



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 191-2023

Ministry of Immigration and Career Training

January 10, 2024

Summary:

The Ministry of Immigration and Career Training (Immigration) received an access to information request under *The Freedom of Information and Protection of Privacy Act* (FOIP) from the Applicant. The Applicant requested the Commissioner conduct a review of Immigration's decision to withhold responsive records under subsections 22(a), (b), and (c) and 29(1) of FOIP. The Commissioner found that Immigration made a *prima facie* case that subsection 22(a) of FOIP applied to the records. The Commissioner recommended that Immigration continue to withhold the records under subsection 22(a) of FOIP, but that it consider the fees paid and any other information that would not reveal the communication protected by privilege be provided to the Applicant within 30 days of issuance of this Report.

I BACKGROUND

[1] On June 2, 2023, the Ministry of Immigration and Career Training (Immigration) received an access to information request under *The Freedom of Information and Protection of Privacy Act* (FOIP) from the Applicant. The Applicant sought access to records described as follows:

Please provide an overview of all fees paid to any external lawyers or law firms (and related) for services related to any legal opinions/work/briefs/services that were provided for Immigration and Career Training, more specifically the Program Integrity Unit. Include name of firm or lawyer, copies of contracts, dates, as well as confirmation of fees paid. October 11, 2013 until present.

- [2] On June 7, 2023, Immigration sent the Applicant a fee estimate of \$550.00 for 310 pages of records indicating it would proceed with processing the request once a deposit for half of the amount of the fee estimate was received.
- [3] On June 8, 2023, Immigration received the deposit from the Applicant.
- [4] On June 28, 2023, Immigration advised the Applicant that it was extending the time period for responding to their request by 30 days pursuant to subsection 12(1)(b) of FOIP.
- [5] On August 11, 2023, Immigration advised the Applicant that their application for access was now deemed abandoned as it had not received the remainder of the fee estimate providing:
- On June 7, 2023, our office provided you with notification that payment of a deposit of **\$277.50** was required in order to proceed. On June 8, 2023, our office received the deposit payment of **\$277.50**. We have not received the remaining balance within the stipulated period.
- As such, in accordance with section 7.1 of FOIP, this request is deemed abandoned, and has been closed.
- [6] On August 14, 2023, the Applicant contacted my office to initiate a request for review.
- [7] On August 18, 2023, my office contacted Immigration requesting a copy of its section 7 decision.
- [8] On August 28, 2023, Immigration acknowledged its error and indicated to my office that it had not issued the section 7 notice, nor was the Applicant advised of the timeline for payment of the second half of the fee estimate. Immigration indicated it would reach out to the Applicant and provide the section 7 decision.
- [9] On August 29, 2023, Immigration contacted my office indicating that it would be refusing the Applicant access to the records. My office reminded Immigration to provide the

Applicant with its section 7 decision. As this did not happen, again on September 11, 2023, my office contacted Immigration again requesting the same.

- [10] On September 12, 2023, Immigration provided its section 7 decision to the Applicant indicating that the deposit paid would be reimbursed and it was withholding the records in full under subsections 22(a), (b), (c) and 29(1) of FOIP.
- [11] On September 12, 2023, the Applicant confirmed the scope of their request for review with my office. Notice was then provided to both the Applicant and Immigration of my office's intent to undertake a review of Immigration's decision to withhold the records under subsections 22(a), (b), (c) and 29(1) of FOIP.
- [12] On September 21, 2023, Immigration advised my office that it would not be providing the records to my office as was requested but rather would provide an affidavit and letter of explanation by November 13, 2023. On the same day, my office indicated we required the records for which Immigration applied subsections 22(b), (c), and 29(1) of FOIP for our review.
- [13] On October 2, 2023, the Applicant provided their submission to my office.
- [14] On October 16, 2023, after no response from Immigration, my office again notified it of its obligation to provide the records for which it applied subsections 22(b), (c), and 29(1) of FOIP. Immigration responded stating that it would not be providing the records to our office for review of these exemptions. As I did not receive a copy of the records, I will not consider subsections 22(b), (c) or 29(1) of FOIP in this review.
- [15] On November 28, 2023, Immigration provided its affidavit, schedule and submission to my office.

II RECORDS AT ISSUE

- [16] When providing its fee estimate to the Applicant, Immigration estimated a total of 310 pages of responsive records. Immigration provided a schedule to my office which then indicated the pages of responsive records totaled 160 pages detailed as follows:

(1) invoices from private law firms	<p>Records 2 to 7, 9 to 20, 23 to 27, 29, 30, 32 to 37, 39 to 42, 44, 45, 47, 49, 51, 53, 55, 57 and 59 are invoices.</p> <p>The invoices were created by private law lawyers and describe the type of work done on a file, the date it was completed, the amount of time spent on the task, and which lawyer(s) completed the work.</p>
(2) receipts	<p>Records 21, 31, 43, 46, 48, 52, 54, 56 and 58 are receipts.</p> <p>The receipts show the amount paid for legal work to the relevant law firm, including the invoice number and date.</p>
(3) ledgers	<p>Records 1, 8 and 28 are ledgers that outline the former Ministry of Economy's private legal bills for certain time periods of a fiscal year (for example, quarters or two-month periods).</p> <p>The ledger sets out the law firm retained, where the law firm is located, a description of the legal work that was completed for each file described in layperson's terms, and the amount of the bill.</p>
(4) receipts of payment	<p>Receipts of payment are found in records 38 and 50. They are similar to receipts but are records acknowledging that payment has been received.</p> <p>One receipt of payment was created by a law firm and the other created for a law firm. The receipts of payment include the amount of the lawyer's bill and the relevant file numbers. Record 38 contains an individual's name.</p>
(5) a transaction record	<p>Record 22 is a transaction record. This record shows the amount paid to a law firm for legal services provided to the former Ministry of Economy.</p>

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[17] Immigration qualifies as a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to undertake this review.

2. Did Immigration make a *prima facie* case that subsection 22(a) of FOIP applies?

[18] My office’s [*Rules of Procedure, Part 9: Solicitor-Client or Litigation Privilege*](#) (revised August 16, 2023) at page 39 outlines the process a local authority is to follow when claiming solicitor-client or litigation privilege:

9-1 Claiming solicitor-client or litigation privilege

(1) Where solicitor-client or litigation privilege is being claimed as an exemption by the head or delegate, the commissioner’s office will request the head or delegate to provide a copy of the records, or an affidavit of records, schedule and redacted record over which solicitor-client or litigation privilege is claimed setting out the elements requested in Form B.

[19] Immigration is making a *prima facie* case that subsection 22(a) of FOIP applies, and thus provided my office with an affidavit, schedule and submission rather than of a copy of the records for my review. The records consist of the following:

- invoices created by private law lawyers which describe the type of work done on a file, the date it was completed, the amount of time spent on the task, and which lawyer(s) completed the work;
- receipts showing the amount paid for legal work to the relevant law firm, including the invoice number and date;
- ledgers which show the law firm retained, where the law firm is located, a description of the legal work that was completed for each file described in layperson’s terms, and the amount of the bill;
- receipts of payment which are similar to receipts but are records acknowledging that payment has been received; and
- a transaction record shows the amount paid to a law firm for legal services provided to Immigration (the former Ministry of Economy).

[20] 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;

[21] As per the *Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated October 18, 2023 (*Guide to FOIP*, Ch. 4 at page 257), subsection 22(a) of FOIP is a discretionary, class-based exemption. It permits refusal of access in situations where a record contains information that is subject to any legal privilege, including solicitor-client privilege.

[22] My office has determined, as set out in the *Guide to FOIP*, Ch. 4 at pages 260 – 267, when determining whether subsection 22(a) of FOIP applies to the records, the following three-part test can be applied as follows:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Did the parties intend for the communication to be treated confidentially?

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

[23] In its submission to my office, Immigration provided the following information about the records, indicating they represent the financial transactions between solicitors and Immigration:

The Ministry submits that the above information demonstrates that all the records described above reflect the bills for legal advice, including litigation in the form of prosecutions, provided by private law counsel to the former Ministry of the Economy.

[24] In their submission to my office, the Applicant provided their arguments for why subsection 22(a) of FOIP should not apply. They asserted the following:

First, the information sought in the ATIP request does not qualify for exemption under s. 22(a). Records of legal services retained by a public body including fees paid are not in themselves “subject to any privilege that is available at law, including solicitor-client

privilege” because they do not satisfy the first of the three-part test in *Solosky v The Queen*. While the scope of privilege may be interpreted with a “very liberal approach” as per Justice Lamer in *Descoteaux et al. v. Mierzwinski*, information such as the name of the law firm, the date of the invoice and the fees paid for the legal services are not in themselves “communication between solicitor and client”.

[25] As per the *Guide to FOIP*, Ch. 4 at page 260, in [*Descoteaux et al. v. Mierzwinski*, \(1982\)](#), Justice Lamer outlined 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 protection is very strong, as long as the person claiming the privilege is within the framework. Therefore, I must first establish who the solicitor and who the client is in this matter.

[26] Pages 260 to 261 of Ch. 4 of the *Guide to FOIP*, defines solicitor and client as follows:

- **Solicitor** means a lawyer who is duly admitted as a member and whose right to practice is not suspended. Lawyer means a member of the Law Society and includes a law student registered in the Society’s pre-call training program.
- **Client** means a person who:
 - Consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
 - Having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf;

and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client’s work.

[27] In its submission, Immigration provided the names of the lawyers involved in the records. All of the lawyers involved are currently members of the Law Society of Saskatchewan and licensed to practice law in Saskatchewan; therefore, I find that the private law lawyers qualify as the solicitors in this matter.

[28] The *Guide to FOIP*, Ch. 4 at page 260, specifies the following:

- The purpose of solicitor-client privilege is to assure clients of confidentiality and enable them to speak honestly and candidly with their legal representatives. The

privilege has long been recognized as “fundamental to the proper functioning of our legal system” and a cornerstone of access to justice. It has evolved from a rule of evidence to a substantive rule that is more nuanced than simply any communications between lawyer and client.

- In *Solosky v. The Queen, (1980)*, Justice Dickson regarded the rule of solicitor-client privilege as a “fundamental civil and legal right” that guaranteed clients a right to privacy in their communications with their lawyers. Further, that solicitor-client privilege must be claimed document by document, and that each document must meet the three-part test.

[29] The *Guide to FOIP*, Ch. 4 at page 261, states that this provision ensures that a government institution, as the client, has the same protection for its legal documents as persons in the private sector. I note that some of the correspondence at issue are between Immigration (formerly under the Ministry of Economy) and the private lawyer; some are between the private lawyer and Ministry of Justice and Attorney General Justice (Justice) on behalf of Immigration; and some are between Immigration (formerly under the Ministry of Economy) and Justice.

[30] In its submission to my office, Immigration provided the following:

The Ministry of Justice and Attorney General has the responsibility to ensure that the administration of public affairs is in accordance with the law. It is also responsible to provide legal advice to ministries and for regulating and conducting all litigation for or against the Crown or any ministry. Clause 9(1)(b) and (e) and 10(c) of *The Justice and Attorney General Act* state:

9(1) The minister shall:

(b) see that the administration of public affairs is in accordance with the law;

...

(e) advise the heads of the several ministries of the government upon all matters of law connected with those ministries;

10 The Attorney General:

...

(c) shall regulate and conduct all litigation for or against the Crown or any ministry in respect of any subject within the authority or jurisdiction of the Legislature;

There are times where private law lawyers are engaged to provide legal advice and conduct litigation on behalf of ministries. When this occurs, the Ministry of Justice and Attorney General remains involved because of its responsibilities mentioned above. When private law lawyers provide invoices, Crown Counsel in the Legal Services Division of the Ministry of Justice and Attorney General review them to ensure that the bills are in order. ...

Some of the records responsive to this request are sent from private law lawyers to either Civil Law or a specific Senior Crown Counsel, John Hobbs, K.C. These invoices are directed to the former Civil Law Division or John Hobbs, K.C., specifically, because the Ministry of Justice and Attorney General is ultimately responsible for the legal advice, including litigation, provided to Ministries. The review of the private law lawyer's bills by Crown Counsel is a way to fulfill this responsibility when outside counsel is relied upon. Sometimes, the invoices are addressed to Civil Law rather than a specific Crown Counsel, however, this did not affect the process that the invoice went through.

[31] Justice is therefore acting as solicitors for Immigration. Therefore, in term of the records in this matter, Immigration is the client and the private law lawyers are the solicitors. Further, the legal services provided by Justice on behalf of Immigration is within the solicitor-client relationship and not a waiver of the client's privilege.

[32] Page 260 of Ch. 4 of the *Guide to FOIP*, defines "communication" as follows:

- A **communication** is the process of bringing an idea to another's perception; the message or ideas so expressed or exchanged; the interchange of messages or ideas by speech, writing, gestures or conduct.

[33] In my office's [Review Report 229-2017, 031-2017 – PART II](#), I found that invoices are communications between a solicitor and a client. Consistent with my previous findings, the invoices identified by Immigration in this matter are communications between solicitor and client and therefore, meet the first part of the test. I will now consider the ledgers, receipts, receipts of payment, and transaction record.

[34] In its submission to my office, Immigration stated the following with regards to the records identified as ledgers:

The Ministry of Justice and Attorney General requests that ministries provide regular updates on what law firms are engaged, the amount spent on the legal services and a description of the legal services provided. These are provided in the form of ledgers ...

[35] In its submission to my office, Immigration stated that the ledgers indicate which private law lawyers are engaged in providing legal services to Immigration and the ledgers are provided to the Ministry of Justice and Attorney General by Immigration. As indicated by Immigration, the ledgers also include a description of the legal work that was completed for each file described in layperson's terms. As noted earlier in this Report, this information would be provided to Justice to enable it to perform its obligations under *The Justice and Attorney General Act*.

[36] In the Information and Privacy Commissioner of Ontario's [Order MO-2486](#), it was found that if the disclosure of information would reveal the same information as that qualifying as communication between solicitor and client, it would also qualify:

Record 5 is a work log book entry prepared by the school principal that does not on the face of it reflect a written communication between a solicitor and client. It was not prepared "by or for" counsel for the Board for use in giving or seeking legal advice. However, based on my review of the contents of the record, I am satisfied that its disclosure would reveal the same legal advice provided by Board counsel that appears in Record 4, which I have found to be exempt under section 12. Accordingly, I find that Record 5 contains legal advice and is properly withheld under section 12 for the same reasons as those given with Record 4.

[37] Therefore, although the ledgers themselves may not be communications between the solicitor and the client, they are a summary of what is in the invoices which have already been found to meet the first part of the test. The ledgers would reveal some of the details of the communications between solicitor and client just as the invoices would. Given this, I find the ledgers qualify as communications between solicitor and client and as such, the first part of the test is met.

[38] Immigration did not indicate whether the receipts, receipts of payment and transaction record are communications between the solicitor and client. However, for the same reasons as paragraph [37], they would reveal the same information as contained on the invoices.

Therefore, I find the receipts, receipts of payment and transaction record also meet the first part of the test.

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

[39] The *Guide to FOIP*, Ch. 4 at page 263, describes the scope of solicitor-client privilege as broad. It applies to all communications made with a view of obtaining legal advice. If a communication falls somewhere within the continuum of that necessary exchange of information, the object of which is the giving or receiving of legal advice, it is protected by solicitor-client privilege.

[40] Page 263 of Ch. 4 of the *Guide to FOIP*, defines legal advice as follows:

- **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.

[41] Page 263 of Ch. 4 of the *Guide to FOIP*, also states that the privilege applies not only to the records that actually give the legal advice but also to those that seek it and that provide factual information relative to which the advice is sought.

[42] The *Guide to FOIP*, Ch. 4 page 267, states that a lawyer's bill of accounts and itemized disbursements are protected including: the terms and amount of the retainer; the arrangements with respect to payment; the type of services rendered and their cost – all these matters are central to the solicitor-client relationship.

[43] The Federal Court of Appeal decision [*Stevens v. Canada \(Prime Minister\)*, 1998 CanLII 9075 \(FCA\), \[1998\] 4 FC 89](#), recognized that invoices of lawyers constitute communications for the purpose of obtaining advice.

[44] In [*Imperial Tobacco Co. v. Newfoundland and Labrador \(Attorney General\)*, 2007 NLTD 172 \(CanLII\)](#) (Imperial), the Court said that if the disclosure of the contingent fee agreement would disclose information which legal advice could be based, then the document should be regarded as privileged:

[95] In my view, in light of conflicting non-binding judicial views on the issue, the proper way to approach the question of whether a fee agreement is privileged is to consider whether the fundamental purpose of solicitor-client privilege would be subverted or compromised if the terms of the agreement were disclosed. This is the approach taken to the issue in *Rieger v. Burgess*. **If, therefore, disclosure of a contingency fee agreement would involve disclosure of information on which legal advice could be based, or the legal advice itself, or could reasonably lead to the discovery of legal advice passing between lawyer and client, then the document should be regarded as privileged.**

[Emphasis added]

[45] Similarly, the ledgers, receipts, receipts of payment and transaction record would disclose the same information as the invoices; therefore, I find the second part of the test is met.

3. Did the parties intend for the communication to be treated confidentially?

[46] In its submission to my office, Immigration provided:

The Supreme Court of Canada has rejected an approach to solicitor-client privilege that would distinguish between a fact and a communication:

[19] Although Descoteaux appears to limit the protection of the privilege to communications between lawyers and their clients, this Court has since rejected a category-based approach to solicitor-client privilege that distinguishes between a fact and a communication for the purpose of establishing what is covered by the privilege (*Maranda*, at para. 30). While it is true that not everything that happens in a solicitor-client relationship will be a privileged communication, facts connected with that relationship (such as the bills of account at issue in *Maranda*) must be presumed to be privileged absent evidence to the contrary (*Maranda*, at paras. 33-34; see also *Foster Wheeler*, at para 42.) This rule applies regardless of the context in which it is invoked (*Foster Wheeler*, at para 34; *R v Gruenke*, [1991] 3 S.C.R. 263, at p. 289).

[20] In the case at bar, therefore, we cannot conclude at the outset that Mr. Thompson's communications with his clients are distinct from financial records that disclose various facts about their relationships in order to determine whether solicitor-client privilege covers those facts. Absent proof to the contrary, all of this information is prima facie privileged, and therefore confidential. [emphasis added] *Canada (National Revenue) v Thompson*, 2016 sec 21.

As per the *Guide to FOIP*, Ch. 4. pages 265 to 267, in *Descoteaux et al. v. Mierzwinski*, (1982), Justice Lamer set out the substantive rule 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.

[47] In their submission to my office, the Applicant provided:

As per Chapter 4 of the IPC Guide to FOIP, general identifying information such as file identification, name, and title of communications are not exemptible and therefore must be released. Not to mention that the fees were paid with public funds and taxpayers are entitled to know how and where their taxes have been spent.

[48] As per the *Guide to FOIP*, Ch. 4. page 266, an applicant is entitled to general identifying information, such as the description of the document (for example, the "memorandum" heading and internal file identification), the name, title and address of the person to whom the communication was directed, the subject line, the generally innocuous opening words and closing words of the communication and the signature block.

[49] In my office's [Review Report 229-2017, 031-2017 – PART II](#), paragraph [26] where I also found invoices were intended to be confidential, I noted that the SCC decision, *Maranda v. Richer*, which stated that it "is in the interests of the administration of justice and of society in general for there to be greater transparency in respect of the amount of the fees that lawyers charge their clients". Immigration may want to consider then whether

transparency with the amount of fees a government institution pays for its lawyers would serve this interest.

[50] Furthermore, in my office's [Review Report 003-2017](#), I considered whether certain portions of a legal invoice were subject to solicitor-client privilege because they would reveal the nature of the communications between solicitor and client. In that case, I found that where portions of the invoices, such as the amount of fees paid and identifying information, did not reasonably reveal the communication protected by privilege, it should be released.

[51] I find that Immigration has made a *prima facie* case that subsection 22(a) of FOIP applies to the records. While Immigration may continue to withhold the legal invoices, receipts, ledger, receipts of payment and transaction records in their entirety pursuant to subsection 22(a) of FOIP, I recommend that it provide the fees paid and any other information that would not reveal the communication protected by privilege, to the Applicant.

[52] Also, as Immigration has refused the Applicant access to the records, subsection 8(2) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations) requires that the deposit paid by the Applicant must be refunded as follows:

8(2) Where a deposit has been paid pursuant to subsection 9(4) of the Act and access to the record requested is refused, the deposit is to be refunded to the applicant.

[53] Consistent with subsection 8(2) of FOIP Regulations, Immigration returned the deposit to the Applicant by a refund to their credit card on August 31, 2023.

IV FINDINGS

[54] I find that I have jurisdiction to conduct this review.

[55] I find that Immigration has made a *prima facie* case that subsection 22(a) of FOIP applies to the records.

V RECOMMENDATION

[56] I recommend that Immigration continue to withhold the records pursuant to subsection 22(a) of FOIP, but that it consider releasing to the Applicant the fees paid and any other information that would not reveal the communication protected by privilege.

Dated at Regina, in the Province of Saskatchewan, this 10th day of January 2024.

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