



REVIEW REPORT 204-2019

Ministry of Justice

December 16, 2020

Summary: The Applicant submitted an access to information request to the Ministry of Justice (the Ministry) for a policy manual used by government institutions to decide whether to grant a fee waiver under *The Fee Waiver Act*. The Ministry refused the Applicant access to the record citing subsections 22(a) and 22(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP) as its reasons. The Commissioner found that the Ministry did not make a *prima facie* case that solicitor-client privilege applies to the record nor did it demonstrate that subsection 22(b) of FOIP applies to the record. He also found that the Ministry is not in compliance with subsection 65(1) of FOIP. The Commissioner recommended that the Ministry release the record at issue to the Applicant and that the Ministry post the record to its website pursuant to subsection 65(1) of FOIP.

I BACKGROUND

[1] On June 4, 2019, the Ministry of Justice (Ministry) received the following access to information request:

Pursuant to s. 65 of The Freedom of Information and Protection of Privacy Act [sic], we request the policy manual used by governmental entities to decide whether to grant an applicant [sic] Fee Waiver [sic] under The Fee Waiver Act [sic].

[2] In a letter dated June 18, 2019, the Ministry responded to the Applicant. The Ministry refused the Applicant access to the record, citing subsections 22(a) and (b) of *The Freedom of Information and Protection of Privacy Act* (FOIP) as its reasons.

[3] On June 25, 2019, the Applicant requested a review by my office.

[4] On June 28, 2019, my office notified both the Applicant and the Ministry that it would be undertaking a review.

II RECORD AT ISSUE

[5] The record at issue is an eight page reference guide.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[6] The Ministry qualifies as a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, my office has jurisdiction to undertake this review.

2. Did the Ministry properly apply subsection 22(a) of FOIP?

[7] Subsection 22(a) of FOIP provides:

22 A head may refuse to give access to a record that:

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

[8] When considering a claim of solicitor-client privilege or litigation privilege, public bodies have three options when preparing records for review with my office. These options are 1) providing the records to my office stating that the government institution is not waiving the privilege; 2) providing the records to my office with the portions severed where solicitor-client privilege is claimed; or 3) providing my office with an affidavit with a schedule of records. If I have a reasonable basis for questioning the content of an affidavit, I may exercise my formal powers, and only as necessary, request additional background information by affidavit or otherwise. In this review, the Ministry went with the third option, which is to provide my office with an affidavit and a schedule of records.

[9] Page 247 of Chapter 4 of my office’s *Guide to FOIP* (updated February 7, 2020) (Guide to FOIP) provides a three-part test that my office uses to determine if subsection 22(a) of FOIP applies to a record. This test was established by Justice Gleason in *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821. My office uses this test to determine if subsection 22(a) of FOIP applies to a record:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Was the communication intended to be confidential?

[10] Page 247 of the Guide to FOIP explains that the purpose of solicitor-client privilege is to assure clients of confidentiality and enable them to speak honestly and candidly with their legal representatives. Justice Lamer in *Descoteaux et al. v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 SCR 860 provided that solicitor-client privilege applies to all communications made within the framework of the solicitor-client relationship. Page 250 of the Guide to FOIP provides that “legal advice” means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. Further, page 251 of the Guide to FOIP provides that without confidentiality, there can be no privilege and when confidentiality ends so too should the privilege.

[11] In its submission, the Ministry explained that the record at issue is an eight page reference guide, developed by a Crown Counsel “in conjunction with both Court Services and the courts/tribunals”. It explained that the implementation of *The Fee Waiver Act* resulted in “an entirely different regime with new application processes, eligibility requirements, etc.” Finally, the Ministry explained that the record was intended to both assist with training of staff and to act as a reference in instances where fee waiver issues arose.

[12] I find that the eight page reference guide does not constitute communications of a confidential nature between a solicitor and client where legal advice is sought or given. This is in keeping with Order PO-1928 by the Office of the Information and Privacy Commissioner of Ontario (ON IPC). In Order PO-1928, the government institution refused

access to a guide because it claimed the guide was subject to solicitor-client privilege. The ON IPC explained its reason as follows:

First, the evidence before me indicates that these documents, being generic training materials, were not treated in a confidential manner, but were widely distributed among most if not all OCL staff and agents. While early drafts of these documents may have been treated confidentially (and in fact may have been privileged), once this record was finalized and widely distributed OCL staff and agents, it cannot be said to constitute a confidential communication.

Second, in a similar vein to my finding above under litigation privilege, to be subject to solicitor-client communication privilege, the communication in question must relate to a particular matter on which legal advice is being sought or provided. This privilege is not intended to apply to general guidelines to staff or agents, or policies about how to carry out their duties, in the absence of a specific legal issue on which advice is being sought. By contrast, had legal advice been sought and given on the specific legal issue of what the guidelines should contain, then confidential communications between legal counsel and an OCL client made for this purpose may well have attracted privilege.

[13] I agree with the ON IPC that solicitor-client privilege is not intended to apply to guidelines to staff or policies about how to carry out their duties. Since the eight page reference guide is used in training staff and as a reference as fee waiver issues arise, I find that it does not constitute a confidential communication between a solicitor and a client. As such, I find that the Ministry has not made a *prima facie* case that solicitor-client privilege applies to the record at issue.

3. Did the Ministry properly apply subsection 22(b) of FOIP?

[14] Subsection 22(b) of FOIP provides:

22 A head may refuse to give access to a record that:

...

(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;

[15] My office uses the following two-part test to determine when subsection 22(b) of FOIP applies to a record:

1. Were the records “prepared by or for” an agent or legal counsel for a government institution?
2. Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

(Guide to FOIP, pages 261 to 262)

[16] Subsection 22(b) of FOIP contemplates “legal advice” and “legal services”. Earlier, I have provided a definition of “legal advice”. Page 262 of the Guide to FOIP provides that “legal service” includes any law-related service performed by a person licensed to practice law.

[17] The Ministry applied subsection 22(b) of FOIP to the same record to which it applied subsection 22(a) of FOIP. Since the Ministry provided an affidavit with a schedule of records in lieu of providing my office with a copy of the records pursuant to Part 9 of my office’s *Rules of Procedure*, I cannot review the record at issue as a part of my office’s analysis of the Ministry’s application of subsection 22(b) of FOIP. It should be noted that the procedure set out in Part 9 of my office’s *Rules of Procedure* is only for records to which a government institution has claimed solicitor-client privilege or litigation privilege pursuant to subsection 22(a) of FOIP. As I have said in my blog, “Providing the record to my office” (dated November 26, 2020), it is impossible to conduct a review without a copy of the record at issue. Since the Ministry has not provided the record at issue to my office, I am unable to assess it against each part of the test. As such, the Ministry has not met the burden of proof set out in section 61 of FOIP. Since the Ministry has not met the burden of proof, I recommend the Ministry release the eight page reference guide.

4. Is the Ministry complying with subsection 65(1) of FOIP?

[18] In my Review Report 042-2019, I recommended that the Ministry make its manuals, policies, guidelines or procedures that are used in a decision-making process that affects the public, and that are in the possession and control of the Ministry be made publicly available pursuant to subsection 65(1) of FOIP. I had recommended that until manuals, policies, guidelines or procedures are available on the Ministry’s website, that the Ministry should provide access to such records in electronic or paper form to anyone who requests

them without charging any fees, pursuant to subsection 65(1) of FOIP. In its response to my recommendations pursuant to section 56 of FOIP, the Ministry had indicated to me that it would be fully complying with my recommendations.

[19] However, in this case instead of following through and complying with this recommendation, the Ministry appears to be doing the contrary and withholding a “reference guide” that it must make available to the public pursuant to subsection 65(1) of FOIP. Subsection 65(1) of FOIP provides:

65(1) Every government institution shall take reasonable steps to:

(a) make available on its website all manuals, policies, guidelines or procedures that are used in decision-making processes that affect the public by employees of the government institution in administering or carrying out programs or activities of the government institution; or

(b) provide those documents when requested in electronic or paper form.

[20] Pages 132 to 133 of Chapter 3 of my office’s Guide to FOIP provides that the underpinning of subsection 65(1) of FOIP is one of open government. The availability of material that guides decision-making allows members of the public to understand how decisions that affect them are made and opens the decision-making process to public scrutiny. I find that the Ministry is not in compliance with subsection 65(1) of FOIP.

[21] Other jurisdictions make their guides for the waiver of fees available on its website. For example, Ontario’s Ministry of the Attorney General *Court Fee Waiver Guide* and Forms are available here:

<https://www.attorneygeneral.jus.gov.on.ca/english/courts/feewaiver/>.

[22] Further, the Government of Alberta makes its fee waiver guide available on its website here:

<https://www.alberta.ca/waive-filing-fee.aspx>.

[23] I recommend that the Ministry release the record at issue to the Applicant.

[24] I recommend that the Ministry post the eight page reference guide to its website.

IV FINDINGS

[25] I find that the Ministry has not made a *prima facie* case that solicitor-client privilege applies to the record at issue.

[26] I find that the Ministry has not demonstrated that subsection 22(b) of FOIP applies to the record at issue.

[27] I find that the Ministry is not in compliance with subsection 65(1) of FOIP.

V RECOMMENDATIONS

[28] I recommend that the Ministry release the record at issue to the Applicant.

[29] I recommend that the Ministry post the eight page reference guide to its website.

Dated at Regina, in the Province of Saskatchewan, this 16th day of December, 2020.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy
Commissioner