Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 005-2017
214-2015 – PART II

Saskatchewan Health Authority
(formerly Regina Qu'Appelle Regional Health Authority)

December 19, 2018

Summary: The Commissioner considered whether the Saskatchewan Health Authority (SHA) made a *prima facie* case for solicitor-client privilege. The SHA provided the Commissioner with affidavits describing the responsive records. The Commissioner was satisfied that the SHA made a *prima facie* case that the records were subject to solicitor-client privilege. The Commissioner recommended the SHA take no further action.

I BACKGROUND

[1] On April 27, 2015, the Regina Qu'Appelle Regional Health Authority (RQRHA) received an access to information request dated April 23, 2015 for:

> All personal health information of [name of applicant's family member] within their possession, custody, control or with respect to which they have access. In particular, without limiting the generality of the foregoing… witness statements, investigator notes, letters, memoranda, correspondence, opinions, reports, notices, critical incident notice, critical incident reports, etc. that have any direct or indirection [sic] relation to the death of [applicant's family member] on or about May 10, 2009.

[2] On May 5, 2015, RQRHA sent the Applicant a letter requesting a copy of any documentation showing the Applicant had consent or authority to have this information released to them.

[3] On May 8, 2015, the lawyer representing the Applicant provided RQRHA with a copy of an *Appointment of Administrator* document appointing the Applicant to administer the estate for the deceased family member.

[4] On May 13, 2015, RQRHA provided the Applicant with an interim notice providing the Applicant with a fee estimate of $882.15 for the requested records and raising exemptions that could potentially apply to the requested records. The letter to the Applicant stated:

> You are being provided with a cost estimate as prescribed by section 9 of the Act and subsection 5(2) of *The Local Authority Freedom of Information and Protection of Privacy Regulations*… RQHR has created an Index of Records to assist you in a preliminary review and for you to garner a fulsome understanding of the extent of the solicitor-client privilege afforded these records and the application of The Regional Health Services Act, section 58, and the complementary Critical Incident Regulations in conjunction with section 10 of The Evidence Act and The Local Authority Freedom of Information and Protection of Privacy Act (LA FOIP) subsection 16(3) and sub clause 38(1)(d)(ii) of HIPA to determine what may be released…
>
> If after reviewing the index of records you decide to clarify you request, please advise what records you would like RQHR to review for release against the relevant responsive legislation. If you chose [sic] to go forward with your request in its entirety to review all records then please provide a cheque for the deposit of $441.08.

[5] On June 10, 2015, the Applicant's lawyer responded to the RQRHA stating:

> …My client maintains the full scope of its application and its right to request the balance of the documents identified in your May 13, 2015, letter and such other records as may be discovered, however at the present moment my client wishes to proceed with respect to documents A1 through A37 (89 pages), B1 through B12 with the exception of B7 and B11 (14 pages), C1 through C39 (111 pages), for a total of 214 pages.
>
> The calculation contained in your May 13, 2015, letter was 735 pages totaling $882.15 or $1.20 per page. Therefore, the maximum fee for the 214 pages requested at this time at the same rate is $256.80. Please find enclosed cheque for this full amount…

[6] On July 22, 2015, RQRHA sent a letter to the Applicant releasing portions of the requested records and responded to the Applicant's request as follows:

> On June 22, 2015, I received your cheque for $256.80 and listing of identified records to be covered by the monies.
> …

> As noted a majority of the records requested relate the [sic] Critical Incident or its investigation which is protection under The Regional Health Services Act, section 58, and the complementary Critical Incident Regulations in conjunction with section 10 of *The Evidence Act* and *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) subsection 16(3) and subclause 38(1)(d)(ii) of *The Health Information Protection Act*.
>
> Further application of section 21 is noted through the file covering Solicitor-Client Privilege as applicable.
> …

[7] On November 13, 2015, the Applicant's lawyer submitted a request for review to my office on behalf of the Applicant. My office clarified with the Applicant's lawyer that the review would cover the records at issue in the narrowed scope following RQRHA's fee estimate and index of records as well as search efforts of RQRHA.

[8] On November 19, 2015, my office provided notification to both parties of the review. My office requested RQRHA submit a copy of the responsive records, the index of records and a submission explaining how portions of the records were exempt. The Applicant was also invited to provide a submission for my office's consideration.

[9] I dealt with the records which RQRHA had in its possession in Review Report 214-2015 – Part I. RQRHA claimed solicitor-client privilege over records held in its solicitor's office and refused to provide copies to my office.

[10] 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 concluded that my office should follow the "absolutely necessary" principle. As a result, it suggested 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 production of a record.

[11] 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 when solicitor-client privilege is claimed which includes a form that describes the records as well as a submission providing further information as to why solicitor-client privilege is claimed. The *Rules of Procedure* also includes a sample schedule that should be included with the affidavit. If sufficient information is not provided for me to conclude that the use of subsection 21(a) of LA FOIP is justified, I will request further particulars which can be provided to my office by affidavit.

[12] As RQRHA is now a part of the Saskatchewan Health Authority (SHA), the remainder of this report will refer to the SHA.

[13] On July 5, 2018, my office notified both the SHA and the Applicant that we would be proceeding with Part II of this review. In the notification email to the SHA, my office requested SHA provide an affidavit of records.

[14] On August 7, 2018, the SHA provided my office with a submission and an affidavit of records. On August 31, 2018, my office requested further particulars on the records listed in the SHA's affidavit of records. On September 21, 2018, the SHA responded by submitting an additional affidavit of records addressing the questions posed by my office.

[15] On November 1, 2018, my office contacted SHA to inquire if any of the responsive records contained personal health information, as defined by *The Health Information Protection Act* (HIPA). In the email, my office requested that any records or portions of records that contain personal health information be provided to our office for review and the SHA identify which exemptions under HIPA it was claiming apply to those records.

[16] On November 30, 2018, my office received a submission from SHA identifying the records listed in the affidavit of records that also contained personal health information. In the submission, SHA stated that subsection 38(1)(e) of HIPA applied to the portions of the records that contain personal health information. The SHA also raised that HIPA did not give my office the ability to require production of records, as these records were still subject to solicitor-client privilege.

[17] In this report, I will consider if HIPA allows my office to require production of documents over which public bodies claim solicitor-client privilege. As well, I will consider if the SHA has made a *prima facie* case for the application of solicitor-client privilege to the responsive records.

II RECORDS AT ISSUE

[18] SHA's solicitor conducted a search of its office to identify records responsive to the Applicant's access to information request and based on the scope established in Review Report 214-2015 – Part I. The SHA listed 48 records totalling 78 pages in its affidavit of records in which it claims solicitor-client privilege.

[19] SHA also identified seven of the 48 records, totalling 17 pages, also contained personal health information as defined at subsection 2(m) of HIPA.

III DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction in this matter?

[20] The SHA is a "local authority" as defined by subsection 2(f)(x)(iii) of LA FOIP. The SHA is also a "trustee" as defined by subsection 2(t)(ii) of HIPA.

[21] As such, I have jurisdiction to conduct this review.

2. Does HIPA allow my office to require the production of records over which solicitor-client privilege is raised?

[22] The SHA's submission took the position that my office should consider the application of a claim of solicitor-client privilege, following the same process our office had established for the consideration of subsections 21(a) of LA FOIP or 22(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[23] SHA asserts that the portions of the records containing personal health information were generated for the purpose of ongoing litigation and therefore, subject to solicitor-client privilege.

[24] As noted earlier in this report, in *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34, 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. That decision provided as follows:

> [15] The powers of the Commissioner in conducting a review are set out in s. 43 of LAFOIPA. They include the power to require the production of a record. Section 43 is reproduced below:
>
> > **43**(1) Notwithstanding any other Act or any privilege available at law, the commissioner may, in a review:
> >
> > (a) require to be produced and examine any record that is in the possession or under the control of a local authority; and
> >
> > (b) enter and inspect any premises occupied by a local authority.
> >
> > (2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them:
> >
> > (a) to give oral or written evidence on oath or affirmation; and
> >
> > (b) to produce any documents or things;
> >
> > that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.
> >
> > (3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.
>
> …
>
> **A. Does LAFOIPA empower the Commissioner to require production of records subject to a claim of solicitor-client privilege?**
>
> …
>
> [37] The plain meaning of s. 43(1) – "[n]otwithstanding any other Act or any privilege available at law" – is self-evidently broad. The reference to any privilege available at law is clear and doubtless embraces solicitor-client privilege…

> [38] Thus, in my view, there can be no doubt that, as a matter of ordinary and grammatical meaning, the reference to "any privilege available at law" in s. 43(1) includes all aspects of solicitor-client privilege.
> …
>
> [47] …I see nothing in the statutory context in which s. 43(1) of LAFOIPA is found to suggest it should be given anything other than its ordinary and grammatical meaning. As a result, I conclude that s. 43(1) empowers the Commissioner to require the production of records subject to, or said to be subject to, solicitor-client privilege…
>
> **B. Should the Commissioner have required production of the records?**
> …
>
> [49] …A discretionary statutory authority to abrogate solicitor-client privilege must be exercised so as to interfere with the privilege only to the extent "absolutely necessary" to achieve the goals of the legislation in question…
>
> [50] Significantly, the "absolutely necessary" concept is very demanding. In Goodis, Rothstein J. explained that "[a]bsolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case" (para 20).
> …
>
> [70] …With respect to a review rooted in a denial of access based on a claim of solicitor-client privilege, the character of the review will have to reflect the special place solicitor-client privilege occupies in our legal system and the "absolutely necessary" principle discussed above.
> …
>
> [83] …the Commissioner should have been at pains to exhaust all options short of demanding production of the records in issue. He could have done this by giving the University a clear and unambiguous opportunity to provide, by way of something in the nature of an index of records or affidavit of documents, additional information about such things as the number and nature of the records in question. Only if the University had failed to respond to a reasonable request for such additional information, or if that information or some surrounding circumstance had revealed a reasonable basis for questioning the claim of privilege, should the Commissioner have taken the step of seeking the records themselves.

[25] Section 46 of HIPA speaks to the powers of the Commissioner to require production of records:

> **Powers of commissioner**
> **46**(1) Notwithstanding any other Act or any privilege that is available at law, the commissioner may, in a review, require to be produced and examine any personal health information that is in the custody or control of a trustee.

> (2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them to give oral or written evidence on oath or affirmation and to produce any documents or things that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.
>
> (3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

[26] I find that section 46 of HIPA is similar in wording to section 43 of LA FOIP. Thus, the reasoning and the practice of the Court of Appeal regarding section 43 of LA FOIP is applicable to section 46 of HIPA. Therefore, my office has the power to require production of records. Production of records subject to solicitor-client privilege should only be required if 'absolutely necessary'. If a public body provides me with an affidavit of records, including a schedule, and answers any additional questions that my office may have, I can determine whether the public body has made a *prima facie* case and if so, should not request production of the documents.

[27] I find that production of the portions of the responsive records containing personal health information is not 'absolutely necessary' as the records could be subject to solicitor-client privilege. I will consider if the SHA has made a *prima facie* case for solicitor-client privilege.

3. Has the SHA made a *prima facie* case that the records are subject to solicitor-client privilege?

[28] As the request for review on this matter was received prior to the January 1, 2018 amendments to LA FOIP, my office will consider the previous wording of subsection 21(a) of LA FOIP in the analysis. Subsection 21(a) of LA FOIP provided:

> **21** A head may refuse to give access to a record that:
>
> (a) contains information that is subject to solicitor-client privilege;

[29] My office established the following test for subsection 21(a) of LA 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?

[30] The SHA raised the application of subsection 38(1)(e) of HIPA to the portions of the records that contain personal health information. Subsection 38(1)(e) of HIPA provides:

> **38**(1) Subject to subsection (2), a trustee may refuse to grant an applicant access to his or her personal health information if:
>
> …
>
> (e) the information was collected principally in anticipation of, or use in, a civil, criminal or quasi-judicial proceeding;

[31] Based on the affidavit of records and response to my office's request for particulars, there are five categories of records:

- Internal correspondence between SHA employees
- Correspondence between SHA's solicitor and third party
- Correspondence between SHA's solicitor and SHA
- Correspondence between SHA/SHA's solicitor and third party expert; and
- SHA solicitor's internal correspondence, notes and memos.

[32] I will consider each of these categories of records in my analysis below.

Internal correspondence between SHA employees

[33] The SHA's affidavit of records identified one record as being internal SHA correspondence. However, this record was already considered in my office's Review Report 214-2015 – Part I. In that report, my office found that subsection 38(1)(d)(ii) of HIPA was appropriately applied to record A15, with the exception of the name of the email sender. In that report, my office recommended that the name of the employee that sent the email be released.

[34] As my office has already reviewed this record and issued a finding and recommendation, there is no need to consider a *prima facie* case for the application of solicitor-client privilege for these two records.

Correspondence between SHA's solicitor and third party

[35] The SHA listed 18 records on its affidavit of records that qualify as correspondence between SHA's solicitor and third party. Two of these records, C15 and C20, were considered for exemption under subsection 21(a) of LA FOIP in Part I of this report, Review Report 214-2015 – Part I. In Part I of this Report, my office did not find subsection 21(a) of LA FOIP applied to the records and recommended the SHA consider releasing. As my office has already reviewed these two records and issued findings and recommendations, there is no need to consider a *prima facie* case for the application of solicitor-client privilege for these two records.

[36] I will consider if SHA has made a *prima facie* case for solicitor-client privilege for the remaining 16 records.

[37] As noted, the first part of the test for subsection 21(a) of LA FOIP requires a communication between a solicitor and a client.

[38] However, in the Information and Privacy Commissioner of Ontario's Order PO-2967 discusses solicitor-client privilege and provides the following regarding communications that are not between the client and the solicitor:

> In summary, third party communications are protected by legal advice privilege only where the third party is performing a function, on the client's behalf, which is integral to the relationship between the solicitor and the client. I find this analysis persuasive.

[39] In the affidavits provided to my office, the SHA stated that these records relate to the seeking and receiving of legal advice from SHA's solicitor.

[40] In these communications, the third party is performing a function on behalf of their client, the SHA. Additionally, I am satisfied that the communication was intended to be confidential.

[41] I have not examined these records, however I am satisfied that the SHA has made a *prima facie* case that the records are subject to solicitor-client privilege.

Correspondence between SHA's solicitor and SHA

[42] The SHA identified ten records as correspondence between SHA's solicitor and the SHA. My office considered the application of 21(c) of LA FOIP to one of these records, C22, in Review Report 214-2015 – Part I. My office did not find that subsection 21(c) of LA FOIP applied to this record and recommended SHA release portions of the record. SHA is now raising the application of 21(a) of LA FOIP to record C22.

[43] Subsection 21(a) of LA FOIP is a discretionary exemption. My office's *Rules of Procedure* provides that "discretionary exemptions, not included in a public body's representation [submission] and raised later, may not be considered…" Record C22 was dealt with in Part I of this file, however subsection 21(a) of LA FOIP was not raised for application to this record when its submission was provided in Part I. The purposes of Part II is to consider records that the SHA chose to withhold from my office's review where it claimed solicitor-client privilege applied. As such, I will not consider the application of additional discretionary exemptions to any records that were reviewed in Part I of this file.

[44] I will consider the remainder of the records to determine if SHA has made a *prima facie* case for solicitor-client privilege.

[45] In *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 it provides "it is not sufficient to speak to a lawyer or one of his associates for everything to become confidential from that point on. The communications must be made to the lawyer or his assistants in this professional capacity; the relationship must be a professional one at the exact moment of the communication." In *Foster Wheeler Power Co. v. SIGED Inc.*, 2004 SCC 18, it provides:

> [para 36] We must also bear in mind that lawyers' functions and professional qualifications have evolved dramatically… Lawyers still litigate, represent, advise and draft, but they must often assume other duties in areas where they find themselves

> competing with other professionals. The mandates themselves may include a variety of acts and duties that are not always normally associated with the activities of a lawyer in the traditional sense of the term, as pointed out by Binnie J. in R. v. Campbell, [1999] 1 S.C.R. 565, at para. 50:
>
> > It is, of course, **not everything done by a government (or other) lawyer that attracts solicitor-client privilege.** While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. **Advice given by lawyers on matters outside the solicitor-client relationship is not protected.**
>
> However, as important as professional secrecy may be, it does have its limits. **Not every aspect of relations between a lawyer and a client is necessarily confidential**…
>
> [emphasis added]

[46] SHA's affidavit stated that the communications are between SHA and its solicitor and that the communications involved the seeking and receiving of legal advice. Additionally, I am satisfied that the communication was intended to be confidential.

[47] I have not examined these records, however I am satisfied that the SHA has made a *prima facie* case that these records are subject to solicitor-client privilege.

Correspondence between SHA/SHA's solicitor and third party expert

[48] The SHA identified six records as correspondence between SHA's solicitor and a third party. My office considered the application of subsection 21(c) of LA FOIP to one of these records, AM3, in Review Report 214-2015 – Part I. My office did not find that subsection 21(c) of LA FOIP applied to this record and recommended SHA release portions of the record. SHA is now raising the application of subsection 21(a) of LA FOIP to record AM3.

[49] Subsection 21(a) of LA FOIP is a discretionary exemption. Again, my office's *Rules of Procedure* provides that "discretionary exemptions, not included in a public body's

representation [submission] and raised later, may not be considered…" Record AM3 was dealt with in Part I of this file, however subsection 21(a) of LA FOIP was not raised for application to this record when its submission was provided in Part I.

[50] The purposes of Part II is to consider records that the SHA chose to withhold from my office's review where it claimed solicitor-client privilege applied. As such, I will not consider the application of additional discretionary exemptions to any records that were reviewed in Part I of this file.

[51] SHA also identified that three of the records at issue also contain personal health information. I will consider if SHA has made a *prima facie* case for solicitor-client privilege.

[52] SHA's submission to my office provided the following to support its position that access to the responsive records should be refused:

> The seminal case on litigation privilege and communications between counsel and third-party experts in Saskatchewan is *Gordon Estate v Regina (Regional Health)*, 2015 SKQB 147…
>
> Justice Zarzeczny explained the circumstances in which communications between an expert and counsel may be produced:
>
> > [29] …Solicitor-client privilege applies only to confidential communications between the solicitor and his client whereas litigation privilege is broader – it applies to communications of a non-confidential nature between the solicitor and third parties including materials of a non-communicative nature supplied the third parties. The "third parties" referenced includes experts…

[53] In the Office of the Information Commissioner of Canada resource, *Investigators Guide to Interpreting the ATIA – Section 23 - Solicitor/Client Privilege* it provides the following:

> There are two distinct branches of solicitor/client privilege, the legal advice privilege and the litigation privilege (which is sometimes called the lawyers' brief privilege). The legal advice privilege extends to all communications written or oral, passing between solicitor and client for the purpose of obtaining legal advice. It is not necessary for the purpose of the legal advice privilege that the solicitor have actually been asked to give the advice: preliminary communications made by the client to a solicitor for the purpose

> of asking the solicitor to give advice are also privileged. As for the litigation privilege, it protects from disclosure communications between a solicitor and a client or with third parties which are made in the course of preparation for litigation, whether existing or contemplated, such as experts report where the dominant purpose of obtaining the report was for the purpose of litigation.

[54] Three of the records identified by the SHA were considered in a Court of Queen's Bench decision and found to be captured by litigation privilege. SHA has also taken the position that the other two records identified in its affidavits are also covered by litigation privilege.

[55] Based on the SHA's submission to my office, it is my understanding that these records were prepared for the purposes of the on-going litigation and/or contain the solicitor's legal advice regarding this matter. Additionally, I am satisfied that the communications were intended to be confidential.

[56] As it is my understanding that litigation between SHA and the Applicant is ongoing, I am satisfied that these records would be captured under solicitor-client privilege. Although I have not examined these records, I am satisfied that the SHA has made a *prima facie* case that these records are subject to solicitor-client privilege

SHA solicitor's internal correspondence, notes and memos

[57] SHA identified 13 records as SHA solicitor's internal correspondence, notes and memos. The SHA also identified that portions of three of the 13 records contained personal health information. I will consider if SHA has made a *prima facie* case for solicitor-client privilege.

[58] Past decisions of Commissioners from across the country have considered records in the "continuum" of giving legal advice.

[59] For example, 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)

[60] Based on the SHA's submission to my office, it is my understanding that these records were prepared for the purposes of the on-going litigation and/or contain the solicitor's legal advice regarding this matter. Additionally, I am satisfied that these communications were intended to be confidential.

[61] Although I have not examined these records, I am satisfied that the SHA has made a *prima facie* case that these records are subject to solicitor-client privilege.

IV FINDING

[62] I find that the SHA has made a *prima facie* case that the responsive records are subject to solicitor-client privilege.

V RECOMMENDATION

[63] I recommend that the SHA take no further action.

Dated at Regina, in the Province of Saskatchewan, this 19th day of December, 2018.

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