UNDER THE VEIL

A Critical Examination of the need for Information Commissioners to Review Asserted Privilege

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Introduction

One of the core principles to modern western democracies is the openness and transparency by which governments and their officials conduct their business. While this principle is not absolute, it cannot be understated that the need to access information about government policies and decisions is fundamental to an individual's ability to operate with adequate knowledge to make their choice at the polls.[1] Further, it is a recognized right that individuals have to access their own personal information. For this purpose, governments across Canada have enacted access to information laws, whereby information is free and accessible, with some exceptions. One of those key exceptions is the exclusion of records subject to solicitor client privilege.

These needs for confidential information have given rise to the concept of solicitor client privilege, which the courts hold as fundamental to the administration of justice.[2] Problems between these conflicting concepts of solicitor client privilege and the need for freedom of information stem from their diametrically opposed values (openness versus confidentiality) and their prevalent standing within civil society. This paper briefly examines the importance of solicitor client privilege and the challenges posed by a policy regime that seeks to peek behind the proverbial curtain. Given court rulings and the importance of both values, the judicial and legislative branches of government must create a conclusive framework to manage these challenges. This paper concludes with some recommendations on how that may be accomplished.

[1] Deepa Varadarajan, "Business Secrecy Expansion and FOIA" (2021) *68,* UCLA Law Review (Forthcoming), at pg 5.
[2] Brandon Kain, "Solicitor-Client Privilege and the Conflict of Laws" (2011) 90:2 Can B Rev, at pg 246.

For the purpose of this paper, solicitor client privilege is discussed, as it is the form of privilege referenced explicitly in the *Freedom of Information and Protection of Privacy Act* (FIPPA) for British Columbia and similar statutes in other provinces.[3] It is also important to note that similar provisions are included in the provincial *Personal Information protection Act*, which would affect private organizations.[4] For the expediency of examples, this paper only references FIPPA.

Importance of solicitor client privilege

While democracies rely on access to information for decision making by policy makers, individuals, governments, and private organizations also need some information to remain confidential so that they can have frank discussions about legal matters or consider policy ideas without the public's interference. The need for openness and transparency dates back as far as 1766, where it has expanded to meet the needs of modern society.[5] It Is important to note how long freedom of information has existed, as it has existed alongside the majority of the lengthy history of solicitor client privilege.

First, it is important to recognize and establish that solicitor client privilege is fundamental to the operations of our legal system and the criticisms in this paper are not offered lightly. However, even the Courts have recognized the potential for an opaque system of solicitor client privilege to be abused.[6] While simultaneously recognizing the concept's important role, the Courts have established rules and

[3] *Freedom of Information and Protection of Privacy* Act, RSBC 1996, c.165, s 14.
[4] *Personal Information Protection Act*, SBC 2003, c.63, ss 3(3), 23(3) and 38(3).
[5] Juha Mustonen, ed., *The World's First Freedom of Information Act*, Anders Chydenius Foundation Publications, Kokkola 2006, at pgs 8-17.
[6] Canada (Privacy Commissioner) v. Blood Tribe Department of Health, [2008] 2 S.C.R. 574, 2008 SCC 44 at para. 10.

guidance on when something is considered subject to solicitor client privilege and when it is not.

The core qualification within the rules around solicitor client privilege is that the communications be undertaken with the goal of seeking legal advice. This privilege is further qualified through the requirement that the information is communicated confidentially. There are some exceptions, such as when a criminal matter, a threat to public safety is involved, or the information is required to prove someone's innocence.[7]

On the surface, this definition seems reasonable. However, when applying a privileged labeled to a document, legal professionals must consult with their clients and the client gets to choose when that label is applied.[8] The next section discusses some of the rationale about why this problematic, beyond clients not knowing or understanding the nuances of the test above.

Richards and Solove discuss an important aspect of freedom of information, albeit in a different context, regarding fiduciary privileges. In their work, they note the important function that certain types of organizations play in assisting with the management of an organization or person's affairs. This concept extends into the legal world, where lawyers are privy to the often times complex and deeply personal nature of an individual or organization's dealings. These affairs can take different forms, such as solicitor client, litigation, and settlement privileges. Each of these types of privilege require legal

[7] Catherine Cotter. "Solicitor-Client and Litigation Privilege under FIPPA" (2008) 33:4 Can L Libr Rev at pg 412.
[8] Ibid at pg 410.

professionals representing their clients to keep the information between them private and confidential.[9]

Challenges faced by Commissioners

Under federal and provincial laws, Information Commissioners hold the regulatory oversight role when it comes to the application of exceptions to access to information. This occurs, whether the exceptions are applied under the public or private sector legislation. Orders from Commissioners are often posted publically, so that the situation and rationale is available to the general public comparing cases. This promotes the spirit of openness and transparency required by access to information laws within a democratic society.

When reviewing the decisions on the BC Commissioner's page, a pattern of interesting cases emerges. The BC Commissioner's website, it can be broken down by sub-section of the legislation. Cases that are challenged by judicial review have a gavel beside them. Toggling the sectional index to review cases based on section 14 of FIPPA (solicitor client privilege), the disposition of complains have one of three outcomes. Either the Commissioner affirms the exception, finds that the exception does not apply, or refuses to consider the exception because another exception already applies.[10]

However, the Commissioner's ability to do a complete review of the records where solicitor client privilege has been asserted is problematic. Due to the way that solicitor client privilege records are treated, being foundational to our judicial system as

[9] Neil M. Richards & Daniel J. Solove, "Privacy's Other Path: Recovering the Law of Confidentiality" (2007) 96 Geo. L.J. at pg 129.
[10] Office of the Information and Privacy Commissioner for British Columbia, "Rulings: Sectional Index" at https://www.oipc.bc.ca/rulings/sectional-index.aspx.

discussed above, Commissioners tend to have to resort to other tactics to complete their role in the access to information review process.

For example, in Order 20-42, the BC Commissioner's adjudicator notes that the Ministry did not provide the disputed records. Rather, she needed to review the records using an affidavit from the Ministry's counsel that set out what each record contained. It is interesting that the Commissioner's staff asserted their right to review the record in its entirety but chose not to in order to minimally infringe on privilege.[11] This is not the only case where affidavits are used either, and appears to be a standard operating procedure within British Columbia for reviewing section 14 exceptions.[12]

What may be unique for British Columbia is that their legislation explicitly states that records submitted to the Commissioner for a review of solicitor client privilege do not abrogate their assertion of privilege by submitting to a review.[13] This does not appear to be a privilege shared by all Commissioners, as the Information and Privacy Commissioner for Newfoundland and Labrador noted in his report on the state of the province's access to information laws during the review of their provincial statute. In his report, he notes that government organizations regularly assert privilege and then fail to provide the Commissioner with the records or rationale for their assertion.[14] The matter raised by the Newfoundland and Labrador Commissioner appears to still be under

[11] Order F20-42 Ministry of Attorney General, 2020 CanLII 2020 BCIPC 51, https://www.oipc.bc.ca/orders/3475 at para 11-14.
[12] Order F20-27 City of Vancouver, 2020, CanLII 2020 BCIPC 32https://www.oipc.bc.ca/orders/3438 at para 24.
[13] Supra note 3 at s 44(2.1).
[14] Office of the Information and Privacy Commissioner for Newfoundland and Labrador, "Submission of the Information and Privacy Commissioner to David B. Osborn, Committee Chair of the ATIPPA Statutory Review Committee 2020 on the Review of the *Access to Information and Protection of Privacy Act (ATIPPA, 2015)*" November 25, 2020 at pg 9, https://www.nlatippareview.ca/files/11252020-Office-of-the-Information-and-Privacy-Commissioner-Submission.pdf.

debate in British Columbia also, where the BC Commissioner's submission to the Committee reviewing the private sector legislation argued against removal of the Commissioner's ability to review solicitor client assertions.[15]

Court Rulings

In 2008, an employee of Blood Tribes Health Services was dismissed from their position and applied for records. The Alberta Privacy Commissioner was provided the opportunity to review all of the records except for the ones over which the employer asserted solicitor client privilege. The Commissioner ordered the production of these records and Blood Tribes Health Services challenged this order, eventually making its way to the Supreme Court of Canada. The Supreme Court reviewed the Commissioner's powers to review documents subject to an assertion of privilege under the language of section 12 of the *Personal Information Protection and Electronic Documents Act*.[16] In the case, the Supreme Court argues that, while they agree with the Commissioner that records subject to solicitor client privilege need a review, they questioned whether it was appropriate for that review to be conducted by the Privacy Commissioner. Rather, the court argues that, without explicit instruction in a statute, the Commissioner was supposed to submit reviews of solicitor client privilege to the federal court.[17]

[15] Office of the Information and Privacy Commissioner for British Columbia, "Submission to the Special Committee to Review the *Personal Information Protection Act*, CanLII 2020 BCIPC 47 at pgs 28-29, https://www.oipc.bc.ca/legislative-submissions/3465.

[16] Canada (Privacy Commissioner) v. Blood Tribe Department of Health, [2008] 2 S.C.R. 574, 2008 SCC 44 at case brief.

[17] Ibid at para 30-34.

This case was the leading standard for regulators until the issue was brought again to the Supreme Court against the Alberta Information and Privacy Commissioner. In this case, the Alberta Commissioner sought records that the University of Calgary asserted solicitor client privilege over. The Commissioner demanded either copies of the records or two sworn affidavits asserting privilege based on wording in the statute that the Commissioner could require the production of records despite "any privilege of the law of evidence." An appellant court held that solicitor client privilege did not fall under the privileges of the law of evidence.[18]

For the sake of expediency, this paper does not explore the privileges involved in the law of evidence as it is irrelevant to the arguments of this paper. What is sufficient to note is that the Court rejected the appellant court's argument that solicitor client privilege was not a privilege under the law of evidence. Rather, the court found that the description within the Alberta statute expressly considered the abrogation of privilege to the Commissioner for the purpose of reviewing a claim of privilege, as required under the Blood Tribes case.[19] However, the Commissioner lost the case when the University's external counsel asserted that the documents were communications between the University's external counsel and the University's general counsel. The Supreme Court argued that this assertion, a clear line of communication between two legal parties for the purpose of obtaining legal advice, should have been sufficient for the Alberta Commissioner to ascertain that the privilege assertion was valid.[20]

[18] Alberta (Information and Privacy Commissioner) *v.* University of Calgary, 2016 SCC 53, [2016] 2 S.C.R. 555 at case brief.
[19] Ibid at para 92.
[20] Ibid at para 126-127.

As noted by the Supreme Court in *Alberta (Information and Privacy Commissioner) v. University of* Calgary, the British Columbia FIPPA explicitly states that the disclosure of information subject to the privilege of solicitor client information was considered by the BC Legislature for disclosure to the Commissioner when reviewing an access request. However, it is interesting that the Court asserts that the disclosure of the records to the Commissioner still amounts to the abrogation of solicitor client privilege.[21] This is despite FIPPA section 44(2.1), which explicitly states that disclosure to the Commissioner does not affect the privilege asserted.[22]

This legislated comment on the affect of disclosure to the Commissioner of documents where privilege is asserted is important to understand. As noted by Commissioner McEvoy in British Columbia, the Commissioner never discloses the requested materials themselves to the applicant. Rather, the Commissioner's role is to review the information and provide a recommendation or order back to the public body or organization. In fact, the legislation explicitly instructs the Commissioner to take every reasonable precaution to avoid disclosing privileged information.[23] For the Canadian Bar Association, this assertion in law is insufficient.

Self interest in self regulation

In its submission to the BC Legislature, the Canadian Bar Association asserts that the disclosure of full records subject to solicitor client privilege goes beyond the Court rules. It lays out the court rules, noting that the courts only require a list of documents with

[21] Ibid at para 112.
[22] Supra note 3 at s 42.
[23] Supra note 15 at pg 28.

statements about the grounds for privilege, and that a judge would only order the production of the document in very limited circumstances.[24] This assertion seems reasonable on the surface but becomes problematic when examining the realities of self regulation.

Burns, Newhook, and Gittens note in their article about Oil and Gas companies' rights to protect confidential information that, as regulators, governments often have to acquire vast amounts of information about the internal operations of the companies they regulate. This often includes aggregating internal business strategies, sensitive documents about decision making, future plans, and proprietary information, such as trade secrets around formulas or pending patents.[25]

Deepa Varadarajan notes in his paper about business secrecy that businesses are increasingly wary of sharing information with governments out of a concern that their information will be released under freedom of information legislation.[26] One of the challenges that businesses face when sharing the information with government is that private are then vulnerable to their competitors and other individuals, such as journalists, who would not normally be able to access these records. After all, as Cotter notes, once information is released under an access to information request, the

[24] Canadian Bar Association British Columbia Branch, "Submissions of the Canadian Bar Association (British Columbia Branch) to the Legislative Assembly of British Columbia Special Committee to the Review the *Personal Information Protection Act*," August 14, 2020, at pg 31, retrieved from https://www.cbabc.org/CMSPages/GetFile.aspx?guid=fbf43328-3acc-4e4c-a29a-2975a845fbec.

[25] Stephen D. Burns, Todd Newhook and Sébastien A. Gittens "Confidential Information and Governments: Balancing the Public's Right to Access Government Records and an Oil and Gas Company's Right to Protect its Confidential Information" (2014) 37 Dalhousie L.J. 119 at pg 2.

[26] Supra note 1 at pg 3.

requester can do whatever they want with that information, including publishing it online or in journalistic publications.[27]

What this concern around releasing information leads to is a self-interested self regulation when it comes to applying exceptions to freedom of information.[28] For example, British Columbia's FIPPA section 23(3) requires public bodies to consult with third parties that would have their information disclosed, so that the third party can argue why the information should not be disclosed.[29] In this process, organizations can make arguments, such as the records were provided for litigation or settlement purposes, and are therefore protected by privilege. Public bodies also have the authority under section 14 to withhold information that it believes is subject to solicitor client privilege.[30]

Another challenge with freedom of information requests comes from volume and technology. As noted in its press release for FIPPA amendments, the Ministries of the province alone have seen a 40% increase in the number of FOI requests filed and processed over the last two years.[31] This brings in the role of technology. While Varadarajan argues about the ability for mass expropriation of data, technology also allows for the mass identification and withholding of information.[32]

[27] Supra note 7 at pg 413.
[28] Supra note 1 at pg 6.
[29] Supra note 3 at s 23(3).
[30] Ibid at s 14.
[31] BC Ministry of Citizens' Services, "Amendments strengthen access to information, protect people's privacy," October 18, 2021, at https://news.gov.bc.ca/releases/2021CITZ0048-001990.
[32] Supra note 1 at pgs 15-16.

Private sector software solutions, such as ATIPXpress, have the ability to quick search and redact sensitive information.[33] However, the software is not able to read context. This means that public servants or private sector employees could be labelling documents as “privileged” or “confidential”, the software tends to accept this as true, even if a lawyer is just carbon copied or not even present within the chain. If this is not reviewed, a record response goes back to the applicant as information withheld under solicitor client privilege with no other context. Further, it is the client, not the legal counsel, that would assert privilege over the documents.[34] As argued by Cotter, there is no way to correct this error without a review.[35]

Ideally, legal counsel should attempt to cover the assertion of privilege under other exceptions, such as asserting that the record would create an expectation of harm on the organization.[36] However, when one reviews actual cases, solicitor client privilege is often asserted alongside other exceptions, such as policy advice, in an attempt to keep as much out of the public eye as possible.[37]

In short, both government actors and private bodies have the ability to self designate which exceptions apply to their freedom of information request and withhold that information accordingly. Software that assists with applying these exceptions. Due to time and the quantity of these requests, the chances of the software’s application of exceptions being challenged internally is low. This brings in the role of the Information

[33] Ains. “FOIAXpress – The industry Leader in FOIA Request Tracking and Management Solutions,” at https://www.ains.com/foiaxpress/.
[34] Supra note 7 at 410.
[35] Ibid at pg 413.
[36] Supra note 25 at pgs 12-14.
[37] Office of the Information and Privacy Commissioner for British Columbia, “Sectional Index”, retrieved from https://www.oipc.bc.ca/rulings/sectional-index.aspx.

Commissioner, at the federal level, and the Information and Privacy Commissioners, at the provincial level, to review applied exceptions and ensure they are appropriate.

Policy Options

As displayed, there is a tension between the need for transparency in our governance, while also respecting the importance of solicitor client privilege as a foundation of our judicial system. The technology today makes it far too easy for records to be tagged and privilege asserted without those records meeting the standards of solicitor client privilege established by the Courts. Therefore, it would be irresponsible and undermine public trust for Legislatures to take the approach suggested by the Canadian Bar Association and forbid Commissioners from having any ability to review records for which solicitor client privilege has been asserted. This leaves three potential policy options:

1. Mandate that the courts review all disputed records of solicitor client privilege;
2. Leverage provincial and territorial law societies to act as a regulator for the purpose of reviewing solicitor client privilege records; or
3. Apply the BC standard nationally and make records subject to solicitor client privilege subject to review by Information Commissioners.

Court Mandated Reviews

This policy response would likely be the most appreciated by the Canadian Bar Association, as they trust the Courts to ensure that solicitor client privilege is not infringed. Further, the Courts would act as an independent third party, separate from the operative lawyers and the applicants seeking the information. In a similar vein when

discussing the review of source code amid a trade secret review, Sonia Katyal also argues that the courts are a potentially fruitful possibility, as they represent a demarcation system, permitting a degree of openness while respecting the complexity of a necessary review.[38]

The problem with leveraging the courts is resourcing. As noted by the Canadian Senate in 2016, resourcing of the judicial system is already stretched quite thin and this is causing delays in other sectors of the judicial system.[39] While ideally the Courts would be the venue for reviewing solicitor client privilege, doing so would be costly due to the wages of judges and would create further delays in the administration of justice. In fact, the Senate went so far in its report as to recommend alternative venues for cases to go, including innovations to administration and leveraging technological solutions.[40] Given the realities of limited resources, the courts should only be leveraged to mediate disputes arising from other venues that take a first attempt at resolving disputes over the application of solicitor client privilege.

Leveraging the Law Society

The second option would be to leverage the expertise of the provincial regulator for the legal profession. In BC, the Law Society is responsible for protecting the public interest related to the administration of justice through enforcing standards of professional conduct.[41] While the Law Society is already a public body and regulator in BC, this

[38] Sonia K. Katyal, "The Paradox of Source Code Secrecy" (2019) 104 Cornell L. Rev. 1183 at pg 1259.
[39] Hon. Bob Runciman and Hon. George Baker, "Delaying Justice is Denying Justice," *Senate of Canada* August 2016, at pgs 11-12, retrieved from https://sencanada.ca/content/sen/committee/421/LCJC/Reports/CourtDelaysStudyInterimReport_e.pdf.
[40] Ibid at pages 14; 16-17.
[41] Law Society of British Columbia, "About Us", retrieved from https://www.lawsociety.bc.ca/about-us/.

policy scheme would result in other conflict of interest issues.[42] As noted above, the lawyers asserting privilege are representing the desires of their clients, and may have internally objected to the assertion of privilege.

Further, bringing these cases to the Law Society could create a situation where the conduct of members could be revealed in an access to information review, which could lead to other investigations for conduct. A clear segregation of duties would need to be present. It could also be viewed as perplexing by the public why the body responsible for regulating lawyers is also using lawyers to review the work of other lawyers. In short, the optics of this policy decision could undermine trust as there is no perceived neutral third party.

Utilizing the expertise of Information Commissioners

Finally, there is the option to implement a regime similar to British Columbia across Canada. The Information Commissioners have expertise in the review of documents. They are not strangers to reviewing differing legal standards, such as trade secrets or evaluating for when the disclosure is within the public interest. Further, the Commissioners operate under similar rules of procedure and, as bodies subject to judicial review, must use the same standard of review as the Courts.[43]

Further, the BC Commissioner already appears to attempt to minimize its intrusion of solicitor client privilege by following a similar procedure as the courts by requesting a list and why privilege applies, before ordering production when it is necessary.[44] If there

[42] Supra note 3 at Schedule 3.
[43] Supra note 15 at pg 28.
[44] Supra note 12 at para 24.

were concerns around the training of Commissioner's staff to ensure they are adequately qualified to evaluate solicitor client privilege, the Legislature could implement a requirement in the statute that the Commissioner's delegate reviewing solicitor client privilege have certain qualifications, such as being a member in good standing with their provincial Bar Association.

Conclusion

It is an undisputed fact that solicitor client privilege is a valuable and important aspect of Canada's judicial system. However, no process should be so above scrutiny that its contents are hidden from the transparency mechanisms of our society, such as freedom of information requests. The Supreme Court of Canada has clearly established tests for when items are considered solicitor client privilege or not and how legislatures can authorize a review of their contents to ensure privilege is asserted correctly.

It is within the hands of a lawyer's client's to assert their privilege and with the rise of technology, it is easier than ever to apply labels and rules onto documents when responding to access requests. This reality has only increased the importance of oversight of documents claiming to assert solicitor client privilege. The question then remains about who holds the best venue for reviewing that privilege.

While the answer to this question is ideally the courts, who can make final binding decisions on the matter. In reality this is an impractical and costly solution. Provincial regulators for lawyers could oversee the reviews, however this may cause conflict of interest concerns with the public and create tension if information started leaking from a review of asserted privilege into member conflict investigations.

This leaves the Information Commissioners, who specialize in the review, mediation, and adjudication of disputes related to access to information requests. These Commissioners are specialists in this area, do not release the documents themselves, and are subject to judicial review. So long as they respect the special nature of solicitor client privilege assertions, Commissioners should be permitted by their legislatures to review these documents without abrogating privilege in other areas of the judicial system.

Further, organizations should be more careful in what they assert privilege on and apply for more accurate exceptions, such as trade secrets or that the information was supplied in confidence. Providing Commissioners with this power to review, at a minimum a document asserting privilege and why privilege applies, and at most the documents over which privilege is asserted is an important and necessary function in an already overburdened judicial system.

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