OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F10-04

MINISTRY OF ATTORNEY GENERAL

Michael McEvoy, Adjudicator

February 10, 2010

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Summary: The applicant requested records Legislative Counsel used to complete the Revised Statutes of BC, 1996. The Ministry withheld them claiming solicitor-client privilege. The applicant argued that Chief Legislative Counsel's role in preparing revisions to provincial statutes under the *Statute Revision Act* was not that of a solicitor to the provincial government. Legal professional privilege applies to the requested records and the Ministry was authorized to withhold them.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 14; *Statute Revision Act*, ss. 1, 2, 3, 4 and 5; *Attorney General Act*, s. 2.

Authorities Considered: B.C.: Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 01-53, [2001] B.C.I.P.C.D. No. 56. **Ont.:** Interim Order P-1205; [1996] O.I.P.C. No. 234; Order PO-1721, [1999] O.I.P.C. No. 144; Order P-1570, [1998] O.I.P.C. No. 112.

Cases Considered: *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC); *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia,* [2002] BCJ No. 2464; *Cooper v. British Columbia*, Unreported, February 3, 1999 (Supreme Court of British Columbia Action No. C984069 – Vancouver Registry); *R. v. Campbell,* [1999] 1 S.C.R. 565.

1.0 INTRODUCTION

[1] The applicant requested that the Ministry of Attorney General ("Ministry") provide:

> …all working documents used by the Legislative Counsel Office during the general statute revision process that resulted in the Revised Statutes of BC, 1996, including the marked up originals.

[2] The Ministry withheld the records in their entirety under s. 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") because it said they were subject to solicitor-client privilege. An inquiry was held under Part 5 of FIPPA when mediation did not resolve the issue.

2.0 ISSUE

[3] The issue in this inquiry is whether s. 14 of FIPPA authorizes the Ministry to refuse to disclose certain records. Under s. 57(1), the burden of proof is on the Ministry.

3.0 DISCUSSION

[4] **3.1 Background**—The Office of Legislative Counsel ("OLC") is part of the Legal Services Branch, under the Ministry of Attorney General. The primary task of the Legislative Counsel who work in the OLC is to draft bills, regulations and Orders in Council. The Chief Legislative Counsel ("CLC") heads the OLC. The responsibilities of the OLC include "maintaining an orderly statute book and preparing statute revisions under the *Statute Revision Act* ("Act")."[1]

[5] Section 1 of the *Statute Revision Act* reads as follows:

> **Preparation of revision**
>
> 1 The Chief Legislative Counsel may prepare
>
> (a) a general revision consisting of the public Acts enacted before a date chosen by the Chief Legislative Counsel together with those other Acts considered advisable, or
>
> (b) a limited revision consisting of an Act or a portion of an Act.

[6] The revision powers in s. 2 of the Act allow the CLC to do such things as combine legislation, alter language and punctuation to achieve a clear, consistent and gender neutral style and to make minor amendments to correct grammatical or typographical errors.

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[1] Affidavit of Janet Erasmus, para. 4.

[7] Section 3 provides that the CLC must give the completed revision to the Clerk of the Legislative Assembly for presentation to the Select Standing Committee of the Legislative Assembly designated by the Legislative Assembly to examine the revision. The 1996 statute revisions were received by the Select Standing Committee on Parliamentary Reform, Ethical Conduct and Private Bills ("Committee").

[8] If the Committee approves and recommends revisions be brought into force, s. 4 of the Act provides that the Lieutenant Governor may direct that a copy of the revision be deposited with the Clerk of the Legislative Assembly. Section 5 says that the Lieutenant Governor in Council may specify by regulation when the deposited revision comes into force.

[9] **3.2 The Records**—While not ascribing a specific figure, the Ministry says that the number of responsive records is substantial.[2] The Ministry says that the records fall into 11 categories:[3]

> A. A checklist that provides details concerning what steps must be taken in the statute revision process, including what issues need to be dealt with. These checklists will typically contain handwritten comments and notations by Legislative Counsel, in their role as legal counsel to the Province, and Revision Coordinators, being support staff within the Office taking on this role for the purposes of a statute revision. … Attached to the checklist was a redline copy of the proposed draft statute revision in question, either with or without handwritten comments by the First Drafter, the Second Drafter and/or a Ministry Solicitor. Those drafts often have handwritten and electronic notations, which were exchanged between the client Ministry and Legislative Counsel.
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> B. Correspondence between LSB solicitors, assigned to give legal advice to a particular ministry, and representatives of their client ministry (normally the Director of the Ministry's Legislation Branch) concerning proposed changes to that Ministry's legislation through the statute revision process. Those communications include both memorandums and emails. …
>
> C. Notations and comments made by a representative of the client ministry that are found on copies of the redline proposed statute revision. Those notations and comments include instructions concerning the proposed statute revision, requests for legal advice concerning that document and comments about the proposed revision, all of which were communicated to their Ministry Solicitor …

[2] The Ministry says the responsive records fill more than 13 drawers, each of which is 75 centimeters in depth, Affidavit of Karen Way, para. 7.
[3] Ministry initial submission, para. 4.22.

D. Correspondence between Legislative Counsel and representatives of a client Ministry regarding proposed changes to a statute through the statute revision process. …

E. Correspondence between Legislative Counsel and a Ministry Solicitor concerning proposed changes to a statute through the statute revision process. …

F. Correspondence between the Revision Coordinator and Legislative Counsel concerning proposed changes to a statute through the statute revision process. …

G. Redline copies of draft statute revisions, with hand written comments on the face of the document by the First Drafter, the Second Drafter and/or a Ministry Solicitor. Some of those comments were made in response to suggestions made by the client regarding changes to the statute (i.e. indicating whether they agreed with the client's proposed changes or comments in relation to the proposed statute revision). …

H. Redline copies of draft statute revisions, without hand written comments. …

I. Progress notes of Legislative Counsel, being handwritten notes of Legislative Counsel relating to the process of the draft statute revision in question. …

J. Tables of concordance, which were prepared internally by Legislative Counsel and contain information from a Legislative Counsel Database. That information describes proposed revisions to specific sections of the statute in question …

K. Handwritten notes of Legislative Counsel staff (mostly Legislative Counsel, but sometimes by the Revisions Coordinator, a support person) regarding telephone conversations with representatives of a client ministry. …

[10] **3.3 Solicitor-Client Privilege—**The Ministry argues that s. 14 of FIPPA applies to the entirety of the records:

> The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[11] This provision encompasses two kinds of privilege recognized at law: legal professional privilege (sometimes referred to as legal advice privilege) and litigation privilege.[4] The Ministry argues that legal professional privilege applies here.

[4] See for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56.

Legal professional privilege

[12] Decisions of this office have consistently applied, as I do here, the test for legal advice privilege at common law. Thackray J. (as he then was) put the test this way:[5]

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.
>
> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

[13] The Ministry argues that throughout the revision process the CLC and Legislative Counsel with the OLC acted as legal advisers to "Her Majesty in Right of the Province of British Columbia (the "Province")".[6] The Ministry says it requires the Legislative Counsel it employs to be practicing members of the Law Society of British Columbia who have expertise in the principles of statutory interpretation, parliamentary practice and constitutional and administrative law.[7]

[14] In addition to the work of the OLC, the Ministry argues that it employs other lawyers in its Legal Services Branch ("LSB lawyers") and assigns them to "client" ministries. The Ministry says LSB lawyers also provided advice to ministry clients during the course of the statute revision process.

[15] Janet Erasmus is the current CLC. She deposes that the intention of statute revisions is not to change the law, but make it more readable for the public and more consistent in style and form. For example, language will be changed to be gender neutral or sections will be renumbered to omit spent and repealed provisions. She described the 1996 revision process as commencing with one of its Legislative Counsel ("first drafter") preparing a "redline" version of

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[5] *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).
[6] Ministry initial submission, para. 4.40. Affidavit of Janet Erasmus, para. 13.
[7] Ministry initial submission, para. 4.28.

the then existing legislation. The Ministry explained that the "redline" version showed what changes Legislative Counsel proposed to existing legislation using the Microsoft Word software feature known as "track changes" wherein proposed additions are underlined and deleted words are shown as struck out. The first drafter passed this revision to a second drafter, another Legislative Counsel, who provided comments. When the two agreed, they sent this redline second draft, along with a covering memo and information package, both to the responsible ministry and the LSB lawyer who provides legal advice to his or her client ministry.

[16] After consulting the client ministry, the LSB lawyer provided comments to the first drafter. Based on this, the first drafter prepared and shared a third draft that is conveyed to a senior supervising lawyer for the client ministry. Janet Erasmus deposes that the OLC often exchanged these drafts with the senior supervising lawyer several times before the OLC did a final edit to ensure the draft was consistent with the *Statute Revision Act.* The first drafter conveyed the final version to the responsible Deputy Minister for sign-off, after which it was sent to the Queens Printer for publication with the "redline" markings removed. The CLC then presented the collected revised statutes to the Clerk of the Legislative Assembly who forwarded them to the Committee and an Order in Council brought them into force shortly thereafter.[8]

[17] The Ministry's initial argument focuses on whether the so-called "redline" draft legislation is privileged. The Ministry's submissions on this point stem from two British Columbia Supreme Court rulings, *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*[9] and *Cooper v. British Columbia*,[10] both of which held that legal professional privilege applies to draft legislation on which Legislative Counsel's comments appear but not to draft legislation without such comments. The Ministry submits that handwritten comments, or notations, by both Legislative Counsel and LSB lawyers appear on the draft statutes in dispute in category G above and therefore the records in this category are privileged.[11]

[18] The Ministry acknowledges there are no handwritten comments or notations by Legislative Counsel on the draft legislation in category H. However, the Ministry says these records contain Legislative Counsel's proposed deletions and additions to statutes that are embedded by means of the "track changes" Microsoft Word program; the so-called redline draft version of the statutes described above. The Ministry argues that "despite" *Cooper* and *Health*

[8] The 1996 statute revision was brought into force on April 21, 1997.
[9] [2002] BCJ No. 2464, which followed the decision of Tysoe, J. in *Cooper v. British Columbia*, cited at footnote 10 below.
[10] Unreported, February 3, 1999 (Supreme Court of British Columbia Action No. C984069 – Vancouver Registry).
[11] Ministry initial submission, para. 4.45.

Services,[12] the redline draft statutes in this case constitute legal advice by Legislative Counsel to government in the form of proposed revisions to the statutes. The Ministry puts it this way:

> The Ministry submits that the proposed revisions to statutes that are found in the [redline drafts], as drafted by Legislative Counsel, are no different, in substance, from a copy of the statute (then in force) with handwritten comments of Legislative Counsel as to which provisions in the statute should be changed in compliance with the *Statute Revision Act.* The only difference between documents are [*sic*] that the former has legal advice from Legislative Counsel embedded within the draft document, whereas the latter has such advice hand recorded on a copy of the existing statute. The Ministry submits that it would be absurd to treat those documents differently when addressing the issue of whether they are subject to solicitor client privilege. If one is covered by solicitor client privilege on the basis of *Health Services* and *Cooper*, the Ministry submits that the other must be as well. Given that those cases hold that a draft statute with handwritten comments of Legislative Counsel is protected by solicitor client privilege, the Ministry submits that the [redline drafts] must also be protected by solicitor client privilege.
>
> In the alternative, this case is distinguishable from the facts in *Health Services* and *Cooper.* Firstly, in this inquiry, the Commissioner has evidence before him that was not before the court in the *Health Services* and *Cooper* cases. Secondly, this case deals with the statute revision process, whereas those cases did not. In this case, the advice offered by Legislative Counsel through the drafting process related to how to amend statutes in compliance with a statute, namely the *Statute Revision Act.*

[19] The Ministry further submits that privilege applies to the records in categories B, C and D because both the *Health Services* case and Commissioner Loukidelis in Order 02-38[13] found correspondence between the instructing party and legal counsel regarding draft legislation was protected.

[20] The Ministry contends that the information identified in category E, correspondence between Legislative Counsel and LSB lawyers, is similar to that found to be privileged in Ontario Interim Order P-1205[14] and should likewise found to be privileged here.[15]

[21] The Ministry argues that the records in categories A, I, J and K are in the nature of Legislative Counsel's "working papers" and therefore covered by privilege. It urges that I follow Ontario Order PO-1721[16] where similar records, in that case involving proposed regulatory changes to the *Ontario Health Insurance*

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[12] Ministry initial submission, para. 4.47.
[13] [2002] B.C.I.P.C.D. No. 38.
[14] [1996] O.I.P.C. No. 234.
[15] Ministry initial submission, para. 4.58.
[16] [1999] O.I.P.C. No. 144.

Act and an accompanying schedule of benefits, were held to be a legal adviser's working papers directly related to seeking, formulating or giving legal advice. The Ministry also argues that Ontario Order PO-1721 determined that memoranda from ministry staff or Legislative Counsel to ministry counsel seeking advice about proposed changes to the *Ontario Health Insurance Act* were privileged, as was a draft of the schedule of benefits that the client ministry conveyed to ministry counsel. The Ministry argues that, in the case of the latter example, if the communication of the draft to a ministry lawyer is privileged, so must the reverse scenario. The Ministry contends that Ontario Order PO-1721 supports its claims of privilege for all categories of records other than category F.

[22] The applicant does not agree that the role of the Office in conducting a statute revision is that of a lawyer in a lawyer-client relationship. Historically, he submits, the work of legislative drafters has not required a law degree.

[23] Further, the applicant argues that the Ministry is attempting to deceive this inquiry about who the "client" is in what he terms the "purported solicitor-client relationship."[17] The applicant submits that "Her Majesty the Queen in Right of the Province of British Columbia", being the executive branch of government, is not the client for the purposes of the records in this case. The applicant argues that, under the *Statute Revision Act*, the CLC prepares a revision "in the service of the Legislature." He submits that s. 2(1)(e) of the *Statute Revision Act* speaks of "minor amendments to clarify the intent of the Legislature", not "the intent of the Ministry". The applicant argues that, as the supreme law-making body, the Legislature can

> receive and accept or reject advice regarding contemplated legislation from any person or party it chooses, but that none of that advice constitutes the advice of a solicitor in the legal sense implied in the notion of solicitor client privilege.[18]

[24] The applicant submits further that:[19]

> By insisting that its client is "Her Majesty the Queen in Right of the Province of British Columbia" the Respondent is trying to avoid acknowledging the problem that has arisen because the Legislative Counsel Office failed to recognize that its role in assisting the ministries must be clearly distinguished from its role in serving the Legislature. The entire body of existing statutes belongs to the people through their elected representatives. They do not in any sense belong, collectively or individually, to any ministry.
>
> This apparent confusion is the result of the practices in government that fail to respect the basic principles of our form of representative government.

[17] Applicant's reply para. 4.
[18] Applicant's reply. para. 8.
[19] Applicant's reply, paras. 13 and 14.

[25] The applicant concludes that he need not respond to submissions about the communications between the OLC and the ministries because the records of these communications, regardless of their nature, cannot be privileged because they were not between a client and solicitor.[20]

[26] **3.4 Analysis**—The Ministry's assertion of privilege is premised on the existence of a solicitor-client relationship between Legislative Counsel and "Her Majesty the Queen in Right of the Province of British Columbia".

[27] I begin by clarifying the identity of the client in this case. The applicant submits that "Her Majesty the Queen in Right of the Province of British Columbia" refers to the executive branch of government. The Ministry did not take issue with this. The executive branch of government executes its functions through a Cabinet composed of the Premier and various Cabinet Ministers and ministries accountable to them.[21] I therefore conclude the issue here is whether a solicitor-client relationship exists between the CLC and lawyers of the OLC, on the one hand, and the Cabinet, on the other, with respect to the statute revision process. Also in issue in this case are records in categories B and C concerning communications between LSB lawyers and various ministries. It will therefore also be necessary to determine whether a solicitor-client relationship exists in these instances and if so whether the records related to it are privileged.

[28] Do the CLC and Legislative Counsel act in a legal capacity to Cabinet such that their relationship is protected by legal privilege?

[29] I accept the Ministry's evidence that all Legislative Counsel hold a current practicing certificate issued by the Law Society of British Columbia. This is a requirement of the job, because as Janet Erasmus deposes, Legislative Counsel must have expertise in the principles of statutory interpretation, parliamentary practice and constitutional and administrative law. I agree that the drafting of bills, regulations and Orders in Council, as she deposes, requires the exercise of legal skill and judgment.

[30] However, this alone is not determinative of the matter at issue. While Binnie J. noted, in *R. v. Campbell*[22] that solicitor-client privilege can exist where a lawyer is a member of the public service:[23]

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do

[20] Applicant's reply, para. 16.
[21] "Government" is also a term used to describe the executive branch in the Ministry submission and I will also do so from time to time in this Order.
[22] [1999] 1 S.C.R. 565 at para. 50.
[23] The often-cited authority on this point is *Alfred Compton Amusement Machines Ltd. v. Customs and Excise Commissioners*, [1972] 2 Q.B. 102 at 129 (C.A.) aff's. [1974] A.C. 405.

> is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected….
>
> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[31] Janet Erasmus's affidavit describes more precisely Legislative Counsel's responsibilities and relationship to government:[24]

> The primary responsibility of the [OLC] is to draft Bills, Regulations and Orders in Council for Government. The Office's other responsibilities include:
>
> (1) providing advice to Cabinet on legislative proposals made by ministries and attending Cabinet committee meetings to provide advice in relation to proposed legislation as drafted; for proposed regulations, fulfilling examination and advice responsibilities under section 2 of the *Regulations Act*;
>
> (2) ensuring that new legislation is prepared in a form consistent with other British Columbia legislation and that the Cabinet directives regarding the preparation of Government Bills are respected;
>
> (3) assisting client ministries in achieving Government's intentions for proposed legislation, ensuring that legal and administrative issues in relation to this legislation are resolved and identifying where consultation with other ministries or with persons outside Government is required or advisable;
>
> (4) advising the Government on the content of Bills, legislative procedure and the conduct of Government business in the Legislative Assembly;
>
> (5) answering Government inquiries on the progress of legislation through the Legislature;
>
> (6) maintaining an orderly statute book and preparing statute revisions under the *Statute Revision Act*; and
>
> (7) advising the Government on matters of statutory interpretation.

[32] Most of the matters above explicitly encompass the provision of advice or assistance to government in the course of developing and passing legislation. I readily accept those matters Janet Erasmus referred to describe the pattern of a solicitor-client relationship. For example, when the government of the day

[24] Erasmus affidavit, para. 4.

wishes to pass a law, at some point in the process it will refer the matter to Legislative Counsel to draft its expressed intentions in writing. The client is the ministry; it has authority and instructs Legislative Counsel, who apply legal training, skill and judgement, as lawyers, in fulfilling those instructions.

[33] This was the case in Order 02-38, on which the Ministry relies. The communication there involved a memorandum from a policy analyst, in what was then the Ministry of Skills Development and Labour, to Legislative Counsel concerning instructions to draft an Order in Council related to an occupational health and safety regulation. Commissioner Loukidelis found that solicitor-client privilege protected this communication.

[34] The Ontario cases the Ministry cites are similar. For example, Ontario Order P-1570 concerned communications from ministry counsel to Legislative Counsel requesting the preparation of a regulation relating to pharmaceuticals.

[35] These decisions affirm that, where Legislative Counsel, acting in the capacity of a lawyer in a lawyer and client relationship, carry out the instructions of a client ministry the confidential communications between them relating to the seeking or giving of legal advice are privileged.

[36] The Ministry argues that the role played by the CLC and OLC in the statute revision process parallels those matters just described. The Ministry submits Legislative Counsel's task was to provide legal advice concerning potential changes to the statute in accordance with the criteria established in the Act. Legislative Counsel, for example, advised certain ministries about matters that could not be dealt through the revision process because their substantive nature required legislative amendment. The Ministry also argues that redline draft legislation provided by the OLC to the ministry responsible for the legislation in question, is itself legal advice from Legislative Counsel that the proposed changes accorded with the purposes and authority of the *Statute Revision Act*. For the 1996 statute revision, the Ministry argues this was expressed within the cover memo and information package that was provided to ministries with the drafts seeking their response.

[37] The Ministry's submissions and evidence satisfy me that, in the circumstances of this case, OLC lawyers acted as solicitors to government ministries in respect of the statute revision process described in detail above. *Campbell* notes that in some circumstances work done by government lawyers involves their giving advice having nothing to do with their legal training or expertise, thereby putting it outside the solicitor-client relationship. The evidence here however clearly establishes legislative counsel's work, in respect of all matters leading to the finalized version of the statutes revision, engaged their legal training and expertise. Moreover, their work in this regard was consistent with their roles as employees of the Ministry providing legal advice to government

and government ministries described in the *Attorney General Act*, s. 2 of which reads in part:

> **Duties and powers**
>
> 2 The Attorney General
>
> …
>
> (d) must advise on the legislative acts and proceedings of the Legislature and generally advise the government on all matters of law referred to the Attorney General by the government,
>
> …
>
> (f) must advise the heads of the ministries of the government on all matters of law connected with the ministries,
>
> …
>
> (j) is charged generally with duties as may be assigned by law or by the Lieutenant Governor in Council to the Attorney General.

[38] The applicant's submission suggests that Legislative Counsel cannot, insofar as the statute revision process is concerned, act as both a legal advisor to government and provide the results of its work to the Committee. In my view, however, these roles are not mutually exclusive nor is there anything in the *Statute Revision Act* precluding Legislative Counsel from undertaking both functions. Moreover, I see no conflict in Legislative Counsel providing statute revision advice to government and providing those revisions to the Committee. While the latter function, as the applicant says, may be of service to the Legislative Committee, it does not put Legislative Counsel in a conflict as concerns its legal duties and responsibilities to advise government ministries. To that end, I agree with the applicant that in providing the revised statutes to the Committee this does not constitute the advice of a solicitor to the Committee "in a legal sense implied in the notion of solicitor-client privilege."[25]

[39] As determined above, the evidence establishes a solicitor-client relationship between Legislative Counsel and government ministries relating to the statute revision process. The remaining question is whether the records in dispute are subject to solicitor-client privilege because they disclose the seeking or giving of legal advice.

[40] In the case of the records in categories A, D, E, F, G, I, J and K, I find that all of these records are privileged because I am satisfied they relate to the seeking, formulating or giving of legal advice in confidence by Legislative Counsel in relation to government ministries.

[41] The Ministry also identifies some records as strictly communications between LSB lawyers and government ministries for the purpose of both giving

[25] Applicant's reply submission, para. 8.

and seeking legal advice with respect to the revision of statutes. LSB lawyers serve their specific client ministries and I am also satisfied the records under categories B and C arise from this solicitor and client relationship between the LSB lawyers and their respective ministries. I am also satisfied that those records constitute legal advice between the parties concerning proposed legislative revisions and that such advice was given in confidence.

[42] With respect to the remaining records in category H of the Way affidavit, the Ministry refers me to the *Health Services* and *Cooper* cases.

[43] What I glean from those two cases is that, where draft legislation contains "comments" by Legislative Counsel those records will be privileged as disclosing or seeking legal advice. Neither *Cooper* nor *Health Services* indicates whether the comments in question were handwritten or embedded in the document by virtue of word processing software. In my view, there is no relevance to such a distinction. The only question here is whether the redline "track changes" in the records of category H can be considered commentary that discloses the giving or receiving of legal advice. In my view, the delineated additions and deletions to the text of the draft statutes in this case are commentary disclosing the giving of legal advice by Legislative Counsel. In essence, the tracked changes encapsulate counsel's confidential advice, on the face of the record, as to recommended statutory amendments. For this reason, these drafts are subject to solicitor-client privilege.

[44] **3.5 Fee for Access**—The Ministry raises the issue of what if any fee, under s. 75 of FIPPA, it may charge the applicant if I order any of the records disclosed. This issue was not before me and in any event, given the conclusions reached above no determination of this matter is necessary.

4.0 CONCLUSION

[45] Under s. 58 of FIPPA, I confirm that the Ministry of Attorney General is authorized by s. 14 to refuse access to all records requested by the applicant.

February 10, 2010

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator