OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-004

March 5, 2013

Department of Justice

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* ("the *ATIPPA*") to the Department of Justice (the "Department") for access to the contents of a solicitor's file relating to the Applicant. The Department refused access to all responsive records pursuant to section 21 of the *ATIPPA* (legal advice). The Department also refused to provide the responsive records to this Office in response to the Applicant's Request for Review. After a court-ordered production of the records to this Office and the additional claim of section 30 (disclosure of personal information), the Commissioner determined that the Department had improperly applied section 21 to the majority of the records. The Department was attempting to withhold publicly available information, information that was created by or had previously been sent to the Applicant, and information which simply did not fit within the claimed exception. Consequently, the Commissioner recommended the release of this information.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A–1.1, as amended, sections 21 and 30.

Authorities Cited: *Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Attorney General),* 2011 NLCA 69 (CanLII)

Solosky v. The Queen, [1980] 1 SCR 821 (S.C.C.)

Camp Development Corp. v. South Coast Greater Vancouver Transport Authority 2011 BCSC 88 (CanLII)

R. v. Trang 2002 ABQB 390 (CanLII)

OIPC *ATIPPA* Legislative Review Submission

File #: 10011.09.01

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request on December 28, 2008 to the Department of Justice (the "Department"). The request sought disclosure of records as follows:

> *I am requesting a copy of the entire contents of a file held by* [named solicitor] *Department of Justice – in relation to myself (*[Applicant's name]*). I am also requesting that this request extend beyond* [named solicitor] *and include the following individuals who may have correspondence, notations, emails, etc…that relate to this file – but at date of request have yet to be added to the aforementioned file.*
>
> [List of named individuals]

[2] The Department responded to the Applicant's request on January 26, 2009 and denied access to all of the responsive records citing section 21 of the *ATIPPA*.

[3] In a Request for Review dated February 1, 2009 and received in this Office on February 2, 2009, the Applicant asked for a review of the decisions made by the Department. In accordance with section 52 of the *ATIPPA* an Analyst from this Office requested a copy of the responsive records from the Department.

[4] The 14-day statutory time limit for providing the responsive records to this Office was to expire on February 18, 2009. On February 16, 2009, my Office received notification from the Department that it would be unable to meet the statutory time limit. On February 17, 2009, the Department advised my Office that the responsive records would be provided on February 23, 2009. The responsive records were not provided by the Department by that date and when contacted by my Office the Department advised that the responsive records could be expected by February 27, 2009. The records were not provided by this new date. On March 2, 2009 the Department advised that the records were being prepared for the Deputy Minister's signature. This assurance was again repeated on March 5, 2009; however, in a letter dated March 3, 2009 and received by my Office March 6, 2009, the Department expressed its opinion that section 52 of the *ATIPPA* did not compel the production of records to which section 21 was claimed. As a result, the Department refused to provide the responsive records to this Office.

[5] On March 11, 2009, I wrote to the Minister and advised that it was the opinion of this Office that the Department's interpretation of section 52 was incorrect and once again repeated the request for the responsive records to be provided. A deadline of March 13, 2009 was set and the Department was further advised that should the records not be produced by that time, an application would be made to the Supreme Court, Trial Division for an order of mandamus requiring the Department to perform its statutory duty under section 52(3) of the *ATIPPA*.

[6] On March 13, 2009, the Department advised that it maintained its position and would not be releasing the records. Instead, the Department filed its own application with the Supreme Court, Trial Division seeking judicial interpretation of section 52 of the *ATIPPA;* a declaration that materials to which solicitor-client privilege is claimed are not subject to review by this Office.

[7] The Department's application was heard by the Supreme Court, Trial Division on October 14, 2009 and a decision was entered on February 16, 2010. Madame Justice Marshall upheld the position of the Department not to provide the responsive records to this Office, citing the development of the law surrounding solicitor-client privilege over the past number of years and its elevation from a rule of evidence to a rule of substance.

[8] A Notice of Appeal was filed by this Office with the Court of Appeal of Newfoundland and Labrador and on October 26, 2011, the Court of Appeal overturned the decision of the Trial Division stating:

> *[79]* […] *I conclude that the Legislature intended section 52(3) to enable the Commissioner to compel the production of responsive records that are subject to a claim of solicitor-client privilege. A practical view of the purpose of the legislation leads to the conclusion that this particular type of privilege is included in the phrase "a privilege under the law of evidence" under section 52(3) of ATIPPA.*
>
> […]
>
> *[84]* […] *Section 52 of ATTIPA* [sic] *is unambiguous and explicitly permits the Commissioner to abrogate a claim to solicitor-client privilege in order to verify the legitimacy of such a claim in the discharge of his statutory mandate.*

[9] Consequently, on October 31, 2011 an Analyst from this Office wrote to the Department and requested that the responsive records be provided within 14 days. After various further delays from

the Department, the responsive records were finally provided on December 14, 2011. The Department maintained its claim of section 21 over the entirety of the records, amounting to 656 pages.

[10] On January 30, 2012, following an initial review of the records, the Analyst advised the Department that certain records should be disclosed to the Applicant immediately. The Analyst explained that these records were not severable pursuant to section 21, or any other provision of the *ATIPPA*, either because the records were publicly available, were records sent to or from the Applicant, were records to which the Applicant and others would have been privy, or simply did not meet the requirements of section 21. These records amounted to over half of the responsive records.

[11] The Analyst also noted that the responsive records were not provided in the format outlined in the *Access to Information Policy and Procedures Manual*, nor were they prepared in accordance with the "Preparing for a Review: Public Body Guidelines" issued by this Office. The records were not page-numbered or indexed.

[12] On March 1, 2012, one month after the initial suggestions for release were made, the Department responded by issuing a revised copy of the responsive records containing an index and page numbers and indicated that, despite maintaining its claim of section 21, based on the passage of time the Department was exercising its discretion and releasing all of the records recommended for release by this Office with the exception of 2 pages.

[13] This Office continued its review of the remaining records under the assumption that the agreed upon records would be released to the Applicant immediately. On April 5, 2012, over one month after the Department agreed to release the records, the Applicant advised that no records had been provided to her. When questioned, the Department advised that it had not released the records to the Applicant as the Department wanted to wait until the OIPC completed its review and discussed any further suggestions for release prior to releasing the records to the Applicant. The Department indicated that it believed this process would prevent confusion.

[14] In an email dated April 10, 2012, an Analyst from this Office explained to the Department that it was the general practice to release information to applicants as soon as the decision to release is made. The Analyst explained that this was found to simplify matters by reducing the volume of records being reviewed and also the volume being sent to the applicant. The Analyst also pointed out that where it has been agreed that the information has no basis under the *Act* for being withheld then the information should be released immediately. The Department responded on the same date and indicated its preference not to release the information until the remaining suggestions for release were made. It was the belief of the Department that the remaining suggestions might have an effect on the Department's final decisions. This Office wrote again to the Department on April 17, 2012 and urged the Department to reconsider this position and release the agreed upon records immediately.

[15] The agreed upon records were released to the Applicant on April 18, 2012, over two months after the initial suggestions were made and over one month after the Department agreed to a majority of those suggestions. Some information within the package of records provided to the Applicant was severed pursuant to section 30.

[16] This Office was then required to continue its review of the remaining records and also, to review the new severing within the records sent to the Applicant. On July 17, 2012, an Analyst from this Office:

1) requested additional information regarding certain withheld records;
2) requested certain missing records;
3) recommended the release of all information being withheld pursuant to section 30, with the exception of one page. This recommendation was made on the basis that the information was either written by the Applicant, was information that the Applicant had already received in an original, unsevered form, or was information which the Applicant was otherwise aware of; and
4) recommended the release of certain records and information still being withheld in accordance with section 21.

These recommendations covered more than 100 pages of records.

[17] Responses to the questions posed and the missing information were received on November 5, 2012. At this time the Department also indicated that, of the recent suggestions for release, an additional three (3) pages of information withheld in accordance with section 21 would be released. No information withheld in accordance with section 30 was released.

[18] Consequently, informal resolution attempts were unsuccessful and by letters dated November 8, 2012 the parties were advised that the Request for Review had been referred for formal investigation as per section 46(2) of the *ATIPPA*. As part of the formal investigation process and in accordance with section 47 of the *ATIPPA*, both parties were given the opportunity to provide written submissions to this Office. The parties were informed that the issues to be addressed in the submissions, and which would form the substance of this Report, were:

1) *Was the Public Body correct in its application of section 21 of the ATIPPA (legal advice) and its refusal to disclose information requested by the Applicant pursuant to this provision?*
2) *Was the Public Body correct in its application of section 30 (disclosure of personal information) and its refusal to disclose information requested by the Application pursuant to this provision?*

[19] Following the commencement of the formal investigation process, a new coordinator was assigned to the Department and, on January 14, 2013, this Office was advised that the Department had reconsidered its position and was exercising its discretion to release an additional 109 pages of information to the Applicant. This included the acceptance of all recommendations in relation to section 30. Consequently, at the time of the commencement of this Report:

i) over 60% of the responsive records had been released to the Applicant;
ii) this Office agreed with the Department's severing in relation approximately 25% of the responsive records; and
iii) only 68 pages of records remained at issue for this Report.

II PUBLIC BODY'S SUBMISSION

[20] The Department's submission is set out in correspondence dated January 14, 2013. The Department submits that:

> *The request giving rise to this review sought access to the entire contents of a file held by* [a named solicitor] *in relation to the applicant. As you are aware, at that time,* [the named solicitor] *was the Department of Justice solicitor who was advising* [first named public body] *and* [second named public body] *with respect to an employment dispute concerning the applicant.*

[21] The Department's submission focuses entirely on its claim of section 21, given that all recommendations from the Analyst regarding section 30 had been accepted by the time the submission was provided to the OIPC. The submission addresses both solicitor-client privilege and litigation privilege, as it had already been decided by this Office that section 21 includes both privileges.

[22] The Department notes the test for the application of solicitor-client privilege as enumerated in *Solosky v. The Queen* as follows:

> 1. *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.*

In relation to the second factor, the Department goes on to quote from various court cases across the country which discuss the concept of the "continuum of communications." To this end, the Department submits:

> *These cases establish that even where a document or communication does not contain a request for or provide legal advice, solicitor-client privilege may still attach where the communication is part of the exchange of exchanges or communications which culminate in legal advice, or where necessary history or background is given to the solicitor to enable the solicitor to provide the required legal advice on an ongoing basis.*
>
> *In processing the applicant's request in the instant case, the Department of Justice applied the reasoning outlined above.* […] *The responsive records* […] *consisted predominantly of communications with* [the] *client that either sought or provided direct legal advice in relation to that ongoing dispute, or which conveyed information which was intended to keep* [named solicitor] *informed on the progress of that dispute so that she could provide legal advice as and when required.*

[23] In relation to litigation privilege, the Department explains:

> *In order to be protected by litigation privilege, a document must be prepared, gathered or annotated for the dominant purpose of use in actual, anticipated or contemplated litigation. This can include notes that set out a solicitor's mental impressions, strategies, legal theories or draft questions, whether or not they were actually sent to the client.*
>
> *In this case, the Department of Justice became involved in this matter due to a pending employment dispute that was anticipated to result in litigation. The responsive records were all compiled with such anticipated litigation in mind.* […] *Litigation privilege retains its purpose and effect where the litigation giving rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended.*

III APPLICANT'S SUBMISSION

[24] The Applicant's submission is set out in correspondence dated December 3, 2012. In her submission, the Applicant provides the history leading up to her access request and subsequent Request for Review. The Applicant states that the requested records:

> […] *was/is a* ***HR file****. I have not entered into any legal proceedings in relation to this file. It was the Department of Justice who is hiding behind the client/solicitor privilege. As most employees at the Department of Justice are lawyers, I believe this denial was inappropriate and failed to adhere to the provisions of the Act. It appears to be a deliberate and intentional act to deny me access to my own information.*
>
> [Emphasis in original]

[25] In relation to the records which were released to the Applicant at the time her formal submission was received by the OPIC, the Applicant points out that some of documents which she has received are unreadable or poorly copied due to the placement of "post-it" notes over portions of records. The Applicant also expresses her concern regarding the numerous pages of records which were initially withheld despite being publicly available and, therefore, clearly not protected by solicitor-client privilege. The Applicant notes that of the items listed as withheld there is no apparent reference to any legal proceeding. The Applicant identifies that she had not been provided with information which she, herself, sent to the Department in relation to this matter. Finally, the Applicant notes that the phrase "frivolous and vexatious" was placed on record(s), despite her belief

that the matter was not of such a nature and given that a claim of this nature was not part of *ATIPPA* at the time her Request was made.

[26] It is the position of the Applicant that "*the DOJ abused their authority, implemented unnecessary blockades and ultimately changed legislation all in an effort to preclude me from accessing my information.*"

IV DISCUSSION

[27] The issues to be considered in this matter are whether the Department has properly applied sections 21 and 30 of the *ATIPPA* to withhold information from the Applicant.

[28] As mentioned above, all information severed in accordance with section 30 was recommended for release with the exception of one page, and this recommendation was accepted in its entirety. The one page that I agree must be withheld pursuant to section 30 contains the personal information of identifiable individuals including: names, opinions and views, and employment information.

[29] The records to which I accept that section 21 applies only amount to approximately 27% of the records. It should be noted at this time that despite the issue being raised in its formal submission, it appears that the Department does not claim that litigation privilege attaches to any of the remaining records; only solicitor-client privilege is claimed.

[30] In respect of the information which currently remains severed or withheld in accordance with section 21, I generally accept the Department's position regarding the "continuum of communication", with some qualifications which I will outline below. The necessary elements for a claim of solicitor-client privilege were set out in *Solosky v. The Queen* and have been quoted above; however, I believe they bear repeating:

1. *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.*

[31] Included in the Department's case law in relation to the concept of the "continuum of communications" is this quotation from *Camp Development Corp. v. South Coast Greater Vancouver Transport Authority*:

> *… privilege extends to more than the individual document that actually communicates or proffers legal advice. The reality is that in order for a lawyer to provide advice, he or she will often require history and background from a client. The lawyer will often be asked to provide legal advice that best advances a particular business strategy or objective. He or she may repeatedly contact the client asking for clarification of some issue that is salient to the retainer and to the advice being sought. The first expression of an opinion prepared, whether in a letter or in a commercial document, may elicit further comment from the client and require revision. It is this chain of exchanges or communications and not just the culmination of the lawyer's product or opinion that is privileged.*
>
> [Emphasis in original]

[32] While I accept this position, I believe it requires some qualification. The Court in *R. v. Trang* offered a discussion of the concept of solicitor-client and litigation privilege and while it is lengthy and robust in its cited caselaw, I believe it is necessary to quote from it in full:

> *[13] I find that legal advice was sought and given relating to the Drafts. However, such finding does not resolve the issue of whether any facts/fruits of the investigation contained in the Drafts are protected by such privilege.*
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> *[14] Although the jurisprudence on this issue in the criminal context is sparse, guidance is provided by R.D. Manes and M.P. Silver in Solicitor-Client Privilege in Canadian Law (Toronto: Butterworths, 1993). The authors deal with the disclosure of relevant facts within the client's knowledge in the solicitor-client privilege context. They conclude based on the jurisprudence cited at p. 130:*
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> > *...the client cannot refuse to disclose a relevant fact* ***[fruits of an investigation]*** *within the client's knowledge on the ground of privilege, merely because the client incorporated that fact* ***[fruits of an investigation]*** *into a privileged communication with the client's lawyer. [Emphasis added.]*
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> *[15] The authors elaborate at p. 131:*
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> > *The Supreme Court of the United States in Upjohn Co. v. United States (1981), 449 U.S. 383 (C.A. 6th Cir. 1980) has held that privilege only protects disclosure of communications, but not of facts.*
> >
> > > *The protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client*

> *cannot be compelled to answer the question, "what did you say or write to the attorney?", but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.*

Thus the courts "have noted that a party cannot conceal a fact merely by revealing it to his lawyer."[15] [citation omitted.] It is submitted that this quote states the appropriate rule, and can be seen as an overall rationale for the exception of matters of fact from privilege. It would be all too easy for clients to avoid discovery simply by revealing facts to their lawyer in some form of communication. This would defeat the objective of proper discovery and in the end defeat the ends of justice. Nevertheless, the distinction between what a client said or wrote to a lawyer and a fact within the client's knowledge can be a very fine distinction.

[16] In R. v. Charron reflex, (2001), 161 C.C.C. (3d) 64, the Quebec Court of Appeal at pp. 81, 82 explained the difference:

> *Privilege protects the content of communication and not knowledge independently acquired of facts which may have been disclosed*
>
> *In the context of the law of evidence, privilege prevents disclosure of "communications", but does not extend to "facts" which may have been discussed, the existence of which may be proved independently of the "communication". For example, a client appearing as a direct witness of an automobile accident cannot refuse to respond to the question as to whether the traffic light was red or green, which constitutes a fact, but may refuse to disclose what he revealed to his lawyer on the issue, provided it is a "privileged" communication which meets the aforementioned conditions. This fundamental distinction exists in the doctrine and the case law of both Canada and the United States.*
>
> *...*
>
> *In the doctrine, Sopinka, Lederman and Bryant state the following in their treatise The Law of Evidence in Canada (1992): "The protection is for communications only and facts that exist independent of communication may be ordered to be disclosed". Furthermore, the authors take pains to add that this distinction is not always clear and that the Court should be prudent in this regard so as to avoid blurring the contours of privilege.*
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> *... It is occasionally difficult to qualify a fact which was discovered further to a privileged communication, in which case disclosure of the fact may not be ordered: knowledge of the fact was not acquired independently of the communication. In Gosselin v. The King (1903), 7 C.C.C. 139, a judgment of the Supreme Court of Canada, the Honourable Mr. Justice Davies, speaking for the majority, made the following nuance in the context of privileged "communications" between husband and wife [at p. 152]:*

> *[TRANSLATION] The facts to which she testified were independent facts gained by her own observation and knowledge and not from any communication from her husband.*

[17] Further, solicitor-client advice often takes place in a continuum of communication. Although a civil case, Roscoe J.A. for the Nova Scotia Court of Appeal in Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co., 2000 NSCA 96 (CanLII), 2000 NSCA 96; [2000] N.S.J. No. 258 (QL) dealt with the issue of drafts at paras. 29- 36:

> *¶ 29 As noted above, many of the documents in issue on this appeal are draft copies of letters eventually sent to Jones by Mitsui. Mitsui submits that in each case a draft of the letter was first sent to either or both of the Tokyo legal department and Smith Lyons for legal advice, and that to produce the draft letters would permit Jones to infer the nature and extent of the legal advice received. The respondent cites as authority for this proposition International Minerals & Chemical Corp. (Canada) v. Commonwealth Insurance Co. (1992), 11 C.C.L.I. (2d) 243 (Sask. Q.B.). The respondent submits that since all correspondence was being checked by the legal department in Tokyo, all earlier draft copies of correspondence and references to the preparation of drafts are caught by both solicitor client privilege and litigation privilege.*
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> *¶ 30 In International Minerals, Halvorson J. was asked to determine, in an insurance matter, whether draft proofs of loss were privileged in the context of the insurers' allegation of fraud by the insured in the preparation of the proofs of loss. In an earlier decision concerning a claim of privilege between the same parties in the same case, Halvorson J. had said:*
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> > *To engage solicitor-client privilege, it must be shown that the communication or document was made confidentially for the purpose of legal advice. Those objectives must be construed broadly. Where there is a continuum of communications and meetings between the solicitor and client, and information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, the privilege will attach to those communications and documents (see Balabel). (See International Minerals & Chemicals Corp. (Canada) v. Commonwealth Insurance Co. (1990), 47 C.C.L.I. 196, 89 Sask. R. 1 at pp. 7 and 8 [Sask. R.]).*
>
> *¶ 31 In Balabel v. Air-India, [1988] 2 All E.R. 246 at p. 256, the case relied on by Justice Halvorson, the court agreed with the master who had decided:*
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> > *Once solicitors are embarked on a conveyancing transaction they are employed to ensure that the client steers clear of legal difficulties, and communications passing in the handling of that transaction are privileged [if their aim is the obtaining of appropriate legal advice] since the whole handling is experience*

> *and legal skill in action and "a document passing during a transaction does not have to incorporate a specific piece of legal advice to obtain that privilege".*

¶ 32 Halvorson J. found that the documents were prepared for the specific purpose of obtaining legal advice and that therefore the draft proofs, draft business interruption claims, and associated background papers were protected by solicitor client privilege. Although Halvorson J. found that the documents did not qualify for litigation privilege because they did not meet the dominant purpose test, he found that documents that were not actually placed before counsel, but were a necessary step in generating documents which were to be given to counsel for advice, were protected presumably by solicitor client privilege.

¶ 33 In reviewing the documents in issue on this appeal, where it is revealed that either the legal department or outside counsel were actually involved in the preparation of the draft, that is, that specific legal advice was sought and received, I would agree that the document would be protected by solicitor client privilege. As well, those documents that were "a necessary step" in the process of receiving legal advice would likewise be privileged. However, where it appears that the dominant purpose of any of the documents was not the contemplated litigation, but for the dominant purpose of communicating with Jones in relation to the continued construction of the power plant, litigation privilege would not be applicable.

¶ 34 In this case, even though the final draft of the document was, in many cases, forwarded to Jones and therefore not a communication made in confidence, those portions of it which reflect the advice received from Mitsui's solicitors, to the extent that they are apparent on the draft copies, are privileged. (See Gendis Inc. v. Richardson Oil and Gas Ltd., 1999 CanLII 14214 (MB QB), [1999] 12 W.W.R. 629).

3. Does sending a carbon copy of an otherwise non-privileged document to counsel change its characterization?

¶ 35 The respondent submits that any documents that were sent to the Second Legal Department in Tokyo and outside counsel were sent for the purpose of obtaining legal advice and therefore obviously privileged. As indicated above, to the extent that the documents reveal that advice was sought or given, they will be found to be privileged. However, as noted by Halvorson J. in the first of his International Minerals decisions (1990), supra, at p. 199:

> *... the simple expediency of channelling all communications through legal counsel does not of itself shield the communications from disclosure.*

¶ 36 I would agree with that statement and as well with the following statement made by Saunders J. in Mutual Life Assurance Co. of Canada v. Deputy Attorney General of Canada (1988), 28 C.P.C. (2d) 101 (Ont. S.C.) at p. 105:

> *There are some documents between employees which transmit or comment on privileged communications with lawyers. In my opinion, in the context of this situation, such communications are also privileged.*
>
> *A difficulty arises in the case, for example, of a communication between the employees in which a copy is sent to a lawyer. If the lawyer marks the document or makes notes on it, it becomes a working paper and is privileged. However, not all such documents are privileged simply because the lawyer received copies and put them in his file. In my opinion, that would be extending the right to claim a privilege too far. An unmarked document, it seems to me, must be connected with legal advice or with litigation in order to be privileged.*
>
> [Emphasis in original]

[33] To this end, the concept of the continuum of communications cannot be seen to cloak all the to-and-fro communications between a lawyer and client in the blanket of solicitor-client privilege. The "continuum" must be real, in that the communications must be an advance of idea, thought, strategy, etc to which ultimately the lawyer will provide an opinion or advice. Likewise, the disclosure of strict facts, which on their own would not be protected, cannot be shrouded in protection simply because a letter containing those facts was forwarded to a solicitor. Where solicitor-client privilege is claimed in respect of an access to information request, solicitors should be cautious to ensure that only those records which fall within the continuum and meet the three elements of the test are protected; to do otherwise is a misuse of the privilege.

[34] Most of what the Department is currently attempting to withhold from the Applicant does not appear to be within any continuum of communication. Rather, it seems that these records were simply sent to the solicitor as a matter of routine with no prospect or indication that advice would be sought or given on the matters contained within. Furthermore, many of the records contain only facts which would be independently obtainable outside of the placement of the record in the solicitor's file. As was stated above:

> *... the simple expediency of channelling all communications through legal counsel does not of itself shield the communications from disclosure*
>
> […] *If the lawyer marks the document or makes notes on it, it becomes a working paper and is privileged. However,* ***not all such documents are privileged simply because the***

> ***lawyer received copies and put them in his file.*** *In my opinion, that would be extending the right to claim a privilege too far. An unmarked document, it seems to me, must be connected with legal advice or with litigation in order to be privileged.*
>
> [Emphasis added]

[35] Where there is no indication of a continuum of communication, or where there is nothing within the document to allow the Applicant to infer the legal advice being given or where there is nothing more than facts, independently obtainable, the records must be released to the Applicant.

V CONCLUSION

[36] My finding is that information remains withheld from the Applicant on the basis of a claim of section 21 that does not meet the burden of that section and, therefore, should be released to the Applicant. The specific page references of these records are contained in my recommendations.

[37] There are a few additional matters on which I wish to comment. First, it was stated in the Court of Appeal decision in this matter:

> *[54] This application involves documents in the hands of a DOJ solicitor regarding an employment issue affecting a requester who is an employee of the department. Personnel related matters that may adversely affect public servants whether represented by a union or not, may have significant implications affecting career advancement, demotion, discipline and even termination. There is always a risk that internal management of documents may be affected by personal issues and even matters of political sensitivity. It would be too easy to have documents declared to be subject to solicitor-client privilege to delay resolution of a matter and to deter a public servant or citizen from pressing a claim for access to documents in court.*
>
> *[55] In principle an employment file would likely contain documents (like pay stubs, memos, etc.) that on their face would not normally be considered solicitor-client privileged. Yet the DOJ in this case is claiming privilege for the whole file, not on a document-by-document basis. No affidavit was filed by the Minister with the commissioner identifying, generally, the type of documents in issue and explaining why particular ones met the test for solicitor-client privilege.*

It is clear that had the Department of Justice, in fact, reviewed this file on a "document-by-document basis" at the outset, records would have been released to the Applicant prior to her initiation of a Request for Review with this Office. The Court of Appeal points out that by the very

nature of the matter, it should have been clear to the Department that a more in-depth review of the records was required prior to claiming section 21. The initial review by my Office indicated that over 400 pages of records, on their face, did not meet the parameters to be protected by solicitor-client privilege. This amounted to more than half of the responsive records. The Department's attempt to claim solicitor-client privilege to withhold publicly available material such as legislation and government human resource manuals and policies did not come close to meeting the standard that I expect from the Department of Justice, especially given that it was the lead Department responsible for the *ATIPPA* at the time, and therefore responsible for setting the standard for all other public bodies.

[38] In respect of the Department's claim of litigation privilege, there is not now, nor has there ever been any litigation in this matter. There has been no evidence presented that litigation was anticipated or contemplated. In fact, the Applicant has indicated that this matter was not intended for legal proceedings. For the Department to make a blanket claim without any supporting evidence is not acceptable. Should any public body wish to apply section 21 by claiming litigation privilege, I would expect at least some form of evidence of this claim, beyond a bare assertion.

[39] Finally, I want to point out the amount of time it has taken to resolve this matter. This file has been on-going for over four years. The Applicant has waited far beyond any statutory time frame for access to information, and a large portion of the requested records should have been disclosed under the *ATIPPA* within 30 days. It is disheartening to have to go through a procedure of this length with any public body, let alone a public body such as the Department of Justice, which should have performed far better than it did on this file. Had the time been taken at the outset to properly and thoroughly review the records, a great deal of information might have been released without issue, perhaps reducing the issues for this Review or even avoiding this Review entirely, not to mention the associated court cases.

[40] Under the *ATIPPA* amendments passed in 2012, this Office can no longer review claims of solicitor-client privilege. As a result, an applicant's only options where section 21 has been claimed are to proceed to court to request that the public body's denial of access be reviewed by a judge, or to ask the Commissioner to do so on his or her behalf in accordance with section 60(1.1). This Report now represents the end of a virtual roller coaster ride for the Applicant and for my Office

that began four years ago, which took us through two levels of court and a legislative amendment. It is my most sincere wish, in light of the amended *ATIPPA*, that applicants will not be deterred from seeking an independent review of any decision from an access to information request as a result of being required to proceed through court rather than through my Office for a review. I therefore encourage any applicant whose request has been denied on the basis of a claim of solicitor-client privilege to contact my Office if the applicant wishes me to take their matter before a judge, and I will consider each and every request on its merits.

VI RECOMMENDATIONS

[41] Having found that the Department has improperly applied section 21 to a number of records, in accordance with section 49(1) of the *ATIPPA* I recommend that the Department release to the Applicant the information contained on pages 142-150; 204; 588; 610-614 and 616-653 of the responsive record. I further recommend that the Department review the records which it provided to the Applicant and where the copies are unclear or unreadable, by virtue of the copying procedure or where other documents such as post-its were not removed, provide the Applicant with a clear, readable copy. The post-it notes remain responsive records, however, they should be provided to the Applicant in such a way that the underlying information is not obscured, also ensuring that it remains clear which page each post-it note was attached to.

[42] Under the authority of section 50 of the *ATIPPA*, I direct the head of the Department to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the Department with respect to this Report.

[43] Please note that within 30 days of receiving the decision of the Department 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*.

[44] Dated at St. John's, in the Province of Newfoundland and Labrador, this 5th day of March 2013.

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