

NEWFOUNDLAND AND LABRADOR
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

REPORT A-2008-007

College of the North Atlantic

Summary:

The Applicant applied under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) for access to records relating to his employment with the College of the North Atlantic (the “College”). The College released some of the records responsive to the Applicant’s request but denied access to information contained in an e-mail exchange on the basis that it was subject to solicitor-client privilege and, therefore, covered by the exception set out in section 21(a). The Applicant argued that the information was not subject to solicitor-client privilege and, furthermore, any solicitor-client privilege that may have existed had been waived by the actions of the College. The Commissioner determined that the information in the e-mail exchange was subject to solicitor-client privilege and that the College had not waived its right to claim solicitor-client privilege. The Commissioner concluded that the College had met the onus imposed upon it by section 64(1) and had proven that the Applicant had no right of access to the information at issue.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A – 1.1, as am, ss. 13, 21, 30, 46, 47, 49, 50, 60, and 64; *Freedom of Information Act*, R.S.N.L. 1990, c. F-25; *Right to Information Act*, RSNB 1978, c. R-10.3.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2007-012, 2007-015, and A-2008-002; British Columbia OIPC Orders 00-07 and F07-05; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Imperial Tobacco Co. v. Newfoundland and Labrador (Attorney General)*, 2007 CarswellNfld. 338 (Nfld. T.D.); *Mackin v. New Brunswick (Attorney General)*, 1996 CanLII 4705 (NB Q.B.).

I BACKGROUND

[1] Under authority of the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) the Applicant submitted an access to information request dated 1 May 2007 to the College of the North Atlantic (the “College”), wherein he sought disclosure of records as follows:

1. *All personnel files/documents for [Applicant]. This includes those files in the possession of the College of the North Atlantic, the College of the North Atlantic-Qatar, and the College of the North Atlantic-Qatar Security Academy; and includes, but is not limited to, the following:*
 - a. *Letter of Offer*
 - b. *Letter of Appointment*
 - c. *Detailed job description dated previous to April 23, 2006*
 - d. *Performance reviews*
 - e. *Any other documentation (including email, memorandums, written notes, forms, etc.) completed by [Three named Employees] related to [Applicant’s] performance and/or other employment responsibilities.*
2. *All documentation in the possession of the College of the North Atlantic, the College of the North Atlantic-Qatar, and the College of the North Atlantic-Qatar Security Academy relating to:*
 - a. *The attached email to [Employee] dated February 13, 2007 with the subject matter stated: Security Screening Training;*
 - b. *The attached email to [Two named Employees] dated March 6, 2007 with the subject matter stated: Security Screening Instruction; and*
 - c. *The attached letter from [Employee] dated March 8, 2007 with the subject matter stated: Your concerns.*

The requested documentation includes, but is not limited to, the following:

- (i) *All correspondence (including email, memorandums, written notes, etc.) by/between [Seven named employees].*
- (ii) *The legal review noted in the attached letter (including the date the review was completed).*
- (iii) *All correspondence between legal counsel noted in the letter and [Five named Employees] and/or any other College of the North Atlantic-Qatar representative.*
- (iv) *Any other legal review conducted by or on behalf of the College of the North Atlantic related to the noted letter and email.*

3. *All correspondence (including email, memorandums, written notes, etc.) by/between [Seven named employees] relating to:*

a. The attached email to [Employee] dated February 5, 2007 with the subject stated: Questions about employment contract and Terms of Employment.

[2] The College by correspondence dated 28 June 2007 advised the Applicant that access to the requested records had been granted in part but that information in some of the records had been denied on the basis of the exceptions to disclosure set out in section 13 (Repetitive or incomprehensible request), section 21 (Legal advice), and section 30 (Disclosure of personal information).

[3] In a Request for Review dated 24 July 2007 and received in this Office on 27 July 2007 the Applicant asked for a review of the decision of the College to deny access to the records.

[4] In order to put the Applicant's access request and his subsequent Request for Review in context, I will provide additional background information.

[5] The Applicant became involved in an employment dispute with the College. In order to outline his position on the dispute, the Applicant conducted research on a number of legal issues and sent his analysis of these issues to the College in an e-mail dated 13 February 2007. In response, by correspondence from the Manager of Human Resources dated 8 March 2007, the College advised the Applicant:

Further to your email sent to [Employee] on February 13th 2007, we have had your concerns identified and reviewed by legal counsel for the College. In their opinion they are without merit from a legal standpoint. That being the case, it is expected that you would resume your normal teaching duties and carry on with any assignment of teaching or students which your supervisory [sic] deems to be appropriate.

It is the records containing the opinion given by the legal counsel for the College following his review of the Applicant's concerns and the records containing the request by College officials for that legal opinion which are at issue in this Request for Review.

[6] I will note here, by way of clarification, that the College has denied access to certain other information on the basis of sections 13 and 30. The Applicant in his Request for Review did not ask me to review the College's reliance on these two sections. In fact, the Applicant indicated that the remedy he sought was: "Full disclosure of the record(s) of the noted legal review, in addition to any records of communication between the CNA/CNA-Qatar and their legal counsel that is *directly* related to the noted legal review." Based on the contents of the Request for Review and on the issues discussed during the informal resolution process, this Report will deal only with those records referred to by the Applicant for which the College has claimed the solicitor-client privilege exception set out in section 21(a) of the *ATIPPA*.

[7] Specifically, the information at issue is contained in an e-mail exchange between the President of the College of the North Atlantic-Qatar and legal counsel for the College of the North Atlantic. This e-mail exchange took place on 04 March 2007 to 05 March 2007 and consists of two e-mails from the President and two e-mails from legal counsel. The records containing the information at issue are found on pages 51 to 57 of the responsive record, which itself consists of in excess of 500 pages. The only information that has been severed in these records is the body of the four e-mails, with the information containing the names of the sender and recipient of the e-mails, the names of the persons to whom the e-mails were copied, the subject line, and the date of the e-mails having been disclosed to the Applicant.

[8] Attempts to resolve this Request for Review by informal means were not successful and by letters dated 2 January 2008 both the Applicant and the College were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office pursuant to section 47.

II APPLICANT'S SUBMISSION

[9] The Applicant in an e-mail dated 07 January 2008 advised my Office that he did not wish to make any additional written submissions and, therefore, I will refer to the written comments that

the Applicant has made throughout the investigation of this matter, including those comments made by the Applicant in his Request for Review form.

[10] The Applicant in his Request for Review stated:

It is my assessment that the noted legal review is not subject to solicitor client privilege. The following facts support this assessment:

- 1. At the time the noted legal review was issued, the CNA/CNA-Qatar and I were not opposing parties in any legal proceedings. I was employed by the CNA-Qatar . . .*
- 2. The noted legal review was issued in direct response to my extensively researched analysis of specified Canadian legislation, government policy, and the UN international convention on civil aviation . . .*
- 3. The CNA-Qatar's Human Resources department makes specific and direct reference to the noted legal review in an official letter . . . issued to me; and this letter provides specific direction to me regarding my employment. The utilization of the legal review for this purpose runs contrary to any notion of confidentiality between the CNA/CNA-Qatar management and their legal counsel. By proceeding in this manner, the CNA-CNA-Qatar management (the client) actively and consciously waived any solicitor client privilege that may have applied to this record.*

[Emphasis in original]

[11] The Applicant further stated in his Request for Review form:

. . . it is my assessment that I am entitled to access the records of the noted legal review. The reasons for this are as follows:

- 1. As noted above, the legal review was obtained in response to my analysis of Canadian legislation, government policy, and the UN international convention on civil aviation. . . . I was informed in the previously noted letter from Human Resources . . . that the concerns I had raised were "without merit from a legal standpoint" . . . At no time was I provided with the content of the legal review cited in the letter or any significant information on who completed it.*

As I have significant expertise in the field for which I completed the noted legislation/policy analysis; and as I was provided no specific legal rebuttal or clarification in regards to the specific issues I raised, I chose not to comply with the direction given to me . . .

Given that the noted legal review had such a significant impact on my employment, I am entitled to know the content of the legal review and who completed it so that I can be assured it was completed by a competent authority on the subject matter and that each of the specific issues I raised were addressed appropriately.

2. *In an email to [Employee] on 07 Mar 06 . . . the president of CNA-Qatar states: “You might also reiterate that instructors do not have a right to select which students they will teach on a . . . basis”*

Any notion that I refused to instruct students because of their . . . is absolutely false. Nowhere in the analysis I provided and/or other communication I had with CNA-Qatar management did I make such a statement or implication. . . .

As the implication that I hold such views could seriously damage my personal and professional reputation, I am entitled to access the record(s) of the noted legal review (and any records of communication directly related to it) to ensure:

- a. that my views and the issues I raised in my analysis were accurately conveyed to the legal counsel who issued the noted legal review, and*
- b. that any misrepresentations or false statements about my opinions and attitudes . . . are corrected and/or retracted.*

[Emphasis in original]

[12] The College had initially denied access to the names of the sender and recipient of the e-mails at issue, but during the informal resolution process the College agreed to release some additional information, including those names. Upon becoming aware of the name of the legal counsel who gave the legal opinion, the Applicant sent an e-mail dated 21 December 2007 to my Office stating:

I received the additional information from the CNA. It appears that [name of legal counsel] was the solicitor to which the legal advice was sought. I believe this should be given significant consideration as you proceed in your investigation as [name of legal counsel] was the CNA Vice-President Qatar Project at the time. I can’t see how [the President of CNA-Qatar], or any other member of the CNA-Q staff, could be considered [legal counsel’s] “client”

under this circumstance. Although [the President of CNA-Qatar] appears to have been seeking “legal advice”, given the managerial/executive positions of all of the people listed in the email, this is fundamentally a managerial discussion that applies directly to my employment. Although [name of legal counsel] may have provided a legal opinion, as the CNA Vice-President Qatar Project he was one of the key decision-makers in this matter and in a position of significant influence over my employment.

III PUBLIC BODY’S SUBMISSION

[13] The formal submission of the College is set out in correspondence dated 17 January 2008, in which the College points out that it has denied access to certain records on the basis of section 13 and section 30 and states that “[g]iven that these records are not contested in this review we offer no submission at this time.” The College further indicates that it “maintains its use of Solicitor-Client Privilege as per section 21(a) of the *ATIPPA* on pages 51-57.” As such, I will quote passages from the College’s 13-page submission that provide support for its reliance on the exception to disclosure set out in section 21(a).

[14] The College in its submission refers to a number of e-mails it received from the Applicant and then summarizes its responses to those e-mails on pages 5-6 as follows:

. . . CNA responded to the applicant on July 17, 2007 stating that these records are written and confidential communications between CNA decision-makers and legal counsel and pertain directly to seeking and receiving legal advice. We also explained that according to the ATIPPA procedures manual the decision to waive a privilege is determined in consultation with the client public body, the department of justice or the client public body’s designated legal advisors. In this instance, CNA’s designated legal advisor, [the College’s General Counsel], was consulted and the decision not to waive privilege and continue to withhold the record was upheld.

At that time we indicated to the applicant [that] the legal opinion records were not distributed beyond the decision makers involved and CNA’s ATIPP personnel. We also indicated that the records were kept in a secure location. The record was in fact an email which is stored on the CNA-Qatar’s email server.

[15] The College refers to a number of Reports from this Office which have cited the decision of the Supreme Court of Canada in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. In that case, the Court stated that a document must meet the following criteria in order for solicitor-client privilege to apply:

1. it is a communication between a solicitor and client,
2. which entails the seeking or giving of legal advice, and
3. which is intended to be confidential by the parties.

[16] The College then states at page 11:

The test enunciated in Solosky has been adopted in Newfoundland and Labrador in the access to information context and we agree and submit that this is the proper test in this instance. We submit for your review the following analysis using the criteria in the Solosky test.

[17] The College then proceeded to discuss the *Solosky* criteria in relation to the facts of this case at pages 12-13:

1. It is a communication between Solicitor and Client.

The analysis provided by the applicant to CNA-Qatar was forwarded via e-mail to [the President of CNA-Qatar] by . . . the applicant's supervisor. In turn [the President of CNA-Qatar] approached [legal counsel] for his legal opinion on the analysis presented by the applicant. [Legal counsel], Vice-President-Qatar Project, is a practicing lawyer and former General Counsel for CNA. He retains his practicing status with the Law Society of Newfoundland and Labrador in order to provide legal advice to the Qatar Project and, when asked, to the College as a whole. Thus the emails between [the President of CNA-Qatar] and [legal counsel] were a communication, in the form of email, between a client, CNA and one of its legal advisors.

2. Which entails the seeking or giving of legal advice.

In his initial contact to [legal counsel], [the President of CNA-Qatar] describes the situation as a matter with legal implications about which he would like legal advice on. The purpose of the email is clearly stated and the email thread covers the interaction between solicitor and client.

3. Which is intended to be confidential by the parties.

The email thread of the legal opinion sought and received on this matter was copied to a very select group of CNA decision makers who had a need to know the information. Other than [legal counsel] and [the President of CNA-Qatar] only the acting-President of CNA, . . . and the Manager of Human Resources at CNA-Qatar are added to the conversation. As an example of how tightly held the communications were, CNA notes that the exchange was not copied to [Employee], even though he was the applicant's supervisor. Instead, as indicated by the email on page 65 of the responsive records [the President of CNA-Qatar] informs [Employee] simply that a legal opinion has been sought and that the analysis provided by the applicant would be responded to formally by the Manager of Human Resources. The communication of the legal advice was held confidential and was shared only with senior decision makers who had a need to know.

[18] The College made further observations on page 13:

The applicant has asserted that he has an entitlement or right to solicitor-client materials because of potential damage to his reputation and effect on his employment. CNA notes that an assessment of potential damage done to one's reputation or potential impact on the applicant plays no part in determining if Solicitor-Client Privilege exists. Nor does it play a role in determining whether to waive privilege. That right belongs entirely and wholly to the client without any need or requirement to assess damage to others.

The applicant also asserts that the legal opinion is not subject to solicitor-client privilege because the applicant and CNA were not engaged in legal proceedings at the time. The applicant here . . . confuses litigation privilege (which is dependent on potential or actual litigation) with solicitor-client privilege which is not dependent in any manner on litigation. The applicant's argument that, because there were no legal proceedings, there cannot be any solicitor-client privilege is . . . without merit.

CNA has reviewed the applicant's arguments. However, these records meet the criteria for solicitor-client privilege and based on the recommendations of CNA's designated legal advisor, CNA will not waive that privilege in this matter.

IV DISCUSSION

[19] There are two main issues to be decided:

1. Whether the records at issue are subject to solicitor-client privilege such that they can be withheld from the Applicant pursuant to section 21(a), and
2. If the records at issue are subject to solicitor-client privilege, whether there has been a waiver of that solicitor-client privilege by the client such that the records are no longer protected from disclosure by section 21(a).

1. Are the records at issue subject to solicitor-client privilege?

[20] The solicitor-client privilege exception is set out in section 21 of the *ATIPPA* as follows:

21. The head of a public body may refuse to disclose to an applicant information

(a) that is subject to solicitor and client privilege; or

(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

[21] As indicated by the College in its submission, this Office has adopted the three criteria set out in *Solosky* as the requirements that must be met in order for information to be subject to solicitor-client privilege and thereby excepted from disclosure by section 21(a). In Report 2007-012, my predecessor stated these criteria at paragraph 69:

(i) it is a communication between solicitor and client,

(ii) which entails the seeking or giving of legal advice, and

(iii) which is intended to be confidential by the parties.

[22] I now wish to discuss each of these criteria in relation to the facts of case before me.

(i) It is a communication between solicitor and client

[23] The College in its submission points out that the information at issue is contained in an e-mail exchange between the President of CNA-Qatar and the College's former General Counsel, who is now Vice-President – Qatar Project. The College also indicates that the former General

Counsel retains his practicing status with the Law Society of Newfoundland and Labrador. The Applicant points out that at the time he gave the legal opinion, the former General Counsel was a Vice-President with significant decision-making authority over the Applicant's employment status with the College. The Applicant, therefore, expresses doubt as to whether in these circumstances the President of CNA-Qatar could be considered the client of the former General Counsel.

[24] There is no dispute in my view as to the e-mail exchange being a communication. In addition, I find that when he gave the legal opinion, the former General Counsel was a practicing solicitor and was acting in that capacity.

[25] In relation to the Applicant's concern that the former General Counsel was, as Vice-President, a part of the management team of CNA-Qatar, it is my view that this has no bearing on the nature of the relationship between the parties involved in the communication. It is not unusual for an in-house legal counsel in an organization to also hold a managerial position. Therefore, I find that there was a solicitor and client relationship between the President of CNA-Qatar and the former General Counsel when they entered into their communication by an exchange of e-mails.

(ii) Which entails the seeking or giving of legal advice

[26] The College in its submission indicates that in the initial contact made by the President of CNA-Qatar with the former General Counsel, the President described the situation for which he was seeking advice as "a matter with legal implications." I note that the subject line of the initial e-mail sent by the President is "Legal Advice." My review of the information in the four e-mails involved leaves me with no doubt that the President was seeking legal advice from the former General Counsel and that the former General Counsel gave legal advice to the President.

(iii) Which is intended to be confidential by the parties

[27] The College in its submission points out that the e-mails between the President of CNA-Qatar and the former General Counsel were copied only to the Acting-President of the College and to the Manager of Human Resources for CNA-Qatar. Furthermore, the College indicates that the e-mails were not copied to the Applicant's Supervisor. This limited circulation, the College suggests, provides evidence that the information in the e-mails was intended by the parties to be confidential. I note that the former General Counsel explicitly states in one of the e-mails that his communications are "still solicitor-client privileged." Given these circumstances, I find that the parties to the e-mail communications intended them to be confidential.

[28] In conclusion, I have determined that the information contained in the four e-mails meets the three criteria set out in *Solosky* and is, therefore, subject to solicitor-client privilege. Having reached this conclusion, I must now discuss the second issue and determine whether there has been a waiver of solicitor-client privilege by the College because of its actions.

2. Has there been a waiver of solicitor-client privilege by the client?

[29] The Applicant asserts that there has been a waiver of solicitor-client privilege by the College. In his Request for Review form the Applicant stated:

The CNA-Qatar's Human Resources department makes specific and direct reference to the noted legal review in an official letter . . . issued to me; and this letter provides specific direction to me regarding my employment. The utilization of the legal review for this purpose runs contrary to any notion of confidentiality between the CNA/CNA-Qatar management and their legal counsel. By proceeding in this manner, the CNA-CNA-Qatar management (the client) actively and consciously waived any solicitor client privilege that may have applied to this record.

[30] The Applicant's statement that the Human Resources department refers to the legal review in a letter to him is a reference to the correspondence dated 8 March 2007 from the College's Manager of Human Resources advising the Applicant:

Further to your email sent to [Employee] on February 13th 2007, we have had your concerns identified and reviewed by legal counsel for the College. In their opinion they are without merit from a legal standpoint. That being the case, it is expected that you would resume your normal teaching duties and carry on with any assignment of teaching or students which your supervisory [sic] deems to be appropriate.

[31] It is, therefore, the Applicant's position that by referring to the legal review in an official letter to him, the College has waived the right to claim solicitor-client privilege in relation to the records that contain that legal review.

[32] In *Imperial Tobacco Co. v. Newfoundland and Labrador (Attorney General)*, 2007 CarswellNfld. 338 (Nfld. T.D.), Chief Justice Green discussed waiver of solicitor-client privilege in the access to information context. In that case, Imperial Tobacco had made an access request under the prior access legislation for this province: the *Freedom of Information Act*, RSNL 1990, c. F-25. The request was for a copy of a contingency fee agreement entered into between the Government of Newfoundland and Labrador and an American law firm. Access to the agreement was denied on the basis that it was protected by solicitor-client privilege. Imperial Tobacco appealed the decision denying access to the Supreme Court of Newfoundland and Labrador, Trial Division. Imperial Tobacco argued on appeal that by providing the details of the contingency fee agreement in a press conference, in press releases, and in media interviews the government had waived any solicitor-client privilege that might have existed.

[33] In *Imperial Tobacco*, Chief Justice Green determined that there had been waiver of solicitor-client privilege and stated at paragraphs 110-111:

110 At the appeal level in Stevens, Linden J.A. concluded that Rothstein, J.'s analysis of the waiver issue was essentially correct, but he restated the principle this way:

[50] ... The question of whether or not people have waived their right to privilege, absent explicit waiver, is one which must be judged according to all the circumstances ...

[51] With respect to the release of portions of the records a similar view has been adopted in British Columbia. In Lowry v. Can. Mountain Holidays Ltd [(1984), 59 B.C.L.R. 137 (S.C.)] Finch, J.

emphasized that all the circumstances must be taken into consideration and that the conduct of the party and the presence of an intent to mislead the court or another litigant are of primary importance. I believe that this approach is appropriate in this case.

...

111 I do not read this as asserting that partial disclosure will be treated as waiver of the whole document only where an intent to mislead is present. Where there is an intent to mislead that will, of course, be a very important consideration, justifying release of more information to correct the misleading impression created by partial disclosure. In all cases, however, one must look at "all the circumstances" to determine whether the partial disclosure should as a matter of fairness be treated as full waiver.

[Emphasis in original]

- [34] The British Columbia Information and Privacy Commissioner discussed the waiver of solicitor-client privilege in Order 00-07. The Commissioner provided a definition of waiver on page 7:

The applicant argues, however, that the Ministry has both expressly and implicitly waived solicitor-client privilege in this case. R. Manes and M. Silver, Solicitor-Client Privilege in Canadian Law (1993, Toronto: Butterworths), write, at pp. 189 and 191, that:

Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.

...

Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

- [35] In Order 00-07, the Commissioner made the following determination at page 17:

In this case, I am satisfied that the disclosure of the "gist" of the legal opinion - really, the conclusion of the Ministry's legal advisor - cannot on any objective analysis be considered to demonstrate an intention to waive privilege. On the contrary, the record in question makes it clear the Ministry did not intend to waive privilege over that opinion. I am also satisfied - based on my review of the withheld information - that, to quote Rothstein J. in the Stevens case, "the partial

disclosure of [the] privileged information cannot be taken as an attempt to cause unfairness between parties, or to mislead an applicant or a court, nor is there any indication that it would have that effect". To my mind, neither the facts nor fairness compel a conclusion that the Ministry has waived privilege here.

- [36] The British Columbia Commissioner also discussed the waiver of solicitor-client privilege in Order F07-05. In that case, the applicant requested a copy of a legal opinion for which a municipal government claimed solicitor-client privilege. Parts of the opinion were publicly disclosed during an open council meeting and the opinion was also referred to by the Mayor in a letter to a local newspaper. The Commissioner narrowed the issue to be decided at paragraph 16:

[16] Although the applicant ascribes a great deal of importance to it, the fact that the Village sought legal advice because of public concerns about the amendment process does not by itself affect privilege. The motivation of the Village in this regard is immaterial. The same can be said for the motivation behind the Mayor's letter. The question is whether the actions of the Village, evidenced by the introduction and discussion of the CAO's report at the open Council meeting and the Mayor's letter to the Sayward News, resulted in that privilege being waived.

[Emphasis added]

- [37] The Commissioner's conclusion on the issue of whether there was a waiver is found at paragraphs 27-29:

[27] In the circumstances of this case, I find that the Village did not intend to waive privilege over the opinion by publicly disclosing part of the legal advice received through the CAO's report. Adopting the words of Linden J.A. quoted above, it is the Village as client which enjoys the privilege over the legal advice it received; the Village may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the advice the Village was merely exercising its discretion in that regard. It did not, by exercising that discretion, lose its ability to maintain privilege over the whole of the opinion.

[28] The Village disclosed the advice that it did in an effort to respond to concerns that were voiced about the process that was followed surrounding the amendment. I accept the evidence of the Mayor and of the CAO in this regard. In my view, the conduct of the Village is evidence of its effort to give effect to the principle of transparency and, as I have said above, I decline to weigh this conduct against the Village in determining whether it intended to waive privilege.

[29] *In light of what I have said above, it should be clear that the more important issue in determining whether the Village has lost privilege over the opinion is whether the partial disclosure was unfair or intended to mislead. My review of the opinion in question—which the Village provided to this Office for the purposes of this inquiry—leads me to conclude that the partial disclosure did not result in unfairness or mislead anyone.*

[38] The New Brunswick Court of Queen’s Bench discussed waiver of solicitor-client privilege in relation to a request under that province’s *Right to Information Act*. In *Mackin v. New Brunswick (Attorney General)*, 1996 CanLII 4705 (NB Q.B.), the applicant had asked the Province’s Solicitor General to direct the R.C.M.P. to investigate a complaint of contempt of court against the provincial Minister of Justice. As a result, the Deputy Minister of Justice asked a lawyer outside the province to provide an independent legal opinion with regard to the complaint. Following receipt of the independent opinion, the Deputy Minister sent correspondence to the applicant advising him that the legal opinion had concluded that the facts of the case “would not support proceedings for contempt.” The correspondence did not provide the applicant with the full text of the legal opinion, although there were references to parts of it. The applicant’s access request for a copy of the letter of opinion was denied on the basis that it was protected by solicitor-client privilege. The applicant argued before the Court of Queen’s Bench that in the circumstances there had been a waiver of solicitor-client privilege because of the references to the legal opinion in the correspondence he received from the Deputy Minister. The applicant further argued that he had been put at a disadvantage by not having the opinion and, therefore, wanted to see it.

[39] In *Mackin*, the Court determined that the disclosure of a summary of the legal opinion and part of the text of the opinion in the correspondence did not amount to waiver of privilege in relation to the whole document.

[40] In the case before me, there is only a brief reference to the legal opinion in the correspondence dated 8 March 2007 sent to the Applicant by the College. The College stated: “. . . we have had your concerns identified and reviewed by legal counsel for the College. In their opinion they are without merit from a legal standpoint. . . .” That which was revealed in the correspondence in this case was much less than what was revealed in the cases I have discussed.

The correspondence in this case did not provide any details of the legal opinion, nor did it provide the “gist” of or a summary of the legal opinion. There were no direct quotations from the text of the legal opinion provided as was the situation in some of the other cases. In conclusion, I am not convinced that there was any “partial” disclosure of the legal opinion in this case; at least not to the extent that there was in the cases I have discussed.

[41] Even if it could be said that there was a “partial” disclosure of the legal opinion in the present case, there was no evidence of an intention by the College to waive solicitor-client privilege in relation to the whole of the legal opinion provided. There is no evidence of intention or effort by the College to mislead, nor does any unfairness result from the statements made by the College in its letter of 8 March 2007.

[42] Therefore, after careful examination of all the surrounding circumstances of this case, my determination is that there was no waiver of solicitor-client privilege by the College.

[43] Before ending my discussion, I wish to deal with a number of other views and opinions expressed by the parties in their submissions.

[44] The Applicant expressed the opinion that the legal review was not subject to solicitor-client privilege because at the time it was issued “the CNA/CNA-Qatar and I were not opposing parties in any legal proceeding. I was employed by the CNA-Qatar.” The College responded to this by stating that the Applicant is confusing litigation privilege, which is dependent upon there being potential or actual litigation, and solicitor-client privilege, which is not dependent upon the existence of litigation.

[45] I discussed the distinction between litigation privilege and solicitor-client privilege in Report A-2008-002 where I indicated at paragraph 25 that section 21 of the *ATIPPA* provides protection against disclosure of documents subject to either solicitor-client privilege (that is, legal advice privilege) or litigation privilege. Also in that Report, I stated at paragraph 27 that litigation privilege was not limited to communications between a solicitor and client and that its purpose was to ensure the efficacy of the adversarial process. Throughout my discussion of section 21 in

Report A-2008-002, I made it clear that solicitor-client privilege (that is, legal advice privilege) exists in the absence of actual or potential litigation, but that for litigation privilege to exist there must be actual or potential litigation.

[46] Therefore, I must agree with the College when it states that Applicant has confused solicitor-client privilege (that is, legal advice privilege) with litigation privilege. There is no requirement for any actual or potential litigation in order for solicitor-client privilege to exist. As such, the e-mails at issue in this Review are subject to solicitor-client privilege even though there was no actual litigation between the Applicant and the College at the time the e-mails were sent.

[47] I also wish to comment upon the Applicant's opinion that because the legal review was given in direct response to his extensive legal analysis he should be entitled to the legal review in order for him to determine if all the issues he raised in his analysis were appropriately dealt with. In my view, what prompted a client to seek a legal opinion has no bearing on whether or not that legal opinion is subject to solicitor-client privilege. As was stated by the British Columbia Commissioner in Order F07-05, the motivation for seeking a legal opinion is immaterial to the determination of whether the legal opinion is subject to solicitor-client privilege or of whether the privilege has been waived. In the case before me, the fact that the e-mails at issue may have been sent in response to the Applicant's sending his legal analysis to the College does not have any bearing on whether or not the e-mails are protected by solicitor-client privilege.

[48] The Applicant also suggests that he should have access to the legal review because it had a significant impact on his employment and it may contain misrepresentations or false statements about his opinions or attitudes. It is my opinion that whatever justifications or motives the Applicant may have for wishing to have access to the legal review, these have no impact upon the fact that the information in the e-mails is subject to solicitor-client privilege. I note that in the *Mackin* case the New Brunswick Court of Queen's Bench did not give any consideration to the applicant's argument that he had been put at a disadvantage by not having the legal opinion to which he wanted access.

[49] I have an appreciation for the Applicant's determination to have access to the information contained in the four e-mails. He genuinely feels that the legal opinion contained in the e-mails has had an important impact on his life. On the other hand, I also have an awareness of the importance that has been assigned to the principle of solicitor-client privilege, as indicated by my predecessor in Report 2007-015 at paragraph 35:

[35] I would first like to acknowledge the significance and the importance of solicitor-client privilege to the legal system in particular and to society in general. Solicitor-client privilege is a concept borne out of the common law, which is found in the ATIPPA as well as equivalent access legislation in other jurisdictions across Canada. Generally speaking, it is meant to protect communication between a lawyer and his or her client for the purpose of seeking or giving legal advice. The Supreme Court of Canada, in Solosky v. The Queen, [1980] 1 S.C.R. 821, has said that

...The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice.

...

...the right to communicate in confidence with one's legal advisor is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client...

[50] Therefore, while I understand the Applicant's reasons for wanting to have access to the information in the e-mails, I must apply the long-recognized and fundamental principle of solicitor-client privilege as provided for in section 21 of the ATIPPA.

V CONCLUSION

[51] The records at issue meet the three necessary criteria as set out in *Solosky* and are, therefore, subject to solicitor-client privilege.

[52] There has not been a waiver of solicitor-client privilege by the College in relation to the records at issue.

- [53] The College has proven on a balance of probabilities that it is entitled to deny access to the records pursuant to section 21(a).
- [54] Having found that the College of the North Atlantic acted appropriately by releasing all responsive records to which the Applicant is entitled, it is not necessary for me to make a recommendation.
- [55] Under authority of section 50 of the *ATIPPA* I direct the head of the College of the North Atlantic to write to this Office and to the Applicant within 15 days after receiving this Report to indicate its final decision with respect to this Report.
- [56] Please note that within 30 days of receiving a decision of the College of the North Atlantic under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*.
- [57] Dated at St. John's, in the Province of Newfoundland and Labrador, this 23rd day of May 2008.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador