OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-20-006

Re: Department of Economic Growth, Tourism and Culture

May 6, 2020

Prince Edward Island Information and Privacy Commissioner
Karen A. Rose

Summary: An applicant asked the Department of Economic Growth, Tourism and Culture for access to records related to a grant of financial assistance that the Department had provided to a company in 2010. The Department provided the applicant with access to some responsive records, but withheld some records on the basis that they are subject to solicitor-client privilege relating to another person.

The applicant requested a review of whether the Department had properly applied solicitor-client privilege to withhold 47 pages of records.

The Commissioner found that the 47 pages of records are subject to solicitor-client privilege, and they relate to a person other than the Department, pursuant to subsection 25(2) of the *FOIPP Act.*

The Commissioner confirmed that the Department is required to refuse to provide the applicant with access to the 47 pages.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss. 7, 25, 65

Interpretation Act, RSPEI 1988, c I-8, s. 26(o.1)

Decisions Cited: Order FI-17-008, *Re: Department of Education, Early Learning and Culture*, 2017 CanLII 49926 (PE IPC)

Solosky v. The Queen 1979 CanLII 9 (SCC), [1980] 1 SCR 821

Edmonton Police Service v *Alberta (Information and Privacy Commissioner*), 2020 ABQB 10 (CanLII)

Alberta (OIPC) v. University of Calgary, 2016 SCC 53 (CanLII)

Order FI-17-004, *Re: Public Schools Branch*, 2017 CanLII 19225 (PE IPC)

Boudreau v Loba Limited, 2015 ONSC 4877 (CanLII)

Canada (National Revenue) v. Thornton, 2012 FC 1313 (CanLII)

Philip Services Corp v. Ontario Securities Commission, 2005 CanLII 30328 (ONSCDC)

Other sources cited: Report of the Auditor General of Prince Edward Island, *Special Assignment: Government Involvement with the E-Gaming Initiative and Financial Services Platform*, October 4, 2016

Prince Edward Island, Legislative Assembly, Hansard, 65th Leg, 2nd Sess, Standing Committee on Public Accounts, *Auditor General's Report on E-gaming and Annual Report to the Legislative Assembly* (19 October 2016)

I. BACKGROUND:

[1] In 2016, Prince Edward Island's Auditor General investigated initiatives related to internet gaming which the government of Prince Edward Island had explored, but did not implement. The Auditor General issued a report entitled *Special Assignment:*

Government Involvement with the E-Gaming Initiative and Financial Services Platform ("the Special Report"), dated October 4, 2016.

[2] In the Special Report, the Auditor General commented on three grants provided by Innovation PEI, a part of what is now the Department of Economic Growth, Tourism and Culture (the "Public Body").

[3] Pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01 ("the *FOIPP Act*"), an applicant ("the Applicant") requested access to records relating to one of the grants to a corporation. I shall refer to the corporation as "the Affected Party" throughout this order. The Applicant requested access to the following records:

> In December, 2010, a grant was issued to [the Affected Party] by Innovation PEI. The Auditor General stated in Section 3.32 of her Special Report on e-gaming that "...in late 2010, as the e-gaming project was progressing, [the Affected Party] contacted Innovation PEI requesting an additional grant," and that "Staff took the information request to the CEO, at the time, who approved a further grant of $100,000 to [the Affected Party] in December, 2010." I am requesting a copy of all documents contained in the physical subject files that make mention of this grant, including, but not limited to, the "letter of offer"; "the grant agreement"; "the approval sheet"; "the budget"; "the initial communication between [the Affected Party] and staff, as well as any subsequent communications.

The time period of the requested records is September 1, 2010 to January 31, 2011.

[4] The Public Body located and retrieved 70 pages of responsive records. The Public Body withheld some information pursuant to four provisions of the *FOIPP Act*. The Applicant requested a review by the Information and Privacy Commissioner ("the Commissioner") of the Public Body's decision to withhold 47 pages pursuant to subsection 25(2) of the *FOIPP Act,* which relates to legal privilege.

[5] The Applicant also questioned the adequacy of the Public Body's search, and provided specific questions and observations. The Public Body provided further details regarding their records search, and the Applicant indicated that it was no longer necessary to pursue the adequacy of the search.

II. RECORDS AT ISSUE

[6] The Public Body claims that solicitor-client privilege applies to 47 pages of responsive records, and that the records relate to a person other than the Public Body. The person is a corporation who confirms that the 47 pages are invoices to them from a law firm, for legal services. I will refer to these 47 pages as "the records at issue".

[7] The Public Body provided some responsive records to the Applicant. Within those records, the Public Body disclosed to the Applicant a table summarizing the particulars relating to five invoices, including the dates of the invoices, the invoice numbers, and the total amount due. The table also includes columns of "claimable expenses", "rate" (80%), and "eligible expenses". The narrative portion of invoices, in which the particulars of services are described, is not included.

III. THE ISSUE

[8] There is one remaining issue in this review:

> Did the head of the Public Body properly apply subsection 25(2) of the *FOIPP Act* to withhold the records at issue?

IV. BURDEN OF PROOF

[9] As this inquiry relates to the decision of the head of the Public Body to refuse to provide the Applicant with access to all or part of a record, the burden of proof is on the Public Body. Pursuant to subsection 65(1) of the *FOIPP Act,* it is up to the head of the Public Body to prove that the Applicant has no right of access to the records at issue. The Public Body must present evidence which shows that it is more likely than not that subsection 25(2) of the *FOIPP Act* applies.

[10] In this matter, the Public Body does not claim to hold the legal privilege; rather, the Public Body submits that it is held by the recipient of the financial grant, the Affected Party. The Commissioner gave the Affected Party the opportunity to provide submissions, and considered the representations of the Public Body, the Applicant and the Affected Party.

V. ANALYSIS

[11] Subsection 25(2) of the *FOIPP Act* is a mandatory exception to disclosure, requiring a public body to withhold information which is subject to the exception. As noted at paragraph 10 of Order FI-17-008, *Re: Department of Education, Early Learning and Culture*, 2017 CanLII 49926 (PE IPC), subsection 25(2) of the *FOIPP Act* prohibits a public body from disclosing records containing privileged information when the privilege belongs to another party. Subsection 25(2) references clause 25(1)(a). These two provisions state:

> 25. Privileged information
> (1) The head of a public body may refuse to disclose to an applicant
> (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege;

. . .
(2) The head of a public body shall refuse to disclose information described in clause (1)(a) that relates to a person other than a public body.

[12] If the components of subsection 25(2) are met, the head of a public body must not disclose the responsive information to an applicant. As the exception is mandatory, there is no discretion for the head of a public body to provide an applicant with access to the information. There are two components to a subsection 25(2) analysis:

- The information in the records at issue must be subject to legal privilege; and
- The privileged information must relate to a person other than a public body.

[13] I will address whether the information in the records at issue relates to a person other than a public body. I will then consider whether the information in the records at issue is subject to solicitor-client privilege.

Does the information in the records at issue relate to a person other than a public body?

[14] I have considered the contents of the Special Report, and the contents of the records that the Public Body has disclosed to the Applicant. I have also considered that the Public Body advises the records at issue relate to the Affected Party, which the Affected Party confirms.

[15] The Affected party is a corporation. Subsection 26(o.1) of the *Interpretation Act* states that the word "person" in an enactment, includes a corporation:

26. In an enactment
. . .
(o.1) "person" includes a corporation; . . .

[16] Based on the foregoing, I find that the records at issue relate to the Affected Party, who is not a public body, and who is a person within the meaning of subsection 25(2) of the *FOIPP Act*.

Is the information in the records at issue subject to solicitor-client privilege?

[17] *Solosky v. The Queen* 1979 CanLII 9 (SCC), [1980] 1 SCR 821 is one of the leading Canadian decisions relating to solicitor-client privilege. At page 837, Justice Dickson cited remarks of the trial judge with approval, and set out three requirements of solicitor-client privilege:

> As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(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.
> . . .

[18] These three criteria are widely known as the *Solosky* test. There have been many subsequent decisions of various courts since this 1979 decision, which have fleshed out further detail relating to these three criteria.

[19] The Affected Party has identified themselves as the client to whom the records at issue relate, and has also identified the law firm who provided the records at issue to the Affected Party, satisfying the first criterion of the *Solosky* test. Further, invoices of a solicitor are presumed to be subject to solicitor-client privilege. The Alberta Court of Appeal recently commented on this presumption in *Edmonton Police Service* v *Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), stating:

> [349] There is a presumption that information in lawyers' bills of account is privileged: *Maranda* at para 33. This presumption is "consistent with the aim of keeping impairments of solicitor-client privilege to a minimum:" ibid. "This rule applies regardless of the context in which it is invoked …:" *Canada*

(National Revenue) v *Thompson*, 2016 SCC 21, Wagner and Gascon JJ at para 19.

[350] The information presumptively privileged includes both the "narrative" in accounts and billed amounts: *Maranda* at para 33.

[351] The economic terms of a solicitor-client relationship are privileged, even if the fact of that relationship is public: *Stevens* v *Canada* at para 39, relying on *Municipal Insurance Assn. of British Columbia* v *British Columbia (Information & Privacy Commissioner)* (1996), 1996 CanLII 521 (BC SC), 143 DLR (4th) 134 (BC SC) at 139.

[352] The presumption of privilege might be rebutted by evidence, e.g., supporting the inference that account information did not relate to legal communications but to purely business transactions. Thus, "if the retainer at the time of receipt of funds is merely to act as a paying agent, there might be no privilege:" *Wyoming Machinery Company* v *Roch*, 2008 ABCA 433 at para 22; see also *Maranda* at para 30; *Stevens* v *Canada* at para 49 (a lawyer sells a piece of property for the client). In this sense, "whether the financial records of a lawyer are subject to solicitor-client privilege depends on an assessment of the connection between the record in issue and 'the nature of the relationship in question' (*Maranda* at para. 32):" *Donell* v *GJB Enterprises* at para 55. This type of rebuttal of the presumption of privilege goes to the issue of whether the information fell properly within the scope of a solicitor-client relationship (as opposed to some other relationship). That is, while accounts are presumed to be privileged, evidence may show that the accounts did not relate to a solicitor-client matter.

[20] The Public Body declined to provide the records at issue to the Commissioner to review. The 2016 Supreme Court of Canada decision, *Alberta (OIPC) v. University of Calgary*, 2016 SCC 53, held that the Alberta Office of the Information and Privacy Commissioner could not compel a public body to provide records over which a public body claims solicitor-client privilege. The provisions considered in the Supreme Court decision are similar to those of Prince Edward Island. Therefore, the Commissioner cannot compel a public body to provide to the Commissioner any records over which a public body claims solicitor-client privilege.

[21] The Commissioner must consider all of the evidence presented to assess whether the Public Body has properly applied subsection 25(2) of the *FOIPP Act*. In this matter, there has been much public scrutiny, and there is some publicly available information related to the circumstances of the creation of the records at issue. Additionally, the Affected Party confirms that the records at issue are invoices to the Affected Party from a law firm for legal services. In consideration of the contents of the Special Report, the contents of the other responsive records the Public Body provided to the Applicant, and the evidence of both the Public Body and the Affected Party, I accept that the records at issue are invoices from a law firm to the Affected Party.

[22] As noted above, the presumption that a legal invoice is subject to solicitor-client privilege is rebuttable by evidence that the invoice does not relate to legal communications. The Applicant challenges whether the invoices relate to legal services. The Applicant bases their submission on the Auditor General's statements in the Special Report (paragraphs 3.16 and 3.17 of the Special Report), and on subsequent testimony by the Auditor General before the Legislative Assembly's Standing Committee of Public Accounts, that the law firm was supplying project management services, and that such services are not protected by solicitor-client privilege.

[23] The Applicant directed the Commissioner to excerpts of the testimony of the Auditor General at meetings of the Standing Committee of Public Accounts. On October 19, 2016, at page 57 of the transcript, the Auditor General states:

> I'd just like to clarify that we weren't expecting to get any information that was protected by solicitor-client privilege. We made that quite clear. We didn't expect that. We didn't ask for that from [the Affected Party]. We just wanted project management information which is different….

[24] The Auditor General did not suggest that the law firm did not provide any legal services, but concluded that any project management services were not subject to solicitor-client privilege. While I am not aware of the subject(s) of the legal advice, I expect that online

gaming initiatives would have required legal opinions related to various components of the project.

[25] One of the records which the Public Body disclosed to the Applicant, at page 39 of 70, is a letter to the grant recipient, the Affected Party. It states in part:

> This contribution has been authorized subject to [the Affected Party] engaging a local law firm to assist with the legal and logistical details of implementing the findings ("the Project") of the "Regulatory and Compliance Framework" study previously undertaken, and to the pertinent requirements, definitions and limitations of the program as stated hereunder. *[Underline emphasis added]*

[26] I do not need to consider whether the narratives of the invoices relate only to legal services. I must only be satisfied that the invoices relate to some legal services. In Order FI-17-004, *Re: Public Schools Branch*, 2017 CanLII 19225 (PE IPC), at paragraph 34, second bullet, the Commissioner accepted that the Public Body is not required to sever solicitor-client privileged information from a record:

> . . . The *FOIPP Act* does not require a public body to sever information from a privileged communication, even if the information is factual, innocuous or of a general nature, where it is nonetheless part and parcel of the privileged communication.

[27] Based on the foregoing, I am not persuaded that the presumption that the records at issue are subject to solicitor-client privilege has been rebutted. I find that the information in the records at issue is subject to solicitor-client privilege.

Waiver of Privilege

[28] The Applicant submits that, in the event that it is found that solicitor-client privilege applies to the records at issue, the privilege has been waived by the Affected Party:

> If you are not satisfied that there is sufficient rebuttal evidence to support the conclusion that the documents are not privileged, then I would ask that you recognize that by sharing such privileged documents with a third party that privilege was waived, unless the public body can provide you with evidence that the third party was retained or otherwise acting as a vehicle of legal advice between the solicitor and client.

[29] The concerns of the Applicant are quite understandable. The records at issue are in the custody of the Public Body because the Affected Party provided a copy of the invoices to the Public Body to process the financial grant. A copy of the records at issue were also provided to the Auditor General by the Affected Party for a purpose relating to the Special Report investigation.

[30] In Order FI-17-004, *supra*, at paragraph 47, the Commissioner accepted that waiver of privilege requires a voluntary disclosure by the client. If it is not an express waiver, it can be implied if the client's conduct demonstrates an intention to waive privilege.

[31] I accept that the Affected Party provided a copy of their invoices to the Public Body for payments under the financial grant. In *Boudreau v Loba Limited*, 2015 ONSC 4877 (CanLII), at paragraph 22, the Court held that disclosing an invoice for payment was not a waiver of privilege, stating:

> . . . Furthermore, privilege is not waived by sharing privileged information with third parties for accounting and billing purposes (See: *Descoteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860, at page 879; Dodek, *Solicitor-Client Privilege*, *supra* at page 138 and 247-250).

[32] In providing a copy of the invoices to the Public Body, the Affected Party's purpose was for payment. There has been no evidence provided to me that the Affected Party, explicitly or implicitly, intended to waive their privilege. I find that the Affected Party did not waive their privilege by providing a copy of their invoices to the Public Body for the purposes of processing the grant payment.

[33] The Affected Party states that the waiver of privilege required to provide the records at issue to the Auditor General was a limited one, carried out at the request of the Premier at that time. This statement is supported by the circumstances of the Affected Party's disclosure to the Auditor General. Disclosure to the Auditor General was for the purpose of permitting the independent oversight of government programs and expenditures. In *Canada (National Revenue) v. Thornton*, 2012 FC 1313 (CanLII), the Federal Court considered the intention of the privilege holder in exercising a limited waiver of privilege:

> [47] Documents that are protected by SCP and that are knowingly disclosed in confidence by the privilege holder to an auditor for the limited purpose of enabling the auditor to perform an audit and issue a fairness opinion retain such protection vis à vis other third parties, under the doctrine of limited waiver (*Interprovincial Pipe Line Inc and IPL Energy Inc v The Minister of National Revenue* ((1995), 95 DTC 5642, at 5646-7; *Anderson Exploration Ltd v Pan-Alberta Gas Ltd*, [1998] A.J. No 575, at paras 28-30 [*Anderson Exploration*]; *Philip Services Corp v Ontario Securities Commission,* 2005 CanLII 30328 (ON SCDC), [2005] OJ No 4418, at paras 47 and 57-58 [*Philip Services*]). It bears emphasizing that under this doctrine, the intention of the privilege holder is key.
>
> [48] It also bears emphasizing that cases involving disclosure of privileged information to financial institutions are not particularly relevant to a consideration of the issue of limited waiver in the context of such disclosure to an auditor. In the latter context, there is a strong public interest in companies and other types of business organizations being properly audited, for the benefit of actual and potential shareholders or other members of the investing public, even where the disclosure of privileged information is not strictly mandated by statute (see, for example, *Philip Services*, above, at para 57). In furtherance of that public interest, the disclosure of privileged information that may reasonably be required by an auditor for the purposes of providing a fairness opinion will not be considered to constitute an unlimited waiver of SCP, when such disclosure is made in confidence and solely for that purpose.

[34] The Federal Court in *Thornton, supra*, relied upon a previous decision of the Ontario Supreme Court, *Philip Services Corp v Ontario Securities Commission,* 2005 CanLII 30328 (ON SCDC). At paragraph 58 of that decision, the court found that the Ontario Securities Commission had erred in their finding that providing solicitor-client privileged information to an external auditor constituted an unlimited waiver. After quoting Justice Arbour of the Supreme Court of Canada, that solicitor-client privilege must remain as close to absolute as possible, if it is to retain relevance, the Ontario Supreme court stated, at paragraph 51:

> [51] While the present case does not involve a Charter challenge, the message from the Supreme Court jurisprudence is clear: restrictions on solicitor-client privilege to attain other important societal objectives are to be closely scrutinized and restricted to what is absolutely necessary for the competing objective so as to achieve the minimal necessary impairment of solicitor-client privilege. It would follow, therefore, that s. 153 of the OBCA cannot be read as authorizing the auditor to ignore the solicitor-client privilege with which the documents are impressed in his hands by their nature as Legal Opinions and the limited use that may be made of them.

[35] There is no evidence before me that the Affected Party intended their disclosure of the records at issue to include disclosure to the wider public, nor that the Auditor General or the Affected Party disclosed the records at issue to any other person or organization. In my view, the Affected Party's disclosure of a copy of the records at issue for a limited purpose, to assist the Auditor General in her examination of the e-gaming file, does not abrogate the Affected Party's claim of solicitor-client privilege.

[36] I find that the Affected Party has not waived their solicitor-client privilege attaching to the records at issue, except for the limited waiver provided to the Auditor General. As a result, I find that the head of the Public Body properly applied subsection 25(2) of the *FOIPP Act* to withhold the records at issue from the Applicant.

VI. SUMMARY OF FINDINGS

[37] I find that the records at issue are the subject of solicitor-client privilege, and relate to a person other than a public body, the Affected Party. I further find that the Affected Party has not waived their privilege. As such, I find that the Public Body has properly applied subsection 25(2) of the *FOIPP Act* with respect to the records at issue.

VII. ORDER

[38] I confirm the decision of the Public Body to refuse to provide the Applicant with access to the records at issue, pursuant to subsection 25(2) of the *FOIPP Act*.

[39] I thank all parties for their submissions. I am particularly appreciative of the Affected Party for providing a description of the records at issue which permitted the Applicant to make fulsome submissions, and the Commissioner to make informed findings.

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Karen A. Rose
Information and Privacy Commissioner