Office of the Information & Privacy Commissioner for British Columbia

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Order F19-21

MINISTRY OF ATTORNEY GENERAL

Chelsea Lott
Adjudicator

May 13, 2019

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Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 44.

INTRODUCTION

[1] This is an order pursuant to s. 44 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) requiring the Ministry of Attorney General (Ministry) to produce to the Information and Privacy Commissioner (Commissioner) certain records the Ministry claims are subject to s. 14 (solicitor client privilege) of FIPPA. This order is made in the context of an unfinished inquiry into whether, amongst other issues, s. 14 applies to these records. As the Commissioner's delegate, I have concluded that it is necessary to review the records to make a decision regarding the application of s. 14.

[2] By brief background, this proceeding stems from an individual's 2015 access to information request to the Ministry. The Ministry refused to disclose the records in issue, relying in part on solicitor client privilege. The applicant then asked the Commissioner to review the matter. Mediation did not settle the issues and the applicant requested an inquiry.

[3] Following the close of submissions, I extended the Ministry two opportunities to provide further and better evidence regarding its claim of solicitor client privilege. The Ministry provided further evidence in both instances.

However, after reviewing the entirety of the Ministry's materials, I have significant doubts that solicitor client privilege applies to certain records.

[4] In my view, it is appropriate at this stage to review the records to fulfill this Office's statutory mandate to fairly adjudicate whether the Ministry is authorized to withhold the records on the basis of solicitor client privilege. Inspecting the records will mitigate the risk that I order records which are in fact subject to solicitor client privilege to be released to the applicant.

[5] The Commissioner's inspection of potentially privileged records is contemplated by FIPPA and does not affect or waive the privilege.[1]

I. AN OVERVIEW OF FIPPA INQUIRIES

[6] I will start by outlining the statutory scheme and procedural rules governing inquiries under FIPPA, as they are relevant to the sufficiency of evidence tendered by the Ministry.

a. Inquiries under FIPPA

[7] FIPPA creates an administrative body, headed by the Commissioner, with jurisdiction to resolve access to information disputes. The Commissioner provides independent oversight of British Columbia's access to information laws which have been recognized as quasi-constitutional.[2]

[8] The public's right to access government records is subject to limited exceptions to disclosure, some of which are mandatory and some discretionary. For instance, a public body must refuse to disclose cabinet confidences (s. 12) and may refuse to disclose information that is subject to solicitor client privilege (s. 14).[3] An applicant can request that the Commissioner "review" a public body's decision to withhold information.[4] If the Commissioner accepts the request for a review, a copy of the applicant's request for review will be provided to the head of the public body.[5] A delegate of the Commissioner is then assigned to investigate and try to settle the matter.[6]

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[1] FIPPA, s. 44(2.1).
[2] The commissioner is appointed by the Lieutenant Governor on recommendation of the Legislative Assembly and is an officer of the Legislature and independent of government (s. 37). The commissioner's legislated mandates and responsibilities are set out in s. 42. Regarding its quasi-constitutional status see *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para. 40, which stated that federal access to information legislation was quasi-constitutional.
[3] FIPPA, ss. 12–22.1.
[4] FIPPA, s. 52.
[5] *Guide to OIPC Processes (FIPPA)* at p. 10 which can be accessed on the OIPC website at https://www.oipc.bc.ca/guidance-documents/1599.
[6] FIPPA, s. 55; *Guide to OIPC Processes (FIPPA)* at p. 11.

[9] If the matter is not settled at mediation, FIPPA authorizes the Commissioner to conduct an "inquiry" which is an administrative hearing into the public body's refusal to disclose information under FIPPA's enumerated exceptions.[7] Section 56 of FIPPA provides:

> 56(1) If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[10] Disputes about a public body's decision to withhold information are only sent to an inquiry if requested by the applicant, in other words, the Commissioner does not initiate an inquiry. Before an inquiry, the investigator will prepare a fact report describing the issues in dispute for the inquiry. The parties must generally approve the issues in dispute as set out in the fact report.[8] Inquiries are conducted as a new proceeding, entirely separate from the mediation.[9]

[11] After receiving the parties' fact report, the registrar of inquiries sends the parties a notice of inquiry, which sets out the order and timelines for submissions. The registrar makes procedural decisions in the course of submissions such as adjournments and evidentiary issues. When submissions are complete, the matter is assigned to an adjudicator, who is always a different delegate of the Commissioner than the one who conducted the mediation. The Commissioner's long standing policy is to only assign inquiries involving solicitor client privilege to a delegate who is a lawyer or has a law degree.

[12] At an inquiry regarding a public body's decision to withhold information, the adjudicator will consider whether the party with the burden of proof under s. 57 of FIPPA has met that burden. The adjudicator's decision turns on questions of fact and law and affects the interests of the applicant and public body.[10] The adjudicator is required to make an order regarding the information in dispute.[11] The order is a final decision and can be enforced as if it were a judgment of the BC Supreme Court, subject to any judicial review of the decision.[12]

[13] In the present case, the applicant requested this inquiry when the matter was not settled at mediation.[13] The investigator's fact report listed ss. 14 and 22 as the issues to be decided at the inquiry. The parties approved the fact report and, therefore, agreed that the Ministry's decision to withhold information in the

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[7] FIPPA, s. 56.
[8] *Guide to OIPC Processes (FIPPA)* at p. 12.
[9] Order F18-27, 2018 BCIPC 30 at para. 5.
[10] Section 56 says the commissioner may decide all questions of fact and law arising in the course of the inquiry.
[11] FIPPA, s. 58(2).
[12] FIPPA, ss. 59 and 59.01.
[13] Investigator's fact report at para. 8.

records under ss. 14 and 22 of FIPPA was to be adjudicated at inquiry.[14] Thus, the applicant has specifically challenged the Ministry's assertion that the records are subject to solicitor client privilege. If he had not, s. 14 would not be set out as an issue for inquiry in the fact report. Both parties have made submissions on whether ss. 14 or 22 apply to the information in dispute.

II. Section 14 of FIPPA

[14] I will now address how s. 14 of FIPPA has been interpreted. Section 14 is a discretionary exception that provides that the head of a public body "may refuse to disclose to an applicant information that is subject to solicitor client privilege." Section 14 includes litigation privilege as well as legal advice privilege, which is commonly called solicitor client privilege.[15] In this case, the applicant is challenging the Ministry's assertion that the information in dispute is protected by legal advice or solicitor client privilege.

[15] The purpose of s. 14 is "to ensure that what would at common law be the subject of solicitor-client privilege remains protected."[16] As explained in *Legal Services Society v BC (Information and Privacy Commissioner)*:

> Certainly the purpose of the Act as a whole is to afford greater public access to information and the Commissioner is required to interpret the provisions of the statute in a manner that is consistent with its objectives. However, the question of whether information is the subject of solicitor-client privilege, and whether access to a record in the hands of a government agency will serve to disclose it, requires the same answer now as it did before the legislation was enacted. The objective of s. 14 is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly.[17]

[16] Solicitor client privilege ensures that clients can speak fully and frankly with their lawyers and receive appropriate legal advice. It is a rule of evidence, a fundamental civil and legal right and a principle of fundamental justice in Canadian law.[18] As Justice Côté for the majority in *Alberta (Information and Privacy Commissioner) v University of Calgary* [*University of Calgary*] stated, "[t]he importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole."[19] Solicitor client

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[14] Investigator's fact report at para. 11.
[15] Order F18-49, 2018 BCIPC 53 at para. 18.
[16] *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 at para 31 [*Lee*] relying on *Legal Services Society v BC (Information and Privacy Commissioner)*, 2003 BCCA 278 at para 35.
[17] 1996 CanLII 1780 (BC SC) at para. 26.
[18] *Keefer Laundry Ltd v Pellerin Milnor Corp et al,* 2006 BCSC 1180 at para. 56 [*Keefer Laundry*].
[19] 2016 SCC 53 at para 26.

privilege must be jealously guarded and infringed upon only in unusual circumstances.[20]

[17] Privilege must be claimed document by document and each document must meet the following criteria: (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] The scope of solicitor client privilege extends beyond the actual requesting or giving of legal advice and includes communications that are part of the information exchanged between client and solicitor, provided the object is the seeking or giving of legal advice.[22]

III. Substantiating a Claim of Privilege before the Commissioner

a. Civil Litigation provides Guidance

[18] At an inquiry regarding a public body's application of s. 14, the public body bears the burden of establishing that it is authorized to withhold information on the basis of solicitor client privilege.[23] The law and practice of claiming and establishing solicitor client privilege in civil litigation guides the adjudication of solicitor client privilege in an inquiry under FIPPA.[24]

[19] In civil litigation, under the *Supreme Court Civil Rules*, a party asserting privilege over a document must list each document separately and provide the date and a brief description of the document.[25] A party must "describe the documents for which privilege is claimed in a manner that, without revealing privileged information, enables its opponent to assess the claim of privilege."[26] At a minimum, to assess the validity of a claim of privilege the courts have indicated that the description of privileged documents should include the date it was

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[20] *Ibid* at paras 34–35.
[21] *Solosky v The Queen*, [1980] 1 SCR 821 at p. 837, 1979 CanLII 9 (SCC); *Huang v Silvercorp Metals Inc*, 2017 BCSC 795 at para. 99 [*Huang*] stating that the party asserting privilege must prove on a balance of probabilities each document meets the criteria for solicitor client privilege to apply.
[22] *Lee*, *supra* note 16 at para. 33; *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104 at paras. 27–29.
[23] FIPPA, s. 57. This is consistent with the burden of proof at common law: *Huang, supra* note 21 at para. 94.
[24] *University of Calgary, supra* note 19 at para. 70 (majority) and paras 127 and 137 (separate reasons of Cromwell J and Abella J both concurring on this point); *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 at para. 75 [*University of Saskatchewan*].
[25] *Supreme Court Civil Rules*, Rules 7-1(1) and (2) and Form 22.
[26] *Gardner v Viridis Energy Inc,* 2013 BCSC 580 (in Chambers) at para. 36; *Supreme Court Civil Rules*, Rule 7-1(7).

created or sent, the nature of the communication (such as "email" or "memorandum") and the author and recipient.[27]

[20] In *Ansell Canada Inc v Ions World Corp* [*Ansell*], the court suggested that the degree of detail required "should include the function, role and status of the receiver and sender of the documents in question and their relationship to the party to the action, the grounds for the claim of privilege, and a description of each document consistent with the law which renders it privileged."[28] *Ansell* was adopted as authority for the kind of information that will be satisfactory to establish solicitor client privilege before the Information and Privacy Commissioner of Alberta.[29] However, there are no steadfast rules and the sufficiency of detail required depends on the nature of the case and the nature of the document.[30]

[21] In addition to a sufficient description of the records, the party claiming privilege must tender evidence in support of the claim. It is not enough to merely assert that privilege applies.[31] The evidence may include the very records in dispute, with or without affidavit evidence, or a party may rely only on affidavit evidence.[32]

b. Asserting versus Establishing Solicitor Client Privilege

[22] It is appropriate at this point to address recent case law which could be erroneously interpreted as meaning that public bodies are not required to tender evidence to substantiate claims of solicitor client privilege.

[23] In *University of Calgary*, the University claimed solicitor client privilege over records involving communications between it and its general and external counsel. In asserting the privilege the University provided a list of documents identified by page numbers only. This way of asserting privilege complied with the requirements of civil litigation in Alberta at the time. The Information and Privacy Commissioner's delegate then directed the University to substantiate its privilege claim by either providing him with a copy of the records in issue or

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[27] *Anderson Creek Site Developing Ltd v Brovender*, 2011 BCSC 474 at para. 114 [*Anderson Creek*]; *Keefer Laundry, supra* note 18 at para. 71.
[28] [1998] OJ No 5034 (Ont Ct J Gen Div) at paras. 10 and 19.
[29] Decision P2011-D-003, 2011 CanLII 96593 (AB IPC) at para. 127.
[30] *Anderson Creek*, *supra* note 27 at para. 113.
[31] *Nelson and District Credit Union v Fiserv Solutions of Canada Inc*, 2017 BCSC 1139 (Master) [*Nelson*] at para 52; *Nanaimo Shipyard Ltd v Keith et al*, 2007 BCSC 9 (Master) at para. 29 [*Nanaimo Shipyard*].
[32] *Intact Insurance company v 1367229 Ontario Inc,* 2012 ONSC 5256 at para 22 [*Intact Insurance*] (stating that a party was required at a minimum to provide a sworn affidavit or *viva voce* evidence setting out the basis of the claim to privilege); *Nelson*, *ibid*; See also Dodek, Adam M., *Solicitor-Client Privilege* (Toronto: LexisNexis, 2014) at p. 325, §9.19 [*Solicitor-Client Privilege*]. In *Keefer Laundry*, *supra* note 18, the party asserting privilege did not provide any evidence so the court resorted to reviewing the records.

providing additional information about the records including, for example, the date and length of each record and some information about the author and the addressee. The University did not comply and, as a result, the Commissioner's delegate issued a Notice to Produce Records. In response, the University sought judicial review of the delegate's decision to issue the Notice.

[24] The Supreme Court of Canada found the Commissioner's delegate had erred in requesting production of the records in issue. Justice Côté, writing for the majority of the Court, noted that the University of Calgary's failure to present evidence of its privilege claim in the format required by the Commissioner's protocol was of no ultimate significance because the protocol had no legal status. Rather, the protocol was merely a guide established by the Commissioner. Justice Côté went on to underline that the prevailing Alberta civil law authority at the time allowed parties to identify solicitor client privileged documents by number.

[25] Justice Côté found the Commissioner's delegate had acted improperly by demanding copies of the records in issue because the veracity of the University's privilege claim had not been challenged:

> … No evidence or argument was made to suggest that solicitor-client privilege had been falsely claimed by the University. In these circumstances, the delegate erred in concluding that the claim needed to be reviewed to fairly decide the issue.[33]

[26] In other words, the University's claim that the records were privileged was not truly in issue and so the Commissioner's delegate could not require further evidence on the matter.

[27] A similar conclusion was reached by the Saskatchewan Court of Appeal in *University of Saskatchewan*.[34] In *University of Saskatchewan*, the applicant requested a review of the University's decision to withhold records. In the course of that review, Saskatchewan's Commissioner issued an order to the University to produce records the University claimed were privileged.

[28] The court held that the Commissioner should not have ordered the records without first asking for further information about the records and in the absence of any argument that the University had inappropriately asserted privilege. The court explained the procedure the Commissioner should have followed if he was not satisfied with the University's evidence:

> …. if he was not satisfied with the University's affidavit, the Commissioner should have been at pains to exhaust all options short of demanding

[33] *University of Calgary*, *supra* note 19 at para. 70.
[34] *University of Saskatchewan, supra* note 24.

> production of the records in issue. He could have done this by giving the University a clear and unambiguous opportunity to provide, by way of something in the nature of an index of records or affidavit of documents, additional information about such things as the number and nature of the records in question. Only if the University had failed to respond to a reasonable request for such additional information, or if that information or some surrounding circumstance had revealed a reasonable basis for questioning the claim of privilege, should the Commissioner have taken the step of seeking the records themselves.[35]

[29] In my opinion, *University of Calgary* and *University of Saskatchewan* stand for the principle that if a public body properly asserts solicitor client privilege, i.e., in the same manner required in civil procedure *and* nothing else in the evidence or argument indicates that the claim of privilege is invalid, then the public body's assertion is sufficient to meet its burden of proof. If however, there are doubts about a public body's claim of solicitor client privilege, then it may be appropriate for the Commissioner to inspect the documents.

[30] My interpretation is supported by *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)* [*Calgary (Police Service)*]. In *Calgary (Police Service)*, the public body argued that at an inquiry before the Alberta Commissioner, it was only required to assert privilege in the way it would under the *Rules of Court* and it did not have to tender evidence.[36] The court rejected this argument and discussed the requisite standard of proof for establishing solicitor client privilege at an inquiry in light of *University of Calgary*:

> Reviewing those comments by the Supreme Court of Canada in context, and noting that the Supreme Court of Canada was not there determining how solicitor-client privilege was to be proven, I find that those comments of the Supreme Court of Canada relate to the *assertion* of solicitor-client privilege by a party. In relation to an inquiry under the *Act*, all the public body is required to provide to the Commissioner to *assert* privilege is a description of the documents that would be a sufficient description if it was placed in an Affidavit of Records in a civil action.
>
> However, that only relates to what is necessary for a public body to *assert* a claim of privilege.
>
> The task of the Commissioner is to determine whether, in fact, a claim of privilege has been made out. In doing so, the Commissioner must apply the law respecting proof of privilege.[37]

[31] Based on this rationale, the reviewing court in *Calgary (Police Service)* determined that it was necessary for the court to see the records in dispute to determine whether the Alberta Commissioner was correct in deciding that solicitor client privilege did not apply. In other words, the court concluded that

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[35] *Ibid* at para. 83.
[36] 2017 ABQB 656.
[37] *Ibid* at paras. 18–20.

a description of the records in accordance with civil procedure rules was not enough to decide whether the records were in fact privileged. This decision was upheld by the Alberta Court of Appeal.[38]

[32] From the foregoing authorities it follows that a public body which asserts privilege over records should adhere to the prevailing standard in civil litigation for describing those records. Thus, in response to an access request under FIPPA, a public body should describe any privileged records as it would if it were required to describe those documents in a list of documents under the *Supreme Court Civil Rules.* If, however, an applicant disputes the public body's claim of privilege and the matter proceeds to an inquiry under s. 56 of FIPPA, then the Commissioner can require the public body to substantiate its assertion through affidavit evidence, or if absolutely necessary, by producing the records to the Commissioner for his review.

c. Application to Present Case

[33] In the present case, I am satisfied that the applicant is directly challenging the Ministry's application of s. 14 and the Ministry must do more than merely assert the privilege.

[34] As discussed above, the applicant initially requested that the Commissioner review the Ministry's decision to withhold information. The matter was assigned to an investigator for mediation. When the matter could not be settled at mediation, the applicant requested this inquiry. The investigator's fact report says that at the inquiry, the Commissioner will consider whether the Ministry is authorized by s. 14 to withhold the records in dispute.[39] The parties approved the fact report and, therefore, agreed that the Ministry's decision to withhold information in the records under s. 14 was to be adjudicated at inquiry.

[35] I have also considered the applicant's inquiry submissions. I have had some difficulty understanding his submissions. However, taken as a whole it is clear that the applicant has asked the Commissioner to determine whether the records may be withheld on the basis of solicitor client privilege.

[36] The thrust of the applicant's argument appears to be that solicitor client privilege should give way to the public interest in government transparency and accountability.[40] He says that he trusts that the Commissioner will consider these competing interests and promote openness and transparency.[41]

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[38] *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114.
[39] Investigator's fact report at para. 11.
[40] Applicant June 26, 2017 submission at p. 1.
[41] *Ibid* at p. 1.

[37] He specifically notes that "not everything that occurs in a lawyer's office is covered by [solicitor client privilege]."[42] He also says that privilege does not extend to communications where legal advice is not sought or offered, where they are not confidential or where the lawyer is not acting in her capacity as a lawyer. In addition, he notes that privilege does not cover mere factual information. The applicant is self-represented. Although the applicant has not applied these principles to the facts of the case, it would be unfair to interpret his submissions as anything other than disputing that the Ministry is authorized to rely on solicitor client privilege to withhold the records.

[38] For these reasons, I would distinguish *University of Calgary* and *University of Saskatchewan* from the present case. The procedural background and argument before me clearly supports the conclusion that the applicant disputes the Ministry's claim of solicitor client privilege. Thus, it is not sufficient for the Ministry to simply assert that the records are privileged by describing them as it would in a civil proceeding. In order to meet its burden of proof, the Ministry must tender sufficient evidence to prove on a balance of probabilities that the records are privileged.

IV. When is it appropriate for the Commissioner to Compel Records?

a. Statutory Authority to Compel Records

[39] I will now outline the Commissioner's statutory authority to compel production of records for his review.

[40] The Commissioner's authority to order records in the course of an inquiry is set out in s. 44(1)(b) of FIPPA:

> 44(1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:
> …
>
> (b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.

[41] Section 44(2.1) confirms that disclosing a record as ordered under s. 44(1)(b), does not affect solicitor client privilege:

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[42] *Ibid* at p. 7.

> 44(2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.[43]

[42] Section 44(3) provides that the public body must produce a record to the Commissioner within 10 days when ordered to do so:

> 44(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1).

[43] The Commissioner must review such records on an *in camera* basis and cannot disclose them.[44] If a public body declines to comply with his order, the Commissioner can apply to the Supreme Court of British Columbia for an order directing a person to comply with his order (s. 44(2)).

b. Exercise of Discretion under s. 44

[44] Despite the Commissioner's authority to compel records, when a public body claims solicitor client privilege, the Commissioner will generally not order production of the records even for the limited purpose of verifying the merits of the claim of solicitor client privilege. When exercising his discretion to review records pursuant to s. 44 of FIPPA, the Commissioner is guided by what the courts have said about when they will inspect documents.[45]

[45] In *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, and more recently in *University of Calgary*, the Supreme Court of Canada has signalled that the Commissioner should only review solicitor client documents to ensure privilege is properly claimed where there is evidence or argument establishing the necessity of doing so to fairly decide the issue.[46]

[46] The courts in British Columbia take a restrained approach to inspecting documents. In *GWL Properties Ltd v WR Grace & Co of Canada Ltd*, the court cautioned against examining privileged documents, but said that it is appropriate in some circumstances:

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[43] See also: *School District No 49 (Central Coast) v British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 at para. 56.

[44] Under s. 47 of FIPPA, the Commissioner must not disclose information obtained in performance of his duties other than that necessary to conduct the inquiry. He is prohibited from disclosing any information a public body would be authorized to refuse to disclose in records to which access is requested (s. 47(3)(a)). The Commissioner can disclose information to the Attorney General related to the commission of an offence (s. 47(4)).

[45] Order 00-08, 2000 CanLII 9491 (BC IPC) at p. 8. Overturned by *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, as it related to s. 13(1), but the court did not consider the Commissioner's authority to review records.

[46] *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para. 17; *University of Calgary, supra* note 19 at para. 68.

> The request for the court's examination must never be made lightly and certainly not as a matter of course. Solicitors bear a serious responsibility to resort to this kind of court intervention only when the circumstances in which the privilege is claimed compel them to do so. But when they do, justice requires that the court's independent assessment be made.
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> To ask the court to make an assessment of a claim of privilege obviates the necessity of one party having to accept the statement of its adversary, or its adversary's solicitor, about whether relevant evidence is producible. It may be the party's only means of rebutting the *prima facia* privilege that attaches to communication that is said to be confidential communication between a solicitor and his client for the purpose of facilitating legal advice. To seek the court's examination of a document does not necessarily question a party's credibility or that of its solicitor. Rather, it is to ask the court to determine if the basis for the privilege claimed, which is, in the end, a matter of legal opinion, is sound and applicable to all of the communication in question.[47]

[47] More recently, in *Keefer Laundry*, the court stated that when deciding whether to inspect the document, a court should take into account the volume of documents and the nature of the dispute. Courts should also bear in mind that it is preferable to resolve disputes over privilege on the basis of affidavits rather than review of the document by the court, as that keeps the process open rather than secret. Where, however, a party cannot provide the information required to establish privilege without revealing the privileged information itself, it is entirely appropriate for a court to review the documents.[48]

[48] In *Keefer Laundry*, the court ultimately decided in favour of inspecting the documents:

> In this case, I reluctantly chose to review the 18 documents subject to Milnor's claim of Legal Advice Privilege. My reluctance arose from several concerns. One was the fact that the information Milnor provided to Keefer about these documents consisted only of the limited information in the lists of documents, and that information fails to demonstrate the basis of Legal Advice Privilege. Another was the concern that the court is not in a position to know facts that should be known or discoverable by counsel and that may be necessary to assess whether Legal Advice Privilege applies, such as who the people are who are named as sending and receiving emails, and in what context a particular document was created.
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> In this case, I exercised my discretion to review the 18 documents in an effort to bring a just, speedy, and inexpensive determination of this dispute, and in the hope that it might be apparent on the face of the documents whether they are privileged by Legal Advice Privilege.[49]

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[47] 1992 CanLII 182 (BC SC) at pp. 11–12.
[48] *Keefer Laundry, supra* note 18 at paras. 73–75.
[49] *Ibid* at paras. 76–77.

[49] In *Huang*, the defendant failed to provide sufficient descriptions of the records or evidence to substantiate its claim of privilege. Nevertheless, the court declined to inspect the documents because they were voluminous (7,000 documents and 11,000 partially redacted documents) and reviewing the documents would not provide the facts required to reach conclusions as to the purpose that each document was created.[50] Having already extended the defendant one opportunity to bolster its evidence in support of its privilege claim, the court concluded that it would be unjust to further delay the proceeding to provide the defendant with another chance to establish privilege. Instead, the court ordered the defendant to produce the records to the plaintiff.

[50] The courts in other provinces have taken varied approaches to when it is appropriate to review privileged records.

[51] In *Ansell*, an Ontario court considered that inspection should not be ordered as a matter of course but was appropriate in that case because "sufficient doubt had been raised with respect to the issue of privilege" as to justify it.[51]

[52] As discussed above, in *University of Saskatchewan*, the court said that where the public body claims privilege, the records should not be inspected as a matter of course. The court explained that if the Commissioner was unsatisfied by evidence concerning the privilege, he should have asked for further particulars, or some other information short of the records themselves.[52]

[53] In Alberta, the courts have taken a more liberal approach to reviewing privileged records. *Calgary (Police) Services* involved a judicial review of the Alberta Commissioner's decision that the public body had not established solicitor client privilege. The Alberta Commissioner does not have the statutory authority to review records the public body claimed were privileged.[53] The court sitting in review of that decision considered it necessary to review the records because the question of privilege is reviewed on a standard of correctness:

> The Commissioner's designate, however, is left to do her very best, without the benefit of seeing the actual redacted portions of the documents, in order to test the claim of solicitor-client privilege. She does her best; but whether she is actually correct in her determinations that the documents are not privileged, is simply unknown without a review of the documents. Therefore, it seems obvious to me, that the Court, in conducting this judicial review, must have the documents produced to it, so that it can make the correct determination as to whether they are privileged.[54]

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[50] *Huang*, *supra* note 21 at paras. 122–124.
[51] *Ansell*, *supra* note 28 at para. 20.
[52] *University of Saskatchewan*, *supra* note 24 at para. 83.
[53] This was the conclusion of the majority in *University of Calgary, supra* note 19.
[54] *Calgary (Police Service)* (AB QB), *supra* note 36 at para. 27.

[54] The court reasoned that without review of the records, there was a significant risk that records "which are in fact solicitor client-privileged would have to be produced by the public body without ever having been reviewed."[55]

[55] The Court of Appeal agreed with the reviewing judge stating:

> We are satisfied that on a judicial review application where the dispute centres on whether the documents in question are subject to solicitor client privilege, those documents should be put before the reviewing Court. It is this simple. The issue—whether solicitor client privilege exists with respect to the disputed documents—cannot be properly determined in these circumstances without examining the documents themselves. This approach is consistent with the supervisory role of the Court.[56]

[56] The courts' concern that the Commissioner could not make a correct decision without viewing the records was borne out by the judicial review. The Court of Queen's Bench held that some of the records which the Commissioner had concluded, without actually seeing them, were not subject to solicitor client privilege, were in fact privileged based on the court's inspection of the records in dispute.[57]

[57] I pause to comment that the BC legislation differs from the Alberta legislation in that FIPPA specifically contemplates the Commissioner reviewing privileged documents in the course of an inquiry. In particular, the Alberta legislation does not contain an equivalent of s. 44(2.1) in FIPPA, which says that producing records to the Commissioner in response to an order under s. 44(1) does not affect solicitor client privilege. Section 44(2.1) would be redundant if the BC Commissioner did not in fact have the power to order privileged records for his review.

[58] Because the BC Commissioner has the discretion to review records which may be privileged, the BC Commissioner stands on a different footing than Alberta's Commissioner. I interpret the court's comments in *Calgary (Police) Services* that the court must review the records to make a correct decision as to whether records are privileged, as supporting the Commissioner's authority to review allegedly privileged records, if he is of the view that the public body has not established solicitor client privilege on other evidence. Reviewing the records mitigates the risk that the decision maker mistakenly concludes that the records are not privileged.

[59] In an earlier decision of the Alberta Court of Appeal, *Alberta (Provincial Treasurer) v Pocklington Foods Inc.*, Côté J. stated that judges will sometimes

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[55] *Ibid* at para. 29.
[56] *Calgary (Police Service)* (AB CA), *supra* note 38 at para. 3.
[57] *Calgary (Police Service) v Alberta (Information and Privacy Commissioner),* 2019 ABQB 109.

inspect privileged documents "to guard against the possibility that the affidavit or other evidence for privilege is not accurate, whether because of clerical error, dishonesty, or misunderstanding of the law."[58] He likened the inspection to "an external physical examination by a physician"[59] but could not substitute for the importance of affidavit evidence, since sometimes the privilege is not self-evident on the face of the document.

Summary regarding discretion to inspect documents

[60] Adjudicating disputes over privilege based on affidavit evidence is preferable to inspecting records, because this ensures the process is open and preserves the privilege. Where a public body has provided sufficient evidence to substantiate its claim, it is not appropriate for the Commissioner to also review the records as an additional "check". That would be akin to the Commissioner ordering production as a matter of course, which has been criticized in recent appellate decisions.

[61] The Commissioner should only exercise his discretionary power to inspect records pursuant s. 44, where it is necessary in order to fairly decide whether records are privileged. Circumstances where it may be appropriate to inspect records include where there is doubt that privilege has been properly claimed, or the evidence is inconclusive. Inspecting records is also appropriate where affidavit evidence cannot establish privilege without revealing the privileged information.

[62] With this criteria for inspecting records in mind, I will now lay out the factual and procedural background resulting in this order.

V. Background

a. Factual Background

[63] The Ministry has provided little context regarding the records in dispute. I have gleaned the following history based on the applicant's submission and the records disclosed by the Ministry.

[64] Between 2005 and 2007, the applicant was enrolled in a program run by Clearmind International Institute. He believed the course work he was taking would be eligible for credits towards degrees with Rutherford University.

[65] In 2006, the Ministry of Advanced Education (AVED)[60] began to suspect that Rutherford University was operating in contravention of the *Degree*

[58] 1993 ABCA 69 at para. 34.
[59] *Ibid* at para. 35.
[60] Now the Ministry of Advanced Education and Skills Training.

Authorization Act.[61] The *Degree Authorization Act* (DAA) requires private and out of province public institutions to obtain ministerial consent if they wish to advertise, offer and grant post-secondary degrees and/or use the word "university" for these purposes.[62]

[66] In May 2007, AVED appointed an external lawyer under the DAA to conduct an inspection of Rutherford in order to determine whether Rutherford was in compliance with the Act.[63] The inspection was conducted jointly with AVED and the Private Career Training Institutions Agency (PCTIA) based on concerns that Rutherford was also operating in contravention of the *Private Career Training Institutions Act*.[64]

[67] The lawyer submitted her report to AVED outlining evidence that Rutherford had been operating in contravention of the DAA since 2003.[65] Shortly after, AVED requested that a Ministry lawyer (Lawyer A) provide advice related to Rutherford.[66]

[68] Lawyer A wrote to the principals of Rutherford notifying them that he was instructed to pursue an injunction against Rutherford under the DAA.[67] It appears that the matter was settled when the principals of Rutherford agreed to a number of conditions which prohibited the university from operating in British Columbia.[68] Lawyer A closed his legal file related to Rutherford in 2014, having not received instructions from AVED since 2009.[69]

[69] I infer, although the Ministry has not explained this, that the records in issue relate to AVED's investigation of Rutherford and Lawyer A's subsequent provision of advice to AVED.

b. Procedural History

[70] In 2015, the applicant made two access requests under FIPPA for records concerning Rutherford University and related institutions and individuals. Records responsive to both requests are part of this inquiry, but only records pertaining to the applicant's first request (September 15, 2015 request) are the

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[61] Document titled "Rutherford University (Senior University Inc.) in British Columbia: Inspection under the *Degree Authorization Act* (DAA)" (Inspection Synopsis) submitted by the applicant. See also Report dated June 28, 2007 (Inspection Report) contained in records starting at p. 187.
[62] *Degree Authorization Act*, SBC 2002, c 24, s. 3.
[63] Inspection Report. The report describes the post-secondary institution as Senior University Inc. operating as Rutherford College.
[64] Inspection Synopsis.
[65] Inspection Synopsis and Inspection Report.
[66] Affidavit #1 of Lawyer C at para. 7.
[67] Records at p. 163.
[68] Records at p. 162.
[69] Affidavit #1 of Lawyer C at para. 26.

subject of this production order.

[71] The September 15, 2015 request was for records from the Ministry and AVED concerning "Legal Procurement Practices" by the Ministry and AVED regarding Rutherford and Clearmind. When asked to clarify which Ministry he sought records from, the applicant said "both Ministries that would be ideal" and if not, then "Advanced Education."[70]

[72] An employee of the Province's Information Access Operations emailed the applicant a few weeks later, advising that the Ministry was seeking clarification regarding his request.[71] The applicant explained to Information Access Operations that he was seeking "the legal files utilized in each of the cases including the outside counsel file and the fines/contracts to lawyers involved in the mentioned cases."[72] In February 2016, the Ministry advised the applicant that it was withholding the records he requested under ss. 14 and 22 of FIPPA.

[73] In July 2016, the applicant requested that the Commissioner review the Ministry's decision to withhold records. An investigator was assigned to investigate and try to settle the matter. Mediation was not successful and the applicant requested an inquiry.

c. The Ministry's submissions

June 2017 submission

[74] The parties' first round of submissions were closed on June 27, 2017. With regards to the Ministry's claim of s. 14, the Ministry submitted a three page affidavit from a Ministry lawyer (Lawyer B). The Ministry's evidence was:

> 8. The Ministry's responsive records for this access request consist of [Lawyer A's] legal files relevant to this access request, complete with file folder labels.
>
> 9. The responsive records consist of nearly 2500 pages of confidential records that <u>appear to be</u> the written materials [Lawyer A] was provided for the purpose of seeking and receiving his legal advice on matters related to the subject matter of the Applicant's access request.
>
> 10. The Ministry has withheld the entirety of the responsive records under s.14 of FIPPA as being subject to solicitor client privilege.[73]
>
> [underlining added]

[70] Email dated September 16, 2015 to IAO Intake Team.
[71] Affidavit of Lawyer B at Exhibit B.
[72] *Ibid* at Exhibit A.
[73] *Ibid* at paras. 8–10.

[75] Lawyer B was Lawyer A's supervisor at the time that Lawyer A had conduct of the files.[74]

[76] The Ministry also provided a table describing the records, which included the number of pages, the nature of the record and whether ss. 14 and/or 22 applied. I will reproduce four rows for illustration:

Part #	**Page #**	**Document Description**	**Exception Applied**
1	1	File – HMQ v. Rutherford College/Senior University Inc.	s.14
1	3-36	Research regarding Rutherford College	s.14
1	62-69	Email dated June 1, 2007 from PCTIA sending prospective graduates' transcripts to legal counsel	ss.14, 22 (p. 53) s. 14 (pp. 63, 69)
1	87-91	Letter and attachments regarding name change for US trademark application	s.14

[77] In its submission, the Ministry argued that all of the estimated 2500 pages from the September 15, 2015 request (File A) meet the test for solicitor client privilege because they:

- qualify as written communication in that it is the entirety of the legal files of [Lawyer A] relevant to this access request;
- are of a confidential character;
- are communication between clients (the Minister of Justice and Attorney general [sic] on behalf of the Province as well as AVED) and [Lawyer A], who had conduct of these files within LSB.
- are communication directly related to the seeking, formulating or giving of legal advice in that they are the contents of the legal files [Lawyer A] had been provided with by the Ministry and by AVED for the purpose of seeking and receiving his legal advice on matters related to the subject matter of the Applicant's access request.[75]

[78] Based on my initial review of the Ministry's materials, I had number of concerns regarding the Ministry's evidence and submission.

[79] The Ministry's evidence regarding the File A, approximately 2500 pages of records, was contained in three brief paragraphs from Lawyer B, a lawyer

[74] Lawyer A has since retired.
[75] Ministry June 1, 2017 submission at para. 27.

apparently unfamiliar with the records. The Ministry claimed solicitor client privilege on the basis that the records were all confidential communications between Ministry legal counsel and his clients. Yet, based on the table of records, none of records in File A were such communications. Rather, their description indicated that they were records of a non-communicative nature, or communications exclusively between individuals other than Lawyer A and his clients. The Ministry did not provide any alternative authority for claiming privilege over such records, such as being solicitor's work product. In addition, I did not understand why the Attorney General (as opposed to AVED) would be receiving advice from Lawyer A, or the general context surrounding the creation of these records.

[80] In August 2017, I wrote to the Ministry stating my concern that the evidence was inadequate for me to determine the application of solicitor client privilege. I did not set out specific concerns, for reasons addressed by Master Bolton in *Nanaimo Shipyard*:

> … if I were to go through the documents one by one, giving preliminary opinions, and in particular pointing out what sort of evidence counsel for the insurers would need to make out their claim of privilege, the court would in a very real sense be acting as a legal adviser to that party by identifying areas to be canvassed and even suggesting the type of evidence to be adduced, in order to uphold the claim of privilege.[76]

[81] Instead, I expressed the following general concerns with regards to evidence respecting all of the records (i.e. records related to both access requests, some of which were actual communications):

> I am unable to assess privilege on a document by document basis as the majority have been bundled together and are vaguely described. It is not clear to me which individuals were involved in the communications, or their roles. I am also not sure whether lawyers' were acting in their capacity as legal counsel for all communications or how each document relates directly to the seeking, formulating or giving of legal advice.[77]

[82] After receiving my letter, the Ministry located additional records, approximately 800 pages, which it had not previously identified as responsive to the September 15, 2015 access request. The Ministry provided severed copies of these newly produced records to the applicant in December 2017, withholding information under ss. 14 and 22. These newly produced records were added to the inquiry and some are also the subject of this s. 44 order.

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[76] *Nanaimo Shipyards*, *supra* note 31 at para. 19.
[77] August 28, 2017 letter.

January 2018 amended submission

[83] The Ministry then amended its initial submission and provided additional affidavit evidence from a different lawyer (Lawyer C) regarding the records responsive to the first request, including the newly produced records. I will set out the evidence of Lawyer C relevant to this order.

[84] Lawyer C, like Lawyer B, was not personally involved in the legal matters surrounding the records in dispute. With regards to File A, Lawyer C stated that she believed that many of the records in File A were obtained by a Ministry paralegal on July 18, 2007 when she attended the offices of AVED and photocopied AVED's "files relating to Rutherford College."[78]

[85] Lawyer C also believed that several records were obtained electronically and printed by Ministry lawyers or paralegals and placed in a physical file. Lawyer C did not identify which records had been photocopied by the paralegal versus "obtained electronically." Lawyer C stated that it was her belief that all of these documents "were obtained for the purpose of providing legal advice" but did not explain the basis for her belief.[79] Her evidence leads me to assume that the sole basis for her belief is the fact that the records were in files regarding Rutherford.

[86] Lawyer C stated that most of the records in File A are not letters or emails between Ministry legal counsel and clients at AVED. Based on the Ministry's description of these records, it appears that none of them are emails or letters between Ministry legal counsel and clients at AVED.

[87] With respect to 135 pages (File B) of the newly produced 800 pages, Lawyer C provided the following equivocal evidence:

> 21.… I believe these documents were either:
>
> i. Provided to LSB counsel [Lawyer A] and [Lawyer D] by AVED for the purpose of seeking legal advice. It is not possible to determine who at AVED provided these documents to [Lawyer A] and [Lawyer D] through reviewing the file; or
>
> ii. Obtained by [Lawyer A] or [Lawyer D], potentially through searches conducted by paralegals, for the purpose of providing legal advice to AVED.[80]

[88] Lawyer C says a more detailed description of File B may disclose the subject matter of the legal advice and waive privilege.[81] The Ministry has not

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[78] Affidavit #1 of Lawyer C at para. 23.
[79] *Ibid* at para. 25.
[80] *Ibid* at para. 21.
[81] *Ibid.*

cited any case law which supports its assertion that providing a basic description of a document would waive privilege.

[89] In its amended submission dated January 3, 2018, the Ministry argued that records comprising Files A and B, are all subject to solicitor client privilege because they were provided to or obtained by legal counsel for the purpose of receiving their legal advice.[82]

[90] In July 2018, I wrote to the Ministry, this time specifying the express concerns that I had with the Ministry's evidence and description of the records. Despite the Ministry bearing the burden of proof, I did this because *University of Saskatchewan* had come out subsequently to my first request to the Ministry. In that case, the court stated that the Saskatchewan Commissioner "should have been at pains to exhaust all options short of demanding production of the records in issue."[83] Meaning, the Saskatchewan Commissioner should have asked the public body for more information about the records before ordering them to be produced for his review.

[91] With respect to File B, I wrote:

> The Ministry's description of these records is plainly inadequate to decide whether s. 14 applies. The Ministry asserts that a more detailed description would disclose the subject matter of the legal advice being sought and waive privilege. I have difficulty accepting that the Ministry is unable to provide any further detail. In any event, it is open to the Ministry to request that a better description of these records be received by the commissioner *in camera*.

[92] With regards to both File A and B, I expressed my concerns as follows:

> In addition, it is well established that a document that is not privileged does not become privileged simply because it is sent to or received by a lawyer. I am mindful that there is a difference between lawyers' ethical duty to keep confidential all documents received from their clients and the concept of solicitor client privilege. I also question the weight I can give to [Lawyer C's] evidence about the purpose documents were obtained given that [Lawyer C] was not personally involved in the matter.

I cited *British Columbia (Securities Commission) v CWM*, a Court of Appeal case involving similar circumstances, which I will return to later.[84]

[93] While preparing a response to my letter, the Ministry located additional records responsive to the September 15, 2015 access request, specifically

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[82] Ministry January 3, 2018 submission at paras. 46–47.
[83] *University of Saskatchewan*, *supra* note 24 at para. 83.
[84] *British Columbia (Securities Commission) v CWM*, 2003 BCCA 244 [*CWM*]. Leave to appeal dismissed: [2003] SCCA No 341.

attachments to emails previously identified as responsive. The Ministry advised the applicant that the Ministry was withholding the attachments in their entirety under ss. 14 and 22. These records form part of the inquiry, but are not subject to this order.

September 2018 further amended submission

[94] The Ministry provided further submissions on September 25, 2018, including an affidavit from Lawyer D, a lawyer involved in providing advice to AVED at the time the records were gathered or created.

[95] In these further submissions, the Ministry explained that what it had initially characterized as two records (a letter and a fax) were actually seven separate documents either provided by AVED to the lawyers or obtained by the lawyers for the purpose of providing legal advice, similar to the records in File B discussed above.[85] I will refer to these seven records as part of File B.

[96] The Ministry has characterized the records in Files A and B as being documents either provided by AVED to Ministry lawyers or obtained by Ministry lawyers for the purpose of providing legal advice to AVED.[86] The majority of the records are in File A and were also described in the Ministry's June 1, 2017 table of records. The records in File A include student transcripts, emails between PCTIA and an external lawyer, business records and website printouts.

[97] The Ministry has continued to describe the records in the File B only as "documents" provided to or obtained by legal counsel, despite my July 2018 letter requesting a better description. The Ministry submits that "a more detailed description of these records is of no assistance in assessing whether s. 14 of FOIPPA applies."[87]

[98] The evidence of Lawyer C is that the level of detail she has provided exceeds what she would provide in a proceeding under the *Supreme Court Civil Rules*.[88] The Ministry says that its evidence that these documents were either provided to legal counsel by AVED or obtained by legal counsel for the purpose of providing legal advice to AVED "is the evidence the Adjudicator requires in order for her to assess privilege."[89]

[85] Affidavit #2 of Lawyer C at para. 13 and Exhibit D, pp. 157–175.
[86] Affidavit #1 of Lawyer C at paras. 21 and 25, Exhibits A and E; Affidavit #2 of Lawyer C, Exhibit D, pp. 157–175.
[87] Ministry September 25, 2018 submission at para. 61.
[88] Affidavit #2 of Lawyer C at para. 15.
[89] Ministry September 25, 2018 submission at para. 61.

d. Reason for s. 44 Order in this Case

[99] In my view, it is appropriate at this stage to inspect Files A and B, in order to make my final decision about the Ministry's claim of solicitor client privilege.

[100] I have significant doubts that the Ministry's general evidence that the records in Files A and B were all provided to or obtained by legal counsel for the purpose of providing legal advice satisfies the Ministry's burden of proof. I will outline my concerns with the Ministry's legal argument on this point before returning to why I have exercised my discretion to inspect the records.

[101] It is well known that solicitor client privilege does not attach to all communications or documents that pass between a lawyer and their client.[90] As stated by Professor Dodek, "Simply put, a document that is not privileged *ab initio* does not become cloaked with the privilege by sending it to a lawyer."[91] The Ministry acknowledges as much in its argument by quoting the following passage from *Keefer Laundry*:

> A lawyer is not a safety-deposit box. Merely sending documents that were created outside the solicitor-client relationship and not for the purpose of obtaining legal advice to a lawyer will not make those documents privileged. Nor will privilege extend to physical objects or "neutral" facts that exist independently of clients' communications.[92]

[102] The Ministry distinguishes this principle on the basis that in this case, it is a lawyer being asked to produce records as opposed to a client. The Ministry says that there is a "fundamental difference" when considering solicitor client privilege in relation to access requests specifically directed to the Ministry's legal services branch as compared to access requests to a typical ministry.[93] The Ministry says that its application of solicitor client privilege will often be broader than for other ministries.

[103] The Ministry further says that certain documents that are subject to solicitor client privilege in the hands of legal counsel will not be subject to privilege in the hands of their client ministries. The Ministry states that "the Ministry's application of s. 14 is broader than had the Applicant requested similar records from AVED. In the hands of AVED, some of these records [Files A and B] may well not be subject to solicitor client privilege."[94]

[104] I am troubled by the Ministry's argument from a policy perspective. Section 6 requires public bodies to "make every reasonable effort to assist

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[90] *Intact Insurance, supra* note 32, at paras. 14 and 21.
[91] *Solicitor-Client Privilege, supra* note 32 at p. 130, §5.39.
[92] *Keefer Laundry Ltd, supra* note 18 at para. 61.
[93] Ministry September 25, 2018 submission at para. 62.
[94] *Ibid* at para. 63.

applicants" and to respond to applicants "openly, accurately and completely." Section 11 of FIPPA authorizes a ministry to transfer a request to a different ministry. All of the ministries' access requests are processed by a single department, Information Access Operations (IAO). It would be quite easy for IAO to facilitate transferring an access request made to the Ministry of Attorney General to a different ministry, to promote disclosure of more information. The Ministry of Attorney General should not be used to shield responsive records which would otherwise be disclosable by another ministry, simply because the applicant did not know to make his request to a different ministry. It is particularly concerning in this case, where the applicant in fact directed his access request to AVED in priority to the Ministry.

[105] These concerns aside, I have considered the case law cited by the Ministry at paragraphs 64–67 of its September 25, 2018 submission in support of its position. My preliminary view is that, read in their entirety, those authorities do not stand for the principle that records subject to an access request directed to the Ministry's legal services branch enjoy broader protection than such records in the possession of another ministry.

[106] I wish to address the two most relevant of those cases. The Ministry relies on the following quotation from *British Columbia (Minister of Environment, Lands and Parks) v British Columbia (Information and Privacy Commissioner)* [*Minister of Environment*]:

> In the case at bar the communications were exchanged with the solicitor acting in his professional capacity. Simply because the information given to the solicitor may be compellable from the client does not mean that it is compellable within the context in which it was given to the lawyer. The fact that certain information may be compellable on discovery does not bear upon the issue of solicitor-client privilege.[95]

[107] The issue in *Minister of Environment* was not whether non-privileged records in a lawyer's file were privileged in that context. The issue in *Minister of Environment* was whether s. 4(2) of FIPPA, which requires a public body to sever and withhold only information that is protected from disclosure, required the public body to sever legal advice and disclose factual information contained in the same record.

[108] There was no dispute in *Minister of Environment* that at common law, the records in issue were in their entirety subject to solicitor client privilege. The records were a legal opinion and meeting minutes from a meeting where legal counsel provided legal advice to the attendees. The court's point in the above quote was that the facts embedded in the legal opinion and meeting minutes would not be compellable on discovery in their current form as part of those

[95] 1995 CanLII 634 (BC SC) at para. 68.

records. However, the underlying facts, in isolation, could be compelled from the client on discovery. The present case is distinguishable from *Minister of Environment*. The issue here is not whether factual portions of privileged records must be disclosed, rather the issue is whether the records themselves are privileged.

[109] The Ministry also relies on an Ontario decision: *Mutual Life Assurance Co of Canada v Canada (Deputy Attorney General)* [*Mutual Life Assurance Co*]. The issue in that case was whether documents in the possession of the company's in house lawyer were subject to solicitor client privilege. The Ministry quotes following passage:

> As pointed out at the hearing, copies of some of the documents in the file of a lawyer, while privileged in the possession of the lawyer, may not be privileged if found in the file of another employee if there are no lawyer's notes thereon.[96]

[110] Just prior to this statement, the court notes that documents are not privileged simply because the lawyer received copies and put them in his file. Further, the court did not find that all of the documents in the lawyer's file were privileged; rather, the court found that "working papers found in lawyers file [sic], including copies of non-privileged documents *with lawyers notes thereon*" [italics added] were subject to solicitor client privilege.[97]

[111] The application judge in *Mutual Life Assurance Co* did not rely on any authority in support of the above quoted statement and the statement has not been cited by any subsequent courts. In addition, the Ontario Court of Appeal has since rejected the argument that a "solicitor's brief privilege" or litigation privilege exists over copies of public documents simply gathered or copied by a solicitor's office.[98] This argument has also been rejected with respect to solicitor client privilege.[99] For these reasons, I do not find *Mutual Life Assurance Co* to be persuasive authority for the principle asserted by the Ministry, namely that non-privileged documents are subject to solicitor client privilege merely because they are in a lawyer's file.

[112] I will pause here to comment that the status of "solicitor's brief privilege" is unclear in this province. Nevertheless, the Ministry has not claimed "solicitor's brief privilege" over Files A or B, or tendered evidence in support of such a claim, i.e., evidence indicating that the records were assembled by a lawyer exercising legal knowledge, skill, judgment and industry for the purpose of advising his

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[96] [1988] OJ No 1090 (Ont HC) at p. 4.
[97] *Ibid* at p. 5.
[98] *General Accident Assurance Company v Chrusz,* [1999] OJ No 3291 at paras. 33–38, 1999 CanLII 7320 (ON CA).
[99] *Keefer Laundry*, *supra* note 18 at para. 61.

client.[100] Further, even if the Ministry had asserted solicitor's brief privilege, it is unlikely that such a privilege would apply in circumstances outside of ongoing litigation.[101]

[113] The Ministry has declined to address *BC (Securities Commission) v BDS*, which I raised in my July 2018 letter, which is a relevant and more recent authority than those relied on by the Ministry.[102] *BDS* involved a demand made by the BC Securities Commission for production of documents from a solicitor's legal files. The client resisted disclosure to the Securities Commission on the basis of solicitor client privilege. The client's evidence was that all of the documents were provided solely for the purpose of obtaining legal advice. Macaulay J. flatly rejected the client's argument that there is a blanket privilege over all documents sent to or received by a solicitor in the course of a retainer.

[114] The Court of Appeal upheld the application judge's ruling and (at para. 45) quoted the following obiter statement from the Supreme Court of Canada's decision *British Columbia Securities Commissioner v Branch* about documents in a lawyer's file:

> solicitor-client privilege cannot be claimed for all documents that have passed between solicitor and client for the purpose of obtaining legal advice unless the documents were brought into existence for this purpose. If a document is not privileged when the party to litigation receives it, merely depositing a copy of the document with a party's solicitor or making a copy of that document by the solicitor for litigious purposes would not make it privileged . . . .[103]
>
> [underlining added]

[115] For the foregoing reasons, based on how the Ministry has argued its case, I have doubts that the Ministry has established that solicitor client privilege applies to the records.

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[100] *Huang, supra* note 21 at para. 79 saying that "solicitor's brief privilege" describes documents reflecting the application of a lawyer's skill and judgment over which solicitor client privilege, litigation privilege, or both applies.

[101] Whether solicitor's brief privilege applies independent of litigation privilege has been called into doubt/has not definitively been resolved in BC. See: *Teck Cominco Metals Ltd v Foster Wheeler Pyropower, Inc*, 2010 BCCA 51 at paras. 19–20; *Cahoon v Brideaux*, 2010 BCCA 228, at paras. 35–36.

[102] *BC (Securities Commission) v BDS,* 2002 BCSC 664. Aff'd on appeal: *CWM*, *supra* note 84. Leave to appeal to SCC dismissed: [2003] SCCA No 341.

[103] 1995 CanLII 142 (SCC) at para. 43 as quoted in *CWM*, *supra* note 84 at para. 45.

Analysis re ordering records

[116] As discussed previously, the applicant disputes the Ministry's claim of solicitor client privilege. The Ministry is required to satisfy its burden of proof based on evidence and cannot just assert that privilege applies. I am ordering production of Files A and B because the Ministry's evidence and argument raises questions as to whether it has appropriately claimed solicitor client privilege. I am reluctant to issue an order finding that all of the records are not privileged without first reviewing them.

[117] The Ministry's description of the records in File A raises doubt about whether the records are actually privileged. The records are not on their face communications between solicitor and client and the Ministry's evidence regarding them is very general, saying that thousands of pages are privileged because they were provided to legal counsel or obtained by legal counsel for the purpose of ongoing legal advice.

[118] The mere description of the records in File B as "documents" either provided to or obtained by legal counsel, is inadequate to determine whether they are privileged.[104] I have already asked the Ministry for a better description and the Ministry takes the position that it is unable to provide any further description without waiving privilege, thus it is appropriate for me to inspect these documents.

[119] I have also considered that there is a large volume of records, a factor which the courts have indicated weighs against review because of a concern about the efficient use of judicial resources. That is less of a factor in hearings before the Office of the Information and Privacy Commissioner which is a specialized tribunal dealing exclusively with access to information and privacy matters. There are also efficiencies in reviewing the records that I am concerned are not privileged because the Ministry has also applied s. 22 to them. Thus, if I conclude that s. 14 does not apply, I will have to go on to determine whether s. 22 applies and this requires me to see the records.

[120] I have also considered whether reviewing the records themselves would provide any additional evidence which would aid in adjudicating the issues. Certainly, reviewing File B records described as "documents" is necessary for me to make a decision since I have been given no information about the nature or content of the records. It is less clear that anything may be gained by reviewing the records in File A, as the Ministry has provided some description of them, but I am mindful of *Calgary (Police) Services* which suggests that a decision maker should review potentially privileged records prior to ordering them to be produced to an applicant. The sheer number of pages raises the risk that some of File A

[104] *Anderson Creek, supra* note 27 at paras. 109–111; *Huang, supra* note 21 at para. 66.

may be properly subject to solicitor client privilege and I want to exercise caution in making my decision about these records.

[121] I have concluded that nothing further could be gained by more back-and-forth with the Ministry. I have already expressed my specific concerns to the Ministry regarding its evidence and claim of privilege and given the Ministry an opportunity to respond. The Ministry takes the position that it has already provided more than enough evidence for me to adjudicate the issues.[105] In addition, as mentioned above, the Ministry says that further information about the records might waive privilege. It would also be procedurally unfair to the applicant to further delay this inquiry which has already been quite lengthy through no fault of his. Thus, I consider it appropriate at this stage to exercise my discretion under s. 44 of FIPPA to inspect Files A and B.

[122] I wish to stress that the decision to order records for inspection under s. 44 is a discretionary one and the amount of correspondence in this case was unusual. Public bodies should always present their best evidence with their initial submissions. Public bodies cannot rely on the Commissioner providing additional opportunities to bolster their evidence or provide better argument, particularly where the public body has been given such opportunities in the past. Similarly, the Commissioner will not review records simply because the public body has not met its burden of proof.[106] It goes without saying that Commissioner's decision to exercise his discretion under s. 44 turns on the particular circumstances of each inquiry.

CONCLUSION

[123] For the reasons given above, pursuant to s. 44 of FIPPA, the Ministry is required to produce for the Commissioner unsevered copies of the following records:

1. All of the records described in Lawyer C's Affidavit #1, Exhibit A.
2. Pages 1–135 described in Lawyer C's Affidavit #1, Exhibit E.
3. Pages 157–175 described in Lawyer C's Affidavit #2, Exhibit D.

[105] Ministry September 25, 2018 submission at para. 6.
[106] See for example Order F19-14, 2019 BCIPC 16.

[124] Pursuant to s. 44(3), the Ministry must provide the records to the Registrar of Inquiries by May 28, 2019.

May 13, 2019

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator

OIPC File Nos.: F16-66709 & F16-66361