



REVIEW REPORT 283-2016

Ministry of Justice

April 26, 2019

Summary:

The Ministry of Justice withheld 419 pages pursuant to subsection 22(a) of *The Freedom of Information of Information and Protection of Privacy Act* (FOIP) and five pages pursuant to 22(b) and 22(c) of FOIP. The Commissioner considered whether Justice made a *prima facie* case that the 419 pages were subject to solicitor-client privilege. Justice provided the Commissioner with an affidavit describing these pages. The Commissioner was satisfied that Justice made a *prima facie* case that the 419 pages were subject to solicitor-client privilege. The Commissioner also found that subsection 22(c) of FOIP applies to the five pages. The Commissioner recommended that Justice take no further action.

I BACKGROUND

[1] The Applicant submitted an access to information request that was received by the Ministry of Justice (Justice) on October 26, 2016, requesting access to:

Please provide all emails written to or from [former Executive Director of Civil Law Division] and/or [former Deputy Minister of Justice and Deputy Attorney General] related to the Global Transportation Hub. For the period of April 1, 2012 until December 31, 2012.

[2] By letter dated November 24, 2016, Justice responded to the request. In the response, it indicated they were denying access to the record pursuant to subsections 22(a), 22(b) and 22(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). My office

- received a Request for Review from the Applicant on December 9, 2016. The Applicant indicated the reason for the review was that partial or full access to the record was denied.
- [3] On December 12, 2016, my office notified the Applicant and the Ministry of our intention to undertake a review of this matter pursuant to Part VII of FOIP and invited both parties to make a submission.
- [4] As this file, in part, related to records that were subject to solicitor-client privilege, work on the file was postponed until a court matter that related to solicitor-client privilege concluded.
- [5] On May 16, 2018, the Court of Appeal for Saskatchewan considered whether I had authority to require local authorities to produce records that may be subject to solicitor-client privilege. *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (U of S case) concluded that my office should follow the “absolutely necessary” principle. As a result, it suggested my office follow a process to gather information about records and consider whether a *prima facie* case for solicitor-client privilege has been made before requiring production of a record.
- [6] My office has established a process to consider a claim of solicitor-client privilege which is detailed in the *Rules of Procedure* available on my office’s website. My office will request an affidavit of records over which the solicitor-client privilege is claimed which includes a schedule that describes the records. If sufficient information is not provided to conclude that the use of subsection 22(a) of FOIP is justified, I will request further particulars which can be provided to my office by affidavit.
- [7] Upon conclusion of the U of S case and the development of the above-noted procedure, my office provided Justice with a second notification on July 6, 2018, outlining what my office required from Justice.
- [8] On August 24, 2018, Justice provided my office with a Statement of Records certified by a Justice lawyer and an accompanying letter to the statement of records. In addition it

provided me a submission regarding five pages it was withholding pursuant to subsections 22(b) and 22(c) of FOIP, along with a copy of those five pages.

[9] On October 1, 2018, my office requested additional particulars from Justice. On March 28, 2019, my office received the Affidavit of Records.

II RECORDS AT ISSUE

[10] The responsive record totals 424 pages. Justice has only provided copies of five pages that it has withheld pursuant to subsection 22(b) and (c) of FOIP.

[11] My office will also consider if Justice has made its *prima facie* case regarding the 419 pages it is claiming solicitor-client privilege pursuant to subsection 22(a) of FOIP. Of the 419 pages, 3 pages are meeting invites, 198 pages are emails and 218 pages are attachments to those emails.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[12] Justice is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have the authority to conduct this review.

2. Has Justice made a *prima facie* case that solicitor-client privilege applies to the record?

[13] Justice has claimed solicitor-client privilege to 419 pages of the record.

[14] As noted above, in the U of S case it was concluded that my office follow a process to gather information about records and consider whether a *prima facie* case for solicitor-client privilege has been made before requiring a record. In paragraphs [74] to [75] of that decision, the court noted:

[74] I begin by acknowledging that, in the absence of anything suggesting the University's assertion of privilege was ill-founded, it could be argued the Commissioner was obliged to simply end his inquiry on receipt of Mr. Smith's affidavit, i.e., it could be argued the Commissioner should have contented himself with the University's general declaration that it was denying access to "some" records because they were subject to solicitor-client privilege. However, in my view, such an approach would not give appropriate or reasonable scope to the Commissioner's authority to conduct a review. In order to gain a proper measure of confidence that a claim of solicitor-client privilege is being asserted validly, the Commissioner must be able, at his discretion, to go beyond a statement by a local authority amounting to little more than "trust us". The Commissioner must also be able to request information that falls short of disclosing the records in issue, or otherwise piercing solicitor-client privilege, but that nonetheless helps him to satisfy himself that the privilege claim is being advanced legitimately.

[75] The approach taken to solicitor-client privilege in the civil procedure context is instructive on this front. A litigant is not entitled to simply declare he or she has some undisclosed number of undescribed documents that are being withheld from production because they are subject to solicitor-client privilege. A naked "trust me" is not enough. Rather, as required by Rule 5-6, the litigant must prepare an affidavit of documents as *per* Form 5-6. Form 5-6 does not prescribe the format of the part of the affidavit dealing with claims of solicitor-client privilege in detail but it does require a "list" of such documents. Queen's Bench case law has filled out the picture and provided that the description of a document for which privilege is claimed must provide sufficient detail to identify the document and to allow a Chambers judge to determine whether a *prima facie* case for the claim of privilege has been made out. The usual or best practice is that, in relation to each record, an affidavit will contain such things as (a) the date of the record, (b) whether the record is a letter, a memo, a fax, and so forth, (c) the author of the record, (d) the recipient of the record, and (e) whether the record is an original or a copy. See, for example: *Brewster v Quayle Agencies Inc.*, 2008 SKQB 137 (CanLII) at para 6, 332 Sask R 192.

[15] The Court provided *Brewster v Quayle Agencies Inc.*, 2008 SKQB 137 (CanLII) at para 6, 332 Sask R 192 (*Brewster v Quayle Agencies*) as an example of the type of information I should request before demanding records in which a public body is claiming solicitor-client privilege over. In *Brewster v Quayle Agencies* the court notes at paragraph [6]:

[6] In most cases, there is no way for a party to provide detail as to the dominant purpose of a document without disclosing the information that the party claims is protected by the litigation privilege. In most cases, the party can only provide the kind of information that *Quayle* in this case has provided for each document:

- (a) the date;
- (b) a description of the document, as a fax or a memo or a letter;

- (c) the author;
- (d) the recipient;
- (e) whether the document is the original or a copy.
- ...

[16] In response to the U of S decision, my office developed a process for public bodies to establish if the record is subject to solicitor-client privilege. The process is found in Part 9 of my office's *Rules of Procedure*. Part 9, recently updated, states:

Part 9: Solicitor-Client Privilege

What is this Part about: This Part sets out the procedure to be followed when a head claims solicitor-client privilege.

Claiming solicitor-client privilege

9-1(1) Where in a proceeding it is brought to the attention of the commissioner's office that solicitor-client privilege will be claimed by the head over certain records, the commissioner's office will request:

- (a) an affidavit of records over which solicitor-client privilege is claimed (Form B);
 - (b) a representation (submission) providing further information as to why solicitor-client privilege is claimed.
- (2) The commissioner's office will not release the affidavit of records over which solicitor-client privilege is claimed to the applicant, unless the party submitting the affidavit agrees that the affidavit or a portion thereof can be shared with the applicant (Form B).
- (3) If the affidavit of records over which solicitor-client privilege is claimed does not have sufficient information for the commissioner's office to conclude that exemption based on solicitor-client privilege is justified, the commissioner's office will request further information by affidavit or otherwise until satisfied the exemption is justified.
- (4) In rare cases, where the *prima facie* case for privilege is still not established, despite the informal and / or formal requests for additional information by the Commissioner's Office, and only as absolutely necessary, will the Commissioner order production of the records over which privilege is claimed in order to verify the claim in accordance with his statutory powers.
- (5) The Commissioner's Office will not release any record, partial record, or affidavit of records over which solicitor-client privilege or litigation privilege is claimed to the

applicant, unless the head or delegate submitting the affidavit agrees that the record or affidavit, or a portion thereof, can be shared with the applicant.

[17] On August 24, 2018, Justice provided my office with a Statement of Records certified by a Justice lawyer and an accompanying letter to the statement of records.

[18] On October 1, 2018, my office requested additional particulars from Justice. On March 28, 2019, I was provided with an Affidavit of Records. In the Affidavit of Records, Justice claimed solicitor-client privilege for each of the records and all attachments.

[19] The exemption for solicitor-client privilege is found under subsection 22(a) of FOIP, which 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;

[20] My office has established the following test for subsection 22(a) of FOIP:

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?

[21] I will now consider each part of the test.

1. Is the record a communication between solicitor and client?

[22] In the affidavit, Justice has stated that the records relate to communications and information shared between solicitor and client and/or third party, with sufficient common interest in the same transactions.

[23] In the records schedule, Justice has identified all the listed records as being subject to solicitor-client privilege, however some of the communications are not between a solicitor

and client. I commented on the continuum of legal advice and how it is captured under solicitor-client privilege in Review Report 004-2017, 153-2015 – Part II (University of Saskatchewan). Paragraph [18] and [19] of that Report provide:

[18] As noted, the first test for subsection 21(a) of LA FOIP requires that a communication be between a solicitor and a client. However, past decisions of Commissioners from across the country have considered records in the “continuum” of giving legal advice.

[19] A resource from Alberta’s Office of the Information and Privacy Commissioner (Alberta OIPC) entitled *The Basics of Solicitor-client Privilege* provides the following:

Documents that are not actually passed between the solicitor and client may be part of the continuum of legal advice, or reveal information subject to solicitor-client privilege.

More examples of records found to be part of the continuum of legal advice:

- a discussion between two public officials about how to frame the question that is to be asked of the lawyer (Order F2007-008 at para. 12)
- written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body’s solicitor (Order 99-013 at paras. 62-63; Order 2001-025 at para. 67)
- communications discussing the application of legal advice given by a solicitor (Order 96-020 at para. 133)
- an employee’s notes regarding a solicitor’s legal advice, and comments on that advice (Order 99-027 at para. 95)
- notes “to file” in which legal advice is quoted or discussed (Order F2005-008 at para. 42)
- solicitors’ briefing notes and working papers that are directly related to the seeking or giving of legal advice (96-017 at para. 30)

[24] I am satisfied that the records are a communication between solicitor and client or are part of the continuum. Therefore the first part of the test has been met.

2. *Does the communication entail the seeking or giving of legal advice?*

[25] In the affidavit, Justice states that the records relate to communications and information shared for the purpose of the seeking or obtaining of legal advice or legal services.

[26] I am satisfied the communications entail the seeking or giving of legal advice. Therefore the second part of the test has been met.

3. *Was the communication intended to be confidential?*

[27] In the affidavit, Justice states that the records relate to communications and information intended to be kept confidential and have been consistently treated as confidential. Therefore, the third part of the test has been met.

[28] I have not examined these records. However, I am satisfied that Justice has made a *prima facie* case.

[29] I find that Justice has made a *prima facie* case that the 419 pages are subject to solicitor-client privilege.

3. Did Justice properly apply subsection 22(c) of FOIP to the record?

[30] Justice has applied subsection 22(c) of FOIP in full to five pages of records. It has provided my office with a copy of these pages.

[31] Subsection 22(c) of FOIP is a discretionary exemption and provides:

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

...

(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;

[32] This provision is broader than subsection 22(a) of FOIP and is meant to capture records that contain correspondence between the public body's legal counsel (or an agent of the Attorney General) and any other person in relation to a matter that involved the provision of advice or services by legal counsel (or agent of the Attorney General).

[33] Both parts of the following test must be met:

1. Is the record a correspondence between the public body's legal counsel (or an agent of the Attorney General for Saskatchewan) and any person?
2. Does the correspondence relate to a matter that involves the provision of advice or other services by the agent or legal counsel?

[34] I will now consider each part of the test.

1. Is the record a correspondence between the public body's legal counsel (or an agent of the Attorney General for Saskatchewan) and any person?

[35] *Correspondence* in this context, is an interchange of written communications.

[36] The five pages are email exchanges between various officials and parties outside of government. Justice lawyers have been copied in several of the email chains. There is also one attachment that has been included. I would also note that Justice has not applied severing to these pages and has withheld them in full.

[37] In its submission, Justice has noted that the outside organization was providing information to lawyers within the Civil Law Division of Justice in order for the lawyers to provide advice and services to the Justice clients.

[38] From a review of the record, I agree. Therefore, the first part of the test has been met.

2. Does the correspondence relate to a matter that involves the provision of advice or other services by the agent or legal counsel?

[39] *Legal advice* includes a legal opinion about a legal issue, and a recommended course of action, based on legal considerations regarding a matter with legal implications. *Legal service* includes any law-related service performed by a person licensed to practice law. The correspondence does not have to constitute legal advice or legal services to qualify for this part of the test. However, it must relate back to a matter that involves the provision of

legal advice or services. The public body should explain how the correspondence relates to a matter involving legal advice or legal services provided by its legal counsel.

[40] In its submission, Justice outlined that the information was provided to the Justice lawyers so they could provide advice and services to their client with respect to a matter. Further, in its August 24, 2018 letter to this office, Justice provided a general description of the matters that all of the responsive records dealt with.

[41] With that description and a review of the record, I am satisfied that the correspondence does relate to a matter that involves the provision of advice or other services by the Justice lawyers. Therefore, the second part of the test has been met.

[42] As noted above, Justice has withheld these pages in full. Section 8 of FOIP provides:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

[43] In past reviews, I have recommended public bodies release innocuous portions of email chains such as the email time stamp, senders, recipients, subject lines and signature lines in cases where the full body of an email is exempt from release. However, upon careful review of this record, my concern would be that by releasing the information on these pages, Justice could potentially reveal details of what the Justice lawyers were providing the legal advice and services on. Therefore, revealing details about information that has already been found to be subject to solicitor-client privilege.

[44] Therefore, I find that subsection 22(c) of FOIP applies to these five pages in question in full.

[45] As I have found that subsection 22(c) of FOIP applies, I do not need to consider subsection 22(b) of FOIP.

IV FINDINGS

[46] I find that Justice has made a *prima facie* case that the 419 pages are subject to solicitor-client privilege.

[47] I find that subsection 22(c) of FOIP applies to these five pages in question in full.

V RECOMMENDATION

[48] I recommend Justice take no further action.

Dated at Regina, in the Province of Saskatchewan, this 26th day of April, 2019.

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