



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2012-006

April 12, 2012

College of the North Atlantic

Summary:

The Applicant applied to the College of the North Atlantic (“the College”) under the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) for access to records containing instructions given by the College’s Vice-President and General Counsel to staff in relation to the conduct of a search for records which were to be provided to the Applicant pursuant to an earlier court order. The College allowed access to certain records. However, the College denied access to other records claiming they were subject to litigation privilege and, therefore, excepted from disclosure by section 21 (legal advice) of the *ATIPPA*. The Commissioner determined that the College had properly exercised its discretion to deny access in accordance with the section 21 exception as the records were protected by litigation privilege.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, s. 21; *Access to Information Act*, R.S.C. 1985, c. A-1, s. 23.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2007-015, A-2008-002, A-2008-14, and A-2010-008; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319; *Solosky v. The Queen*, [1980] 1 S.C.R. 821.

I BACKGROUND

[1] In accordance with the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) the Applicant submitted an access to information request to the College of the North Atlantic (“the College”) on April 7, 2009, in which he requested disclosure of records as follows:

[The] Vice President, Qatar project and General Counsel, College of the North Atlantic, submitted an affidavit dated March 22 2009. That affidavit was submitted pursuant to an order from the Supreme Court of Newfoundland and Labrador, Trial Division. The Court Order directed that a representative of the College of the North Atlantic was to supply to me specific documents or in the alternative indicate the reason why the particular documents were not supplied.

1. I am requesting the record(s) of the search parameters or the instructions provided by [the Vice President and General Counsel] or another person to the Qatar personnel who would have initiated the search, which [the Vice President and General Counsel] checked the status of during his mid January 2009 visit to Qatar. It appears that the instructions regarding the search preceded [the Vice President and General Counsel’s] January 2009 visit to Qatar.

Further I am requesting the records of the search parameters or instructions which were left, "with CNA-Qatar staff to continue the searches with respect to certain of the 32 Categories of Documents..."

2. I am requesting the records of the search parameters or instructions provided by [the Vice President and General Counsel] or another person which guided the search which is referenced in number 14 of [the Vice President and General Counsel’s] March 22 2009 affidavit; "I have reviewed the package of documents sent to me by CNA-Qatar and it is incomplete and not what I requested when I provided instructions to staff at CNA-Qatar to provide me with certain documents."

This request is for all records related to this request, which would include but not be limited to emails, letters, reports, memos and personal notes. This request may include my personal information as defined under the ATIPPA but is not limited to my personal information.

The following entries, number 11 (copied in part) and 14 (copied in part) are copied from [the Vice President and General Counsel’s] March 22 2009 affidavit.

11. Many of the 32 Categories of Documents, if they exist, would be located at CNA-Qatar. In mid-January 2009, I traveled to CNA-Qatar. While in Qatar, I met with staff at CNA-Qatar to check on the status of the searches with respect to certain of the 32 Categories of Documents requested by [the Applicant]. The search requests were not complete when I left the State of Qatar so I requested that the searches continue. When I departed from Qatar in late January, 2009 to return to Canada, I left instructions with CNA-Qatar staff to continue the searches with respect to certain of the 32 Categories of Documents and if any documents were located, to forward those documents to me.

14. *On or about March 18, 2009 I received a package of documents from CNA-Qatar which package was compiled and provided to me based on a search relating to certain of the 32 Categories of Documents. I have reviewed the package of documents sent to me by CNA-Qatar and it is incomplete and not what I requested when I provided instructions to staff at CNA-Qatar to provide me with certain documents. The documents included Canadian Adult Achievement Test ("CAAT") results for students of CNA-Qatar, but did not include documentation with respect to TOEFL test results and other student documentation requested by [the Applicant].*

[2] It is necessary to provide background information regarding the Applicant's access request. The Applicant and the College are involved in litigation arising out of a Statement of Claim filed in the Supreme Court of Newfoundland and Labrador, Trial Division. The College has retained external legal counsel to represent it in the litigation.

[3] As part of the court proceedings, on February 23, 2009 the Applicant filed an Interlocutory Application (*Inter Partes*) seeking an order requiring the College to produce certain documents. On February 23, 2009, the Supreme Court of Newfoundland and Labrador, Trial Division ordered that a representative of the College file an affidavit that set out the following: the efforts made to locate the documents requested by the Applicant; which of the documents were found; which documents the College would be producing or not producing; and the reasons why. In response to the order of the court, the College's in-house General Counsel swore an affidavit dated March 22, 2009. It is this affidavit that is referred to in the Applicant's access request, with specific reference being made by the Applicant to paragraphs 11 and 14 of the affidavit. The Applicant is requesting the records relating to the search parameters and instructions communicated by the College's General Counsel or other persons to College staff in relation to the searches referred to by the College's General Counsel in his affidavit.

[4] The College responded to this access request on June 2, 2009, advising the Applicant that access was denied in accordance with section 21 of the *ATIPPA* and indicating that the records were subject to litigation privilege.

[5] In a Request for Review dated June 29, 2009 and received in this Office on that date, the Applicant asked for a review of the decision made by the College.

- [6] During the informal resolution process the College agreed to release additional records to the Applicant. Efforts by an Analyst from this Office to facilitate an informal resolution were unsuccessful and by letters dated November 16, 2010 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.
- [7] The only information at issue in this review is that for which the College has claimed the solicitor and client privilege exception in section 21.

II COLLEGE'S SUBMISSION

- [8] The College provided its submission in correspondence dated December 3, 2010.
- [9] The College points out that “[a]ll of these records relate to the discussion of CNA’s legal team and CNA-Qatar employees as the [sic] work through a request for information made under the rules of the Supreme Court.”
- [10] The College states that the responsive records fall into three categories and has set out its position on each of these categories.

(a) E-mails sent to or by the College’s external legal counsel.

- [11] The College made the following comment on this category of records:

The emails sent to or by CNA’s external legal counsel . . . are meant to be confidential and relate directly to giving or receiving legal advice. Some of the responsive emails contain legal advice in the form of direction for the completion of this search. Some of the responsive email attachments contain legal advice in the form of notations written by CNA’s external legal counsel. The information exchanged in all cases is considered legal advice.

- [12] The College referred to Report 2007-015 in which this Office set out a three-part test that must be met in order to have a valid claim for solicitor and client privilege. There must be:

1. a communication between a solicitor and a client,
2. the communication must entail the seeking or giving of legal advice, and
3. the communication must have been intended to be confidential.

[13] The College submits that the e-mails sent to or by its external legal counsel meet the three-part test for a claim of solicitor and client privilege.

(b) E-mails sent to or by the College's in-house General Counsel

[14] The College points out that when the College's Vice-President and General Counsel sent or received the e-mails he did so as the College's General Counsel and, therefore, the first part of the three-part test is met. In addition, the College states:

The records are also meant to be confidential. The sensitive nature of the request and its significance to CNA and the court case CNA is involved in demands that it be shared only with the individuals best suited to completing the request. No one other than those whose actions were necessary to complete the request would have been copied.

Finally, the legal advice in these records is in the form of direction given to employees of CNA and CNA-Qatar to guide the conduct of request for documents made under the rules of court. We believe therefore that all three parts of the test for solicitor client privilege have been met.

(c) E-mails sent to or by College employees.

[15] The College points out that the records in this category are between a College official and the IT Staff and CNA-Qatar. The College submits that these records are subject to litigation privilege and states:

We note that the records . . . would not have been created if they were not involved in the pending litigation . . . in the Supreme Court of Newfoundland and Labrador Trial Division.

[16] After setting out its position on the three categories of records, the College made the following statement regarding its claim in relation to the solicitor and client privilege exception to disclosure:

CNA carefully considered the actions taken in this request and the decisions to apply Section 21(a). As part of this we considered exercise of discretion and releasing the information. We still believe however after considering the potential benefits of doing this as well as the potential harm it is necessary to maintain the Solicitor/Client privilege of these records.

III APPLICANT'S SUBMISSION

[17] The Applicant did not provide a written submission.

IV DISCUSSION

[18] The only issue to be decided in this Review is whether the information to which access has been denied is subject to solicitor and client privilege and, therefore, excepted from disclosure by section 21 of the *ATIPPA*, which provides 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.

[19] In Report A-2008-002, I discussed the Supreme Court of Canada decision in *Blank v. Canada (Minister of Justice)*, where the Court discussed the phrase “solicitor-client privilege” as found in section 23 of the federal *Access to Information Act* and determined that the phrase included a reference to both legal advice privilege and litigation privilege. I stated in that Report at paragraph 25 as follows:

[25] Given the similar wording of section 23 of the federal Access to Information Act and section 21 of the ATIPPA, I am of the view that section 21 of the ATIPPA provides protection against disclosure of documents subject to either legal advice privilege or litigation privilege. In other words, the phrase “solicitor and client privilege” in section 21 includes both of these privileges.

[20] As indicated in the submission of the College, this Office has adopted a three-part test for determining when information is protected by solicitor and client privilege. In previous Reports this office has relied on the test set out by the Supreme Court of Canada in *Solosky v. The Queen*, which requires that there must be:

- (i) 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.*

[21] I discussed the concept of litigation privilege in Report A-2008-14 and stated at paragraphs 29 to 30 as follows:

[29] The issue of when litigation privilege can be claimed was discussed by the British Columbia Court of Appeal in Hamalainen v. Sippola, 1991 CanLII 440. In that case, the court stated:

Regardless of the terminology used to apply it, the correct rule, as adopted in Voth, is that stated by Barwick C.J. of the Australian High Court in Grant v. Downs (1976), 135 C.L.R. 674 at p.677:

Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

Any attempt to apply the rule when determining a claim of privilege with respect to a document necessarily requires that two factual determinations be made:

- (a) Was litigation in reasonable prospect at the time it was produced, and*
- (b) If so, what was the dominant purpose for its production?*

The onus is on the party claiming privilege to establish on a balance of probabilities that both tests are met in connection with each of the documents falling within the claim. . . .

I am not aware of any case in which the meaning of "in reasonable prospect" has been considered by this Court. Common sense suggests that it must mean something more than a mere possibility, for such possibility must necessarily exist in every claim for loss due to injury whether that claim be advanced in tort or in contract. On the other hand, a reasonable prospect clearly does not mean a certainty, which could hardly ever be established unless a writ had actually issued. In my view litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. . . .

A more difficult question to resolve is whether the dominant purpose of the author, or the person under whose direction each document was prepared, was "... [to use] it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation ...".

[30] Therefore, the College bears the burden of proving on a balance of probabilities that when the documents in question were prepared there was a reasonable prospect of litigation and that the author of the document (or the person at whose direction it was prepared) prepared the document for the dominant purpose of seeking legal advice or to conduct or aid in the conduct of litigation.

[22] The Supreme Court of Canada discussed the rationale for litigation privilege in *Blank v. Canada (Minister of Justice)* at paragraph 27:

27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[23] In its submission, the College has indicated its reliance on both aspects of the solicitor and client privilege exception in section 21; legal advice privilege and litigation privilege.

[24] In relation to the claim for litigation privilege, it is clear that litigation has been commenced. The Applicant's access request involves matters referred to in an affidavit sworn to in response to a court order issued pursuant to an Interlocutory Application (*Inter Partes*) made by the Applicant. The only issue to be determined, therefore, is whether the documents in question were prepared for the dominant purpose of conducting or to aid in the conduct of litigation.

[25] Having reviewed the responsive records, it is my finding that the records were prepared by legal counsel for the College (either external counsel or in-house General Counsel) or College staff for the purpose of searching for documents that had been requested by the Applicant during the litigation process. Therefore, the responsive records were prepared for the dominant purpose of conducting litigation or to aid in the conduct of litigation and are, consequently, protected by litigation privilege. Thus, the responsive records are covered by the solicitor and client privilege exception to disclosure set out in section 21 of the *ATIPPA*. In view of my findings in relation to the claim for litigation privilege, it will not be necessary to discuss the claim for legal advice privilege.

[26] I have indicated in previous reports that when a public body is relying on the exception to disclosure set out in section 21 there is a two-step process. In Report A-2010-008 at paragraph 53 I discussed the process to be followed by a public body when it is exercising its discretion as to whether to rely on the section 21 exception:

. . . to determine first of all whether the information in the analysis conducted by external counsel was subject to solicitor and client privilege. Once it was determined by the College that it was, the College should then have proceeded to the next stage in the process and determined what, if any, harm would result from releasing all or some of the information to the Applicant.

[27] The College indicated that it considered releasing the information “however after considering the potential benefits of doing this as well as the potential harm it is necessary to maintain the Solicitor/Client privilege of these records.”

[28] The College has in this matter followed the proper procedure in its reliance on section 21 and in the exercise of its discretion not to release the severed information. As indicated by the Supreme Court of Canada in *Blank*, the College as a party to litigation with the Applicant must be allowed to prepare its case “without adversarial interference and without fear of premature disclosure.”

V CONCLUSION

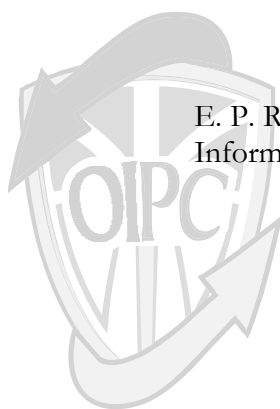
[29] I have concluded that the responsive records are covered by litigation privilege and are, therefore, subject to solicitor and client privilege in accordance with section 21 of the *ATIPPA*. In addition, I have reached the conclusion that the College has properly exercised its discretion by weighing the potential harm against the potential benefits that could result from the release of the records that are subject to solicitor and client privilege. Consequently, the College has properly exercised its discretion to deny access to the records under the section 21 exception. I therefore have no recommendations to make.

VI RECOMMENDATIONS

[30] Although I have made no recommendations, under the 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 their final decision with respect to this Report.

[31] Please note that within 30 days of receiving the 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*.

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 12th day of April 2012.



E. P. Ring
Information and Privacy Commissioner