question of a waiver of solicitor-client privilege by the conduct of the government of Saskatchewan.

II RECORDS AT ISSUE

[10] Justice has elected not to disclose whether there are records responsive to the applicant's access request in its possession or under its control. Justice cited section 7(4) of the Act in support of its refusal to make such an election.

III ISSUES

Did Justice properly apply section 7(4) of the Act to the records requested?

Did Justice properly apply section 22(a) of the Act to the records requested?

Did Justice properly apply section 22(b) of the Act to the records requested?

Has solicitor-client privilege been waived?

Did Justice properly apply section 18(1)(d) of the Act to the records requested?

Did Justice properly apply section 18(1)(e) of the Act to the records requested?

IV DISCUSSION OF THE ISSUES

[11] I take the request to be for records created by or on behalf of government related to any possible award that might be made against the government or for which the government would accept responsibility. This does not extend to records quantifying the claims by the claimants themselves or their solicitors or agents.

[12] The operative time is the date the request was received by the Department – January 12, 2004. If records that would otherwise have been responsive to the request are created at a subsequent time, there is no statutory obligation to provide access. Our office would however certainly encourage a government institution to nonetheless release the responsive record in the interests of the purpose of the legislation. The purpose was discussed in our Report 2004-003, [8] to [11]. We also encourage the Legislative Assembly to consider amending the Act to provide for a continuing request available in certain other provinces such as Ontario [1]and Alberta[2].

[1] *The Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 as amended, section 24(3);
[2] *The Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, section 9(1)

Did Justice properly apply section 7(4) of the Act to the records requested?

[13] Justice has invoked section 7(4) of the Act. That provides as follows:

> *(4) Where an application is made with respect to a record that is exempt from access pursuant to this Act, the head may refuse to confirm or deny that the record exists or ever did exist.*

[14] We note that this section does not appear to have been considered by this office in any report during the first twelve years since the Act came into force.

[15] This is a significant derogation from the principle of openness and transparency that underlies the Act.[3] Unlike other Canadian jurisdictions, it is not limited to only certain kinds of exemptions but would apply to the full range of three mandatory exemptions and seven discretionary exemptions provided for in the Act. For example, in British Columbia and Ontario, such a power can only be invoked if the exemption relates to an unjustified invasion of personal privacy or interference with law enforcement.[4] In Alberta, Prince Edward Island and Manitoba a third ground exists for refusing to confirm or deny the existence of a record namely, where disclosure would threaten health or safety.[5] We recommend that the Legislative Assembly consider narrowing the scope for this discretionary power in line with these other provinces.

[16] The Saskatchewan provision is similar to the provision in the federal Access to Information Act.[6] The federal provision was considered by the Federal Court in X v. Canada (Minister of National Defence)[7]. I find that discussion not particularly helpful since the decision of the Court revolved around certain confidential records the existence of which was apparently acknowledged by the public body in its response to the applicant.

[3] Saskatchewan OIPC Report 2004-003, [8] to [11]. Available online at www.oipc.sk.ca under Reports.
[4] R.S.B.C. 1996, c. 165 as amended, section 8(2); R.S.O. 1990, c. F.31 as amended, section 29(2) and (3)
[5] R.S.A. 2000, c. F-25, section 12(2); S.P.E.I. 2001, c. 37 as amended, section 10(2); S.M. 1997, c. 50 section 12(2)
[6] ATIA, section 10(2)
[7] (1992) 58 F.T.R. 93 (F.C.T.D.)

The Court did observe that:

> *As I am obliged by subsection 47(1) of the Act to take every reasonable precaution to avoid the disclosure of information which the head of an institution may be authorized to refuse to disclose, and since I must therefore avoid an irrevocable disclosure at this point because my decision might be successfully appealed, I must refer to the evidence and the reasons for my conclusions in very general terms only.*

[17] Section 47(1) of the federal Act has its Saskatchewan counterpart. Section 58(3)(b) provides as follows:

> *58(3) The court shall take every reasonable precaution, including, where appropriate, receiving representations ex parte and conducting hearings in camera, to avoid disclosure by the court or any person of:*
>
> . . .
>
> *(b) any information as to whether a record exists if the head, in refusing to give access, does not indicate whether the record exists.*

[18] According to the authors of *Government Information: Access and Privacy*[8]:

> *Any review by the federal or Saskatchewan Information Commissioner of such a response to a request … must preserve silence as to the existence of the information. Of course, if that official recommends that the information be disclosed, should it exist, that will certainly suggest that the information is, indeed, to be found in the institution's records.*[9]

[19] Although there is no statutory reason why Justice cannot invoke section 7(4) in these circumstances, we find the decision troubling for a number of reasons.

[20] The decision to invoke section 7(4) is discretionary. I do not wish to substitute my discretion for that of the head of Justice however I am required to assess whether there was a reasonable basis for this decision of Justice.

[21] Acknowledging the existence of a responsive record in no way weakens the right of the Department to rely on any applicable exemptions. On the other hand, invoking section 7(4) creates an aura of secrecy around what may be a significant expenditure of public moneys.

[8] MNairn, Colin H. and Woodbury, Christopher D., 1992 Thomson Canada Limited,
[9] Ibid., p. 5-10

[22] The applicant is usually in an awkward position on any review under the Act since he or she has to make submissions although they have not and cannot actually view the record in issue. The Applicant in such a case is left to make educated guesses as to what is in the record. That awkwardness is compounded when the applicant must make submissions to our office without any idea of whether there is a responsive document.

[23] I can see no particular prejudice to Justice in this case if it acknowledged responsive records, if they exist. If a responsive record exists, that would likely just conform to public expectations that in litigation involving the government, some assessment would be made at some point in the proceedings as to the risks and exposure to an adverse judgment, damages and costs. On the other hand, if there was no responsive record, the public would reasonably expect that the claim was seen as so spurious that no assessment was required or may well conclude that the Department was not adequately protecting the public treasury. These considerations may be interesting but, in my view, would not be proper reasons to refuse to acknowledge whether responsive records exist. The exercise of the discretion must be based on some legal or business prejudice to the Department and not public sentiment or reaction, actual or anticipated.

[24] I do not believe that there was a reasonable basis for the exercise of the statutory discretion to invoke section 7(4). In the result, I find that Justice should have disclosed whether or not a responsive record exists.

Did Justice properly apply section 22(a)?

[25] Section 22 of the Act provides as follows:

> *A head may refuse to give access to a record that:*
> *(a) contains information that is subject to 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.*

[26] We confirmed that the Department of Justice acts as the legal advisor for all departments of government including the Department of Finance. It does not matter that Justice was providing legal services instead of an outside law firm. In this regard, I rely on the assertion that appears in *The Law of Evidence in Canada*[10]:

> *Lawyers who are employed by a corporation and therefore have only one client are covered by the privilege, provided they are performing the function of a solicitor*[11]

[27] In the same text appears the following statement:

> *When a solicitor-client communication is once privileged, it is always privileged.*[12]

Report 2003/004

[28] This section was addressed by former Commissioner Richard Rendek in Report No. 2003/004. At issue there was an access request for the amount of legal fees paid by SaskWater in the litigation over the claim by IPSCO. Former Commissioner Rendek found that the exemption for solicitor-client privilege in section 22 had been properly invoked. Mr. Rendek relied on the Federal Court of Appeal decision in Stevens v. Canada, [1998] 4 F.C. 89. The Court of Appeal was then considering section 23 of the federal *Access to Information Act* that provides as follows:

> *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.*

[29] Mr. Rendek 's discussion of section 22 in that Report is as follows:

> *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:*

[10] Sopinka, Lederman and Bryant, 2nd ed.
[11] Ibid., paragraph 14.72. Authorities relied on by the authors are IBM Canada Ltd. v. Xerox of Canada Ltd [1978] 1 F.C. 513; R. v. Campbell [1999] S.C.J. No. 16
[12] Ibid., paragraph 14.85. Authority relied on includes Bell v. Smith [1968] S.C.R. 664

(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.*

Report 2003/059

[30] The request had been for certain expenses related to a lawsuit including the amount spent on outside legal advice. Former Commissioner Richard Rendek followed the same authorities cited in Report 2003/004. He stated as follows:

> *The Court* [Federal Court of Appeal in Canadian Jewish Congress…] *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.*

[31] In the result, Mr. Rendek found the documents were exempt under section 22(a) and did not deal with the exemption claims under section 22(b) and (c) and section 15(1)(d).

Report 94/005

[32] In this Report an application has been made for a record of payment to lawyers or law firms for certain years and for a description of the nature of service rendered on behalf of certain Crown Corporations. One of the exemptions invoked had been section 22 of the Act. Then Commissioner Derril McLeod found that, on the basis of Regina v. Box et al,[13] a statement of account from a solicitor to his client was not privileged. If however, the statement contained some information that meets the criteria for privilege, it could be severed under Section 8 of the Act.

[33] Much of the decision dealt with an argument that Crown Corporations could not be required to disclose any information under the Act until after the documents had been first reviewed by the Standing Committee. There was also a claim under section 18(1)(d)(e) and (f) of the FOIP Act but the Commissioner found this was not sustainable.

[34] I have also found useful the discussion of solicitor-client privilege in an adjudication order under the Alberta *Freedom of Information and Protection of Privacy Act*.[14] In that order, Mr. Justice McMahon stated as follows:

> *The Supreme Court of Canada has recently described solicitor-client privilege as "a principle of fundamental justice and civil right of supreme importance in Canadian law": Lavallee, Rackel & Heintz v. Canada (Attorney General), 2002 SCC 61. The scope of legal privilege was examined in Stevens v. Canada, [1998] 4 F.C. 89 (C.A.). At para. 11 the Federal Court of Appeal cited Wigmore:*
>
> *Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.*
>
> *The Court acknowledged the tension that exists when the doctrine of privilege is used to obstruct the truth finding process. Nevertheless, the need to protect the solicitor-client relationship takes priority. At para. 30, Linden J.A. properly observed:*

[13] 102 Sask R. 230
[14] Mr. Justice T.F. McMahon, Adjudicator, Adjudication Order #3, March 13, 2003,

It is essential to keep in mind that what the privilege protects is the integrity of the solicitor-client relationship. From a tactical point of view, in the context of litigation, clients should be free from the possibility that communications to their lawyers in "seeking, formulating or giving of legal advice" might be used against them. From a psychological point of view, in creating an atmosphere in which a client can be forthright and at ease, the privilege protects the relationship from the prying eyes of the state or other parties. A solicitor's bills of account are at the heart of that relationship. In my view, the terms and amounts of the retainer; the arrangements with respect to payment; the types of services rendered and their cost-all these matters are central to the relationship. If the relationship is indeed worth protecting, these matters must be immune to any intrusion.

…

In Legal Services Society v. British Columbia (Information and Privacy Commissioner)(1996), 140 D.L.R. (4th) 372 (B.C.S.C.), a request was made for the amounts paid to a lawyer by the Legal Services Society. The Court framed the issue this way, at para. 12:

> *The question to be asked must be whether granting access to a record requested will disclose any information, directly or indirectly, that is the subject of solicitor-client privilege. [Emphasis in the original]*

And further, at paras. 25 and 26:

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. Privilege has not been watered-down any more than the accountability of the legal profession has been broadened to serve some greater openness in terms of public access.

Certainly the purpose of the Act as a whole is to afford greater public access to information and the Commissioner is required to interpret the provisions of the statute in a manner that is consistent with its objectives. However, the question of whether information is the subject of solicitor-client privilege, and whether access to a record in the hands of a government agency will serve to disclose it, requires the same answer now as it did before the legislation was enacted. The objective of s. 14 is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly.

…

> *To the extent that privilege in these records is the public body's, section 27(1)(a) provides a discretion to the public body. Here, for whatever reason, Alberta Justice has chosen to exercise its right to withhold the accounts from public view. It has the right to do so, unless it has waived its privilege:: Descouteaux v. Muierzwinski, [1982] 1 S.C.R. 860 at 875; Stevens, supra at paras. 22 and 51-53; Legal Services Society, supra at paras. 25-26; Municipal Insurance Assn. of British Columbia, supra at para. 44.*

[35] We note that litigation privilege ends when the litigation is concluded however solicitor-client privilege continues.[15]

[36] I recognize that in the Alberta legislation the exemption is broader than the solicitor-client exemption in our section 22. The Alberta provision is as follows:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Attorney General*
>
> *(ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services, or*
>
> *(c) information in correspondence between*
>
> *(i) the Minister of Justice and Attorney General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.*
>
> *(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.*
>
> *(3) Only the Speaker of the Legislative Assembly may determine whether information is subject to parliamentary privilege.*

[15] Boulianne v. Flynn, [1970] 3 O.R. 84 (H.C.J.) at 88-89; Allied Signal Inc. v. Dome Petroleum Ltd. (1995) 28 Alta. L.R. (3d) 79 (Q.B.)

[37] Those Alberta authorities I refer to in this Report are dealing with "solicitor-client privilege" and not the larger scope of that Alberta provision and are therefore relevant in discussion of section 22 of the Saskatchewan Act.

Did Justice properly apply section 22(b) to the records requested?

[38] I find that section 22(b) would also apply to the records that would be responsive to the access request.

Has Solicitor Client Privilege Been Waived?

[39] The Act does not provide for a burden of proof when waiver is claimed. I note that in the earlier cited Adjudication Order #3, Justice McMahon concluded that the applicant would bear the burden of proving that the public body had waived its privilege in the records in question.[16]

[40] Waiver of privilege is established where it is shown that the possessor of the privilege:

(i) knows of the existence of the privilege and

(ii) demonstrates a clear intention to forego the privilege[17]

[41] According to Justice McMahon of the Alberta Court of Queen's Bench waiver can be "express, inadvertent, by implication or where fairness requires". There must be some intention manifested with respect to the waiver either from the client's voluntary disclosure of confidential information or from objective consideration of the client's conduct.

[42] Even if some documents are released by a government I find there is authority for the proposition that dissemination of some information related to the litigation in question does not constitute a waiver of the public body's privilege in the circumstances of this case[18].

[16] Syncrude Canada Ltd. v. Babcock & Wilcox Canada Ltd. (1992), 10 C.P.C. (3d) 388) Alberta C.A.) at para. 5
Western Canadian Place Ltd. v. Con-Force Products Ltd. (1997), 50 Alta. L.R. (3d) 131 (Q.B. at para. 18
[17] Solicitor-Client Privilege in Canadian Law (Toronto: Butterworths, 1993) p. 187
[18] Adjudication Order #3, March 13, 2003. Available online at www.oipc.ab.ca

[43] I find that the Saskatchewan government has not waived its solicitor-client privilege in any responsive records.

Did Justice properly apply section 18(1)(d)?

> *Section 18 (1) A head may refuse to give access to a record that could reasonably be expected to disclose:*
>
> *(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution;*

[44] In light of my decision on the question of solicitor-client privilege, it is not necessary to deal with section 18(1)(d).

Did Justice properly apply section 18(1)(e)?

[45] Section 18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

> (e) *positions, plans procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;*

[46] In light of my decision on the question of solicitor-client privilege, it is not necessary to deal with section 18(1)(f).

V RECOMMENDATIONS

[47] I find that Justice did not properly apply Section 7(4) of *The Freedom of Information and Protection of Privacy Act* in arriving at its decision to refuse to acknowledge whether or not it had records responsive to the Applicant's request.

[48] I find that, if there are records in the custody or under the control of Justice that are responsive to the Applicant's request, such records should be withheld as records subject to the solicitor-client privilege exemption in section 22(a) and (b) of *The Freedom of Information and Protection of Privacy Act.*

[49] I find that the solicitor-client privilege has not been waived by the Saskatchewan government and can be relied upon by Justice to deny access to any responsive records.

[50] I find that it is not necessary to deal with the exemptions under section 18(1)(d) and (e) of *The Freedom of Information and Protection of Privacy Act*, given my decision above.

Dated at Regina, in the Province of Saskatchewan, this 24th day of March, 2005.

R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for Saskatchewan