NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER
Review Recommendation 15-092
July 22, 2015

Review File: 14-160-5

BACKGROUND

The Applicant made a request to the Department of Community and Government Services and the Department of Health for information with respect to a contract for medevac services. The request sought, among other things, all correspondence on the issue from a list of named individuals. These two departments determined that they did not have all of the records responsive to the request as the list of employees provided by the Applicant included employees from the Department of Economic Development and Transportation (ED&T) and current and previous Cabinet Ministers. Portions of the request were, therefore, transferred to ED&T and to the Department of Executive and Intergovernmental Affairs (EIA). This review relates specifically to the response provided by EIA to the request.

EIA identified 244 pages of responsive records. Some of the information in some of those records was withheld pursuant to sections 13(1)(d) (briefings to members of the Executive Council), 14(1)(a) (advice to officials), 15(a) (solicitor/client privilege) and 23(1) (unreasonable invasion of personal privacy) of the Act

The Applicant was not satisfied that all responsive records were provided. He also questioned the exemptions applied to the portions withheld.

THE DEPARTMENT'S SUBMISSIONS

EIA addressed both of the issues raised by the Applicant.

1. Responsive Records

The electronic accounts of the two ministers named in the Applicant's request for information were accessed, as well as the lists of archived paper records from the Minister's offices. No paper records were found. Keyword searches were done of the Minister's electronic records. The keywords were quite extensive and apparently returned many emails and other electronic records, which were then reviewed for relevance.

Without more information about why the Applicant felt that there were missing records, or what those records might specifically pertain to, EIA had some difficulty explaining why they were not discovered in the records of the two ministers. They suggest that the detailed information which the Applicant was hoping to get would not normally be found at the ministerial level, and instead would have been created and disclosed by the working officials who fell within the scope of the other department's handling of the same request.

2. Application of Exemptions

The exemptions applied to the responsive records sprang from four separate sections of the Act, as outlined above. Two of the exemptions claimed (sections 14 and 15) are discretionary in nature. The other two (sections 13 and 23) are mandatory. They provided a page by page explanation for the exemptions claimed, which will be discussed in more detail below.

THE APPLICANT'S POSITION

The Applicant was invited to expand on why he thought that there were additional records which had not been identified as being responsive and why he objected to the exemptions claimed by EIA but no further submissions were received.

THE RELEVANT SECTIONS OF THE ACT

EIA relies on four of the exemptions provided for in the Act.

Section 13(1)(d)

> 13.(1) The head of a public body shall refuse to disclose to an applicant information that would reveal a confidence of the Executive Council, including
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> (d) briefings to members of the Executive Council or the Financial Management Board in relation to matters that
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> (i) have been before, or are proposed to be brought before, the Executive Council or the Financial Management Board

Section 14(1)(a)

> 14.(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal
>
> (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council.

Section 15(a)

> 15. The head of a public body may refuse to disclose to an applicant
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> (a) information that is subject to any type of privilege available at law, including solicitor-client privilege.

Section 23(1)

> 23.(1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

DISCUSSION

1. Responsive Records

Without anything from the Applicant to explain why he feels that records are missing, I have to rely solely on the submissions of EIA to assess whether the search for records was thorough and revealed all responsive records. I am satisfied, based on the information provided to me by EIA, that they took all appropriate steps to find all responsive records. It may be that there were some keywords missing, but the Applicant did not suggest that that was the case. Based on the information received, I am satisfied that all responsive records from EIA were identified and disclosed.

2. Application of Exemptions

Section 15(a)

This section provides public bodies with a discretionary exemption for records which fall within the definition of "solicitor/client" privilege. In the case of *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)* 1995 CanLII 634 (BC SC), [1995] B.C.J. No. 2594, Justice Thackery set out the following test for determining whether a matter is protected by solicitor/client privilege:

> To establish solicitor-client privilege three criteria must be established. One, the communication must be between solicitor and client.....

> Two, the parties intended the communication to be confidential.....
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> Third, the communication entails the seeking or giving of legal advice. It is the purpose of the communication that is relevant. If the purpose of the communications was simply to obtain information as to a matter of fact, the communications would not be privileged. However, if the purpose was to obtain legal advice then the privilege attaches even if the communication entails no more than the passing of factual information.

The Applicant in this case suggested to the public body that any privilege has expired because the litigation to which it relates is finalized and once litigation ends, so does litigation privilege.

In *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII), the Supreme Court of Canada discussed the difference between "litigation privilege" and "solicitor/client" or "legal advice" privilege. They quote a treatise by R.J. Sharpe (now Sharpe, J.A.) in "Claiming Privilege in the Discovery Process" in *Special Lectures of the Law Society of Upper Canada* (1984) 163 at pp 164-65:

> The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

Communications between lawyers and their clients will always remain privileged, even after the end of the relationship or the end of a litigation. Litigation privilege applies to those records which were obtained or created for the purpose of or in the process leading up to a specific litigation, and includes records which are prepared by third parties for a lawyer or client contemplating litigation. As noted by Justice Fish in the *Blank* case:

> Unlike the solicitor-client privilege, the litigation privilege arises and operates even in the absence of a solicitor-client relationship, and it applies indiscriminately to all litigants, whether or not they are represented by counsel... Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.
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> ...
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> Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification.

Litigation privilege has an end point. Solicitor/client privilege does not. Having reviewed the records in question, while the subject matter of some of them involve a litigation which has been finalized and any litigation privilege would no longer exist, they are still communications are between a lawyer and his client containing legal advice and will remain subject to solicitor/client privilege indefinitely.

The public body has claimed exemptions based on “solicitor/client” privilege for several records:

Pages 1-2

The information included in these two pages pertains to communications between the Legal and Constitutional division of Justice and senior management relating to a third party legal matter.

On the first page of this record, the email at the top of the page has been edited to remove the “Subject” line of the email, as well as the list of attachments. There is nothing in these sections that would reveal anything that might amount to a privileged communication between lawyer and client. I **recommend** these sections be disclosed. This holds true for every email in which the “subject” line has been masked in all of the responsive records.

In the body of this email, the public body has masked four numbered paragraphs. While they relate to a third party litigation that is completed, it is still a communication between a solicitor and his clients and it involves the request for legal advice/action and the giving of legal instructions. I am satisfied that this section is subject to solicitor/client privilege and the public body must exercise its discretion in determining whether or not it should be disclosed.

The body of the second email on the page (first in time) has also been redacted. It refers to court records filed with the court (which are public records by definition) and a

briefing note. While the briefing note (discussed below) is subject to solicitor/client privilege, the content of the email does not amount to the exchange of legal advice. I **recommend** that it be disclosed.

Pages 3-4

This record is a briefing note prepared by legal counsel for the minister and senior bureaucrats and contains a legal opinion. It is properly subject to solicitor/client privilege exemption, subject to the proper exercise of the public body's discretion.

Pages 16 - 17

Much of this record is a duplicate of pages 1 and 2 and should be dealt with accordingly. There are two new emails in the chain. The first of these communications is not between a lawyer and his client but between a Minister and his deputy. Furthermore, it contains no legal advice or confidential information. It is not subject to solicitor/client privilege. I **recommend** that it be disclosed.

The second email is a communication between a lawyer and his client and it contains legal information subject to an exemption, but only in the first full sentence of the body of the email. I **recommend** that this record be disclosed but for that sentence.

Pages 144 - 145

These pages are a duplicate of pages 3-4 and should be dealt with accordingly.

Pages 147-152

These pages have been completely masked, from the name of the department to the date it was written to the name of the writer and the recipient. It is claimed that the entire document is subject to solicitor/client privilege.

The record is a memo from legal counsel for the Department of Justice addressed to the Deputy Minister of Justice. On its face, it states that it is a legal opinion with respect to a litigation involving the GN and a third party. It is clearly marked as "privileged and confidential". Each page also contains a boxed statement about the nature of the record as privileged. I am satisfied on all points that the body of the record is subject to solicitor/client privilege such that the public body has the discretion to refuse access. I would suggest, however, that the "header" indicating the date the memo was written by whom it was written and to whom it was written do not contain or reveal any legal information at all. I **recommend** that this portion of the memo should be disclosed.

Section 23

Section 23 prohibits public bodies from disclosing anything that would constitute an unreasonable invasion of the privacy of a third party. This does not mean every reference to an individual must be redacted. There must be a determination made as to whether or not the disclosure would be an "unreasonable invasion" of privacy. In this case, the public body has applied this section to a portion of the body of an email at Page 119. The email in question appears to be from a private email address and contains a personal exchange between that individual and a minister. The part of the email that relates to the Applicant's request has been disclosed. The writer's personal email address and two paragraphs in which the writer appears to be chatting about a personal trip she took were masked. I am satisfied that this was an appropriate application of section 23(1).

Section 13(1)(d)

Section 13(1)(d) prohibits the disclosure of information that would reveal a confidence of the Executive Council, including briefings to members of the Executive Council or in relation to matters that have been before, or are proposed to be brought before, the Executive Council. This section has been applied to the body of the second email on Page 125. It is from the Deputy Minister of Executive and Intergovernmental Affairs to the Deputy Minister of Community and Government Services and to the Deputy Minister

of Health. It is a request for each Deputy Minister to gather certain documents in preparation for a cabinet discussion. There is no substantive information in the email - nothing that would reveal the nature of the discussion in cabinet and nothing that could be considered a confidence. The only thing that section 13 applies to are those matters discussed in cabinet and, perhaps, briefing notes prepared for such meetings. This communication does not contain anything substantive that would reveal the nature of the conversation in cabinet. I **recommend** that this email be disclosed.

Section 14(1)(a)

Section 14(1)(a) is discretionary. It allows public bodies to refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council. If the material qualifies for this exemption, the public body must still make a decision whether or not to disclose it. In this case the section has been applied to the record which appears at pages 155 and 161 (the same record in two iterations). The public body argues that the information withheld showed a summary of the advice provided to the Ministers regarding cabinet proceedings and process. While most of the record is disclosed, one small section has been redacted, presumably because it is more sensitive that the rest of the briefing contained in the record. It is their argument that the release of this information could place the individual who gave the advice in the position that they would not provide the same information in the future.

While I do not agree with the suggestion that the individual writing the memo would fail to provide similar information if this were disclosed, I am satisfied that it does fall within the parameters of the exception and that the public body has fully exercised its discretion with respect to it.

CONCLUSIONS AND RECOMMENDATIONS

My specific recommendations are outlined above. I am satisfied that the public body in this case made a concerted effort to disclose as much information as they could. I say this because there are some records which may well have qualified for a discretionary exemption which the public body did not withhold. This suggests to me that they gave each exemption careful thought and actively exercised its discretion before withholding those small sections which were not disclosed.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner