IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner),* 2021 BCSC 266

Date: 20210219
Docket: S195477
Registry: Victoria

In the Matter of the Decision of the Office of Information and Privacy Commissioner dated October 29, 2019, in OIPC File No. F16-67664, F17-70478 and F17-70479 and in the matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Minister of Finance

Petitioner

And:

Information and Privacy Commissioner of British Columbia and C.M.

Respondents

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Petitioner:	J. G. Penner
Counsel for the Respondent Information and Privacy Commissioner of British Columbia:	C. J. Boies Parker, Q.C. K. R. Phipps
Place and Dates of Trial/Hearing:	Victoria, B.C. October 15, 2020 and January 21, 2021
Joint Written Submissions:	February 11, 2021
Place and Date of Judgment:	Victoria, B.C. February 19, 2021

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A. INTRODUCTION

[1] In a petition filed December 11, 2019 the petitioner, the Minister of Finance, seeks an order of *certiorari* setting aside portions of a decision of the respondent, the Information and Privacy Commissioner of British Columbia (the "IPC"), dated October 29, 2019 (indexed as *Order F19-38*, 2019 BCIPC 43*)*, among other orders.

[2] The basis of the petition is s. 14 of the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 ("*FIPPA*") which permits a public body to refuse access to records that are subject to solicitor-client privilege.

[3] The October 29, 2019 decision of the IPC found that the petitioner was not authorized under s. 14 of the *FIPPA* to refuse access to records sought by C.M., vice-president of the Sunshine Coast Accommodation Association.

[4] The subject matter of the records sought by C.M. was an August 2015 application by the Sunshine Coast Tourism Society to the Ministry of Finance to have the municipal regional district tax (the "MRDT") applied to the Sunshine Coast Regional District and the Powell River Regional District (the "Districts"). There are four categories of documents at issue: an email attachment, emails involving employees of ministries other than the petitioner, an email copied to counsel for the Assistant Deputy Attorney General (the "ADAG"), and emails involving counsel for tax and revenue issues.

[5] According to the petitioner, the records sought by C.M. are subject to solicitor-client privilege and s. 14 of the *FIPPA* permits it to refuse access to the records. On the other hand, the IPC relies on the reasons given in the October 2019 decision and says the petitioner could not refuse access to the records. C.M. is no longer participating in this proceeding although he was given notice.

[6] The petitioner relies on the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241 and Rules 2-1(2)(b) and 16-1 of the *Supreme Court Civil Rules*.

B. BACKGROUND

[7] The petitioner Ministry of Finance is established by the *Financial Administration Act*, R.S.B.C. 1996, c. 38 and it is a "public body" as defined under the *FIPPA*.

[8] Among other programs, the petitioner administers the MRDT which is authorized under the *Provincial Sales Tax Act*, S.B.C. 2012, c. 35. It is a tax charged on hotel accommodation, commonly referred to as a hotel room tax. A municipality, regional district or eligible entity can apply to have the MRDT apply in a specific area. One of the application requirements is that the majority of accommodation providers in a region must support the imposition of the tax. The funds that are raised are disbursed back to the communities for programs such as the marketing of tourism.

[9] The IPC is an independent Officer of the Legislature that oversees the information and privacy practices of public bodies and private organizations in British Columbia under the authority of the *FIPPA*. It provides the public with the right to access records and information in the custody and control of public bodies. Some exceptions apply to access such as where solicitor-client privilege under s. 14 of the *FIPPA* applies, which is the subject matter of this petition.

[10] The respondent, C.M., is vice-president of the Sunshine Coast Accommodation Association. He is not participating in this proceeding although he was given notice.

[11] C.M., apparently on behalf of the Sunshine Coast Accommodation Association, requested records from the petitioner under s. 5 of the *FIPPA* with respect to the application of the MRDT to the Districts, which was approved by Cabinet by Order in Council on April 29, 2016.

[12] There was an issue about whether the original majority support for the MRDT changed because some of the accommodation providers who originally supported

the MRDT had withdrawn their support. C.M. made three requests to the petitioner for information on May 24, October 2 and October 7, 2016 covering the period September 1, 2015 to October 7, 2016.

[13] A number of documents were disclosed by the petitioner but it withheld some documents claiming solicitor-client privilege under s. 14 of the *FIPPA*. The petitioner withheld other documents relying on other provisions of the *FIPPA* (for example, confidential documents for cabinet) that are not at issue in this petition.

[14] C.M. applied under s. 52 of the *FIPPA* for a review by the IPC. Mediation (under s. 55) was not successful. C.M. then requested that the matter proceed to an inquiry by the IPC under s. 56 of the *FIPPA*.

[15] On April 25, 2018 the IPC issued a Notice of Written Inquiry which formally started an inquiry process. It included an undated and short "Investigator's Fact Report" which simply set out a chronology of events involving the IPC from the first access request in May 2016 to April 2018. At that point the inquiry related to s. 12 (cabinet confidences), s. 13 (policy advice), s. 14 (solicitor-client privilege), s. 21 (disclosure harmful to business interests of a third party) and s. 22 (disclosure harmful to personal privacy) of the *FIPPA*. This petition is only about s. 14, solicitor-client privilege.

[16] The petitioner released some additional documents but not all. It also provided a lengthy submission on June 21, 2018 in which it relied on s. 14 and its claim of solicitor-client privilege (among other exclusions under the *FIPPA*). The submission included affidavit evidence, a description of the documents at issue, tables setting out the documents at issue and the provisions of the *FIPPA* relied on and legal argument. Some documents were apparently disclosed by the petitioner to the IPC on an *in camera* basis, but not all documents.

[17] C.M. provided a submission on July 23, 2018 in which he maintained he was entitled to all of the documents in his original request. The petitioner responded on July 26, 2018 and denied a number of allegations of wrongdoing alleged by C.M.

[18] On November 28, 2018, the IPC assigned the inquiry to a delegate for adjudication. The adjudicator sought additional information from the petitioner through correspondence and the petitioner provided some information on December 12, 2018. On December 20, 2018, C.M. advised the adjudicator and the petitioner that the latter had no claim to solicitor-client privilege. There was correspondence between the petitioner, the adjudicator and C.M. in January and February 2019 including requests from the adjudicator for more information from the petitioner. According to his letter of February 12, 2019, C.M. believes that "[c]abinet … committed abuse of power by approving SCT's [Sunshine Coast Tourism's] MRDT application – resulting in the implementation of an illegal MRDT tax on the Sunshine Coast", among other concerns.

[19] On October 29, 2019 the adjudicator issued her decision under s. 58(1) of the *FIPPA* (*Order F19-38*). The adjudicator's decision confirmed the petitioner's decision to withhold some of the documents at issue under s. 14 of the *FIPPA*. She also found that for other documents the petitioner could not decline to disclose them under s. 14. These latter documents are the subject of this petition.

C. ANALYSIS

[20] As above the adjudicator agreed with the petitioner that it could refuse to disclose some records on the basis of solicitor-client privilege as provided by s. 14 of the *FIPPA* (among other exceptions). However, she did not agree with the petitioner's assertion of solicitor-client privilege for other documents. These are the subject of this petition.

[21] The documents at issue are in four categories: an email attachment, emails involving employees in Ministries (other than the petitioner), an email to counsel for the ADAG and an email about tax issues.

[22] I will consider the following issues:

(a) The role of the IPC in a challenge to one of its decisions;

(b) The standard of review to be applied by the court to the decision of the adjudicator;

(c) The legal context; and

(d) The specific documents in dispute.

(a) Role of the IPC

[23] At the hearing of this petition counsel for the IPC applied to make submissions on the merits of its decision dated October 29, 2019. This was not opposed by the petitioner.

[24] In the past a tribunal such as the IPC had a very limited role in a judicial review of one of its decisions and it was not appropriate for a tribunal to argue the merits of its own decision (*Northwest Utilities Ltd. et al v. Edmonton,* [1979] 1 S.C.R. 684).

[25] The law has developed since that time and it is now generally accepted that a tribunal such as the IPC can assist the court by explaining the structure and provisions of the legislation, the standard of review, the record of the proceeding, the decision under review, the issues in the specific proceeding and the appropriate remedy (*British Columbia (Attorney General) v. British Columbia (Information an Privacy Commissioner),* 2019 BCSC 1132, at paras. 25-26).

[26] In some circumstances the court has discretion to permit a tribunal to go further and argue the merits of its decisions (*Ontario (Energy Board) v. Ontario Power Generation Inc.,* 2015 SCC 44 [*Ontario (Energy Board)*], at paras. 54, 57 and 58). When a tribunal argues the merits of one of its decisions a balance is required between the need for a fully informed court and the importance of maintaining the impartiality of the tribunal. Obviously, a tribunal cannot be strident or aggressive in its defence of a decision.

[27] Three factors are considered when deciding whether the permit a tribunal to argue the merits of one of its decisions (*Ontario (Energy Board),* at para. 59):

> (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
>
> (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
>
> (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[28] In addition, "where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute" (para. 54).

[29] In the subject petition, the initiator of the request for the documents at issue is no longer participating and there is only the IPC available to represent the position adverse to the petitioner. However, the IPC is more of an adjudicative body than a regulatory one and there is authority (discussed below) that the IPC plays an adversarial role in privacy issues, unlike the more objective role of the courts.

[30] At the hearing of this petition I concluded that it would be of assistance to the court to have counsel for the IPC make submissions on issues such as the standard of review as well as the merits of the petition. There is no one else to take that position and the IPC has the expertise in this specialized area of the law. Counsel for the IPC made her submissions on the petition on that basis.

(b) Standard of review

[31] It is agreed that the *Administrative Tribunal Act,* S.B.C. 2004, c. 45 is not applicable to a decision of the IPC. The result is that the common law approach to judicial review is to be used.

[32] The parties also agree that the standard of review in this petition is correctness. This is on the basis of previous decisions that have held that solicitor-client privilege is of "fundamental importance" and it "is necessary for the proper functioning of the justice system." The reasoning for this conclusion includes the proposition that the uniform protection of solicitor-client privilege requires "uniform and consistent answers" that would not be available under a reasonableness standard (*Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 [*University of Calgary*], at para. 20).

[33] In addition, as will be seen, there is some authority to suggest that privacy protection has a quasi-constitutional status and the Supreme Court of Canada has stated that the presumption of a reasonableness standard for judicial review can be rebutted for certain categories of questions, including constitutional questions (*Vavilov v. Canada (Minister of Citizenship and Immigration,* 2019 SCC 65 [*Vavilov*], at para. 17).

[34] On this basis the IPC accepts that the court has full authority to come to its own conclusions. However, the IPC adds that the court should nonetheless take into account the decision maker's reasoning. That reasoning may be persuasive and even convincing. A recent decision of the Supreme Court of Canada is cited for this interpretation of the correctness standard (*Vavilov,* at paras. 16-17).

[35] Initially, the petitioner takes some exception to the qualification placed by the IPC on the standard of correctness. The IPC's position is characterized by the petitioner as making correctness the same as an appellate review where some deference is owed to the decision maker. This is an "erroneous approach" according to the petitioner.

[36] I am approaching my review of the adjudicator's decision on the basis set out in *Vavilov*:

> [54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir,* at para. 50 [*Dunsmuir v. New Brunswick,* 2008 SCC 9]. While it should take the administrative decision maker's reasoning into account – and indeed, it may find that reasoning persuasive and adopt it – the reviewing court is ultimately empowered to come to its own conclusions on the question.

[37] I do not interpret that approach as requiring deference to the IPC decision and nor do I read the submission of the IPC to require deference. I am entitled to find the adjudicator's reasoning persuasive and adopt it for my decision. This would not be deference to the adjudicator but concluding that she was correct.

(c) Legal context

(i) Introduction

[38] This petition involves the relationship between two important protections for use and access to information: solicitor-client privilege and freedom of information.

[39] The IPC relies on the important mandate of the IPC to make public bodies more accountable to the public through freedom of information and to protect personal privacy as described in s. 2(1) of the *FIPPA*. In addition, the public has the right to access "any record in the custody or under the control of a public body", as set out in s. 4. An important element of the *FIPPA* is the opportunity in s. 2(1)(b) for members of the public to request corrections of personal information about themselves held by a public body. Further, access to information held by public bodies and ordered to be disclosed by the IPC is not for selective or restricted purposes. The information is available to the public at large (*Order 01-52, Ministry of Water, Land, and Air Protection (Re)*, [2001] B.C.I.P.C.D. No. 55, at para. 73). These are obviously important legislative objectives and, as above, the *FIPPA* has been described as creating a quasi-constitutional jurisdiction.

[40] On the other hand, the petitioner points out that the principle of solicitor-client privilege is crucial to its work when it requires legal advice. It is accepted that the Ministry of Finance is a public body subject to the *FIPPA* and it is required to disclose records in its custody or control. However, from time to time it obtains legal advice as part of its work developing policy and drafting legislation and that advice must remain privileged. This is because, as with other solicitor-client relationships, clients must be able to communicate with lawyers without fear that their communications will be disclosed to anyone else (*Keefer Laundry Ltd. v. Pellerin Milnor Corp.,* 2006 BCSC 1180 [*Keefer Laundry*], at para. 55; citing *Smith v. Jones,* [1999] 1 S.C.R. 455, at paras. 44-47).

[41] It is not in dispute that legal advice is subject to solicitor-client privilege and disclosure of advice may be refused on the basis of solicitor-client privilege. Indeed, it cannot be in dispute because it is stated expressly in s. 14 of the *FIPPA*: "[t]he head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege." That fact distinguishes the subject petition from the leading cases.

[42] As will be seen, the IPC has agreed with the petitioner that it can refuse to disclose some of the information sought by C.M. on the basis of s. 14. Whether the privilege attaches to other information is in dispute.

[43] I note that the onus to demonstrate privilege lies with, in this case, the petitioner (*Keefer Laundry,* at para. 58; citing *Hamalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254 (B.C.C.A.)). And it is for the IPC to decide if the claim has been made out. If there is a disagreement, the dispute can be taken to court under the correctness standard, as was done here. An application to court might result in the court reluctantly inspecting the document under Rule 7-1(20) of the *Supreme Court Civil Rules* to decide the validity of an objection.

[44] I turn to how the courts have discussed the issues of solicitor-client privilege generally and in the context of freedom of information legislation.

(ii) The leading cases

[45] A 2004 Supreme Court of Canada judgment summarized the earlier law on solicitor-client privilege (*Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31 [*Pritchard*]):

> [16] Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established". The scope of the privilege does not extend to communications: (1) where legal advice is not sought or offered; (2) where it is not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct: see *Solosky*, supra, at p. 835.
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> [17] As stated in *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2:
>
> > Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.
>
> The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction.
>
> [18] In *Lavallee, Rackel & Heintz v. Canada (Attorney General),* [2002] 3 S.C.R. 209, 2002 SCC 61, this Court confirmed that the privilege must be nearly absolute and that exceptions to it will be rare. Speaking for the Court on this point, Arbour J. reiterated what was stated in *McClure*:
>
> > … solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis in original.]
>
> (Arbour J. in *Lavallee*, supra, at para. 36, citing Major J. in *McClure*, at para. 35.)

[46] More recently there is the decision of *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* 2008 SCC 44 [*Blood Tribe*] where the tension between freedom of information and solicitor-client privilege was discussed. The

facts related to a claim of wrongful dismissal by a former employee of the Blood Tribe Department of Health. She requested documents from her employer but the employer refused to provide them and she then filed a complaint under federal privacy legislation. The federal Privacy Commissioner requested the documents and they were provided except for those over which the employer claimed solicitor-client privilege.

[47] The Commissioner then ordered production under s. 12 of the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"). It stated that the Commissioner has the power to compel the production of records "in the same manner and to the same extent as a superior court of record" and to receive such information "whether or not it is or would be admissible in a court of law."

[48] It was common ground that the legislation at issue in *Blood Tribe* did not expressly grant the Commissioner the authority to review documents over which solicitor-client privilege was claimed. The issue was whether and to what extent this language affected solicitor-client privilege.

[49] On judicial review in the *Blood Tribe* case, the Federal Court upheld the Commissioner's decision but this was set aside by the Federal Court of Appeal. The Supreme Court of Canada dismissed a subsequent appeal. It concluded that the right of an individual or organization when asserting solicitor-client privilege must prevail over the language in the applicable statute (para. 1).

[50] The Supreme Court of Canada emphasized the importance of solicitor-client privilege in the following terms:

> [9] Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":

> > [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
> >
> > (*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 35, quoted with approval in *Lavallee, Rackel & Heintz v. Canada (Attorney General),* [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36.)
>
> It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. The privilege belongs to the client not the lawyer. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 188, McIntyre J. affirmed yet again that the Court will not permit a solicitor to disclose a client's confidence.

[51] The court was concerned about the "Sweeping Nature of the Privacy Commissioner's Argument." It noted that the only reason that the Privacy Commissioner in *Blood Tribe* demanded production of the documents at issue was because the employer indicated they existed and the Commissioner did not claim necessity (para. 17). The Commissioner's argument, if successful, would have resulted in "routine access … in any case she investigates where solicitor-client privilege is involved." And "piercing the privilege would become the norm rather than the exception..." Even the courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless there is evidence of the necessity to do so in order to fairly decide the case.

[52] The court disagreed with the Commissioner's position that her powers "could hardly be broader" and that she is vested with similar authority to that of a superior court (paras. 21-22). They concluded that the Commissioner was "a stranger to the privilege." Privilege must be viewed through the eyes of the client and compelled disclosure to the Commissioner would constitute an infringement of the confidence between lawyer and client. This would be more serious if the information was disclosed to the public.

[53] In addition, the authority to receive a broad range of evidence "cannot be read to empower the Privacy Commissioner to compel production of solicitor-client documents from an unwilling respondent" (para. 21). The Supreme Court of Canada

went further and concluded that the Privacy Commissioner may be adversarial in interest, unlike a court. This was because she could take the resisting employer to court to compel production of information and she may decide to share information with prosecutorial authorities without a court order or the consent of the parties (at paras. 18-23).

[54] Another decision, relied on by both parties in the subject petition, is *University of Calgary*. There the dispute arose from a provision in the Alberta *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25. Section 56(3) of that statute stated that "[d]espite any other enactment or any privilege of the law of evidence" a public body must produce a record required under the legislation.

[55] The facts in *University of Calgary* were that the Alberta IPC required production of records over which the university claimed solicitor-client privilege. On judicial review the Alberta Court of Queen's Bench agreed with the IPC but this was overturned by the Alberta Court of Appeal. The Supreme Court of Canada then allowed an appeal by the university. They concluded that the Alberta legislation did not require a public body to produce documents over which solicitor-client privilege is claimed. The decision on the result was unanimous but there were three concurring sets of reasons.

[56] The Supreme Court of Canada in *University of Calgary* discussed solicitor-client privilege as a rule of substance that has evolved from a rule of evidence (per Côté J., para. 38). Others have suggested that it has a quasi-constitutional status and it is an important principle of fundamental justice in Canadian law. At first it provided a basis for a lawyer to refuse to testify in court about confidential communications with a client (paras. 38-39, 41 & 44). It now extends beyond the courtroom and has been formulated as follows (*Descôteaux v. Mierzwinski,* [1982] 1 S.C.R. 860, at 875; *University of Calgary*, at para. 40):

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.

> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.
> …

[57] In *University of Calgary* the Supreme Court of Canada also stated that solicitor-client privilege "must remain as close to absolute as possible and should not be interfered with unless absolutely necessary" (per Côté J., at para. 43; citing *Canada (Attorney General) v. Chambre des notaires du Québec,* 2016 SCC 20, at para. 28). In criminal proceedings the privilege only yields in "certain clearly defined circumstances, and does not involve a balance of interests on a case-by-case basis" (para. 43; citing *R. v. McClure,* 2001 SCC 14, at para. 35).

[58] The conclusion of the majority in *University of Calgary* was also that, subject to constitutional limitations, legislation can "pierce" solicitor-client relations; "[h]owever, the language must be explicit and evince a clear and unambiguous legislative intent to do so" (para. 71). With respect to the Alberta statutory provision before the court "there is no such language."

[59] As above, s. 14 of the *FIPPA* resolves the issues in the above cases in favour of the right of a public body (such as the petitioner) to refuse disclosure of communications subject to solicitor-client privilege. There is, for example, no interpretive issue such as in *University of Calgary* about whether a public body can rely on solicitor-client privilege. The IPC does not have the authority of a superior court and nor is it seeking that authority in this petition.

[60] The British Columbia Court of Appeal has pointed out that the objective of s. 14 of the *FIPPA* is to ensure that common law solicitor-client privilege "remains protected" (*British Columbia (Attorney General) v. Lee,* 2017 BCCA 219 [*Lee*], at para. 31).

[61] In an earlier decision the same court said much the same thing about s. 14, adopting the trial judge's comments as follows (*Legal Services Society v. British Columbia (Information and Privacy Commissioner),* 2003 BCCA 278, at para. 35; citing *Legal Services Society (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C. S.C.)):

> Section 14 is paramount to the provisions of the statute that prescribe the access to records that government agencies and other public bodies must afford. It was enacted to ensure that what would at common law be the subject of solicitor-client privilege remain privileged. There is absolutely no room for compromise. Privilege has not been watered-down any more than the accountability of the legal profession has been broadened to serve some greater openness in terms of public access.
>
> 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. [paras. 25-26]

[62] That conclusion obviously confirms that the value and strength of solicitor-client privilege at common law is not compromised or diminished by s. 14 of the *FIPPA*. The issue in dispute here remains: what is required to establish a claim of solicitor-client privilege under the *FIPPA*?

[63] Two other issues discussed in the authorities are significant here.

[64] First, the authorities discuss the issue of a "continuum of communications." This appears to be used frequently in cases before the IPC involving emails. For example, there can be a dispute when an email is privileged but attachments to the

email may not be privileged. The reverse can also become an issue. The second category of documents discussed below is an example where the adjudicator accepted the attachments to an email were protected under s. 14 of the *FIPPA* but she decided the email itself was not privileged.

[65] As I understand it, the idea behind the application of the continuum of communications is to counter the suggestion that one record can be severed from a series of records when they are a piece for the purposes of solicitor-client privilege. The Court of Appeal has stated that "[a] common way of expressing the breadth of the privilege once the context of the solicitor-client relationship has been established is that the privilege attaches to the continuum of communications in which the solicitor provides advice" (*Lee,* at para. 33). With respect to emails, the continuum of communications applies where disclosure of an email exchange would "disclose the legal advice itself and cannot be severed from the protected whole" (para. 50).

[66] The facts in *Lee* concerned the inadvertent disclosure of an email chain between a government lawyer and personnel at RoadSafety BC in response to an access request to the IPC. Of note, the subject emails were before the IPC adjudicator. On judicial review, the chambers judge held that privilege was not waived by the inadvertent disclosure but three portions of the email chain were not privileged. The court allowed the appeal by the Crown.

[67] The Court of Appeal found that the entire email chain was privileged because "disclosure of the excised portions would inevitably reveal the legal advice contained in what all agree was a privileged communication" (para. 42). Severance could not be reconciled with the protection of passages that fell within the framework of the solicitor-client relationship (paras. 42, 45, & 50). The court concluded that "once the solicitor-client privilege has been established, it applies to all communications within the framework of the solicitor-client relationship and that severance of some of these communications can only occur when there is no risk of revealing legal advice provided by the solicitor" (para. 51).

[68] The Supreme Court of Canada has described the concept of privilege attaching to a continuum of communications as follows (*Maranda v. Richer,* 2003 SCC 67, at para. 22; citing *Descôteaux,* at 892-3):

> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

[69] The subject petition relates to a number of emails with attachments and the petitioner says they cannot be severed into records protected by privilege and records not protected by privilege because they represent a continuum of communications. The IPC does not disagree with the statements in the authorities relied on by the petitioner. But it replies that the adjudicator appropriately applied the idea of continuum of communications when, for example, she made her decision to apply s. 14 to an email but not to its attachments.

[70] Another substantive issue in this petition is the analytical framework for considering a claim for solicitor-client privilege. In its submission of June 21, 2018 the petitioner used an approach from a previous judgment that included four elements that must be proved (*R. v. B.,* 1995 CanLII 2007 (B.C.S.C.)):

> 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.
>
> [Emphasis added].

[71] In her decision of October 29, 2019 the adjudicator used this same framework (see para. 18).

[72] In this petition the petitioner uses what it calls a different framework which uses three factors. This is taken from another previous judgment and it sets out three requirements (*Pritchard,* at para. 15; citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at 837):

> (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.
> [Emphasis added].

[73] The IPC notes the petitioner's reliance on the latter three-part test but points out the petitioner used the four-part test in its submission to the adjudicator, which the petitioner acknowledges. She apparently adopted that approach and/or she used it because the IPC did so in previous decisions (as cited by the IPC on judicial review: *Order F17-42, Vancouver Island Health Authority (Re),* 2017 BCIPC 46*,* at para. 15; as cited by the adjudicator in her decision: *Order F17-43, British Columbia (Ministry of Finance) (Re)*, 2017 BCIPC 47, at paras. 38-39).

[74] I have underlined above the parts of the two tests that the petitioner relies on for its submission; "directly related" in the fourth factor of the four-part test and "entails" in the second requirement of the three-part test. It is submitted by the petitioner that when the adjudicator adopted the four-part test she applied an additional evidentiary burden on the petitioner because "directly related" (in the four-part test) is more restrictive than "entails" (in the three-part test). That additional burden caused the adjudicator to require the petitioner to provide more details of its claims of solicitor-client privilege. Put another way, if she had used "entails" instead of "directly related," the petitioner would have had to meet a less onerous standard. I was provided no authorities or citations from dictionaries for this submission. And I do not understand the petitioner to say that the number of factors in the tests (three versus four) makes any substantive difference.

[75] I note that in *Pritchard* the Supreme Court of Canada, when setting out the three-part test, stated that historically the test for solicitor-client privilege was more restricted. It then said: "… the privilege has been extended to cover any consultation for legal advice, whether litigious or not" (para. 15; citing *Solosky*, at 834). It seems to me that this statement sets considerable scope for solicitor-client privilege. In the end it seems to me that the IPC adopted the test used by the petitioner and I am unable to agree that the two tests differ in the way suggested by the petitioner.

(iii) Establishing a claim for solicitor-client privilege

[76] I take there to be agreement that, generally, something akin to the civil litigation approach is used when there is a claim of solicitor-client privilege before the IPC. The parties obviously disagree about what that approach requires, specifically the amount of detail that is required to establish a claim.

[77] The authorities are somewhat helpful in demonstrating what is required to demonstrate a claim for solicitor-client privilege although they are not consistent (*Keefer Laundry,* at para. 65). They do demonstrate that there is considerable latitude in how much information is required to demonstrate solicitor-client privilege for specific documents.

[78] The practice in court is for a party asserting privilege over a document to provide affidavit evidence setting out the information that is the basis of the claim for privilege. Supreme Court Civil Rule 7-1(7) states that, when privilege is claimed over a document, the document "must be described in a manner that, without revealing information that is privileged, will enable other parties to assess the validity of the claim of privilege." The court does not generally review the document itself and that also appears to be the practice of the IPC (although there is reference to an unexplained *in camera* process to review documents). In general, the information that must be included about a document over which privilege is claimed "will vary depending on the document, but it must be sufficiently described so that if a claim is

challenged it can be considered by a judge in chambers" (*Stone v. Ellerman,* 2009 BCCA 294 [*Stone*], at para. 23).

[79] Rule 7-1(7) obviously is stated in very general terms and does not provide specific direction as to what is required when making a claim of privilege. Perhaps as a result, it is accepted that it is for the judgement of counsel to determine how much information will be provided to justify a claim of privilege without actually revealing the privileged information. Justice Pearlman usefully summarized the approach in a previous judgment (*Gardner v. Virdis Energy Inc.,* 2013 BCSC 580):

> [40] For those documents for which solicitor-client or legal advice privilege is claimed, defendant's counsel as officers of the court will have to determine how much description may be provided without revealing privileged information. However, the defendant has adduced no evidence to suggest only a generic description will ensure that privilege is protected in this case. In most, if not all, instances it should be possible to include, in addition to the date and nature of the document, the identities of the author and recipient. However, that will be a matter for defendant's counsel to determine.

[80] A decision from our Court of Appeal arguably gave more protection to the date of a document and the name of its author when it agreed with Master Caldwell in *Hetherington v. Loo*, 2007 BCSC 129 [*Hetherington*] that the date and the name "may well be protected from disclosure under a claim of solicitor-client privilege" (*Stone*, at para. 27).

[81] In my view, it would be an unusual situation where the date of the document and the names of the sender and recipient are not disclosed for each document. It seems to me that some information is required to understand the document. It also seems to me that indicating whether the sender or the recipient is a lawyer could be helpful and even necessary. Certainly an explanation would be required if this information cannot be provided. Security or privacy concerns can be dealt with by other means such as sealed files.

[82] The IPC has adopted a very similar approach (*Order F20-16, British Columbia (Ministry of Attorney General) (Re)*, 2020 BCIPC 18):

> [10] In addition to a proper description of the records, public bodies must provide evidence to substantiate the privilege claim. It is not enough to merely assert that privilege applies. The evidence may include the very records in dispute, with or without affidavit evidence, or it may be that only affidavit evidence is provided. It is also open to the parties to seek the OIPC's consent to submit evidence *in camera*. While the OIPC has a broad discretion to accept hearsay evidence, ideally, evidence about the communications should come from those with direct knowledge of the communications, who can provide the proper contextual information about the communication, as well as the intentions of the parties to the communication. This makes the evidence more reliable. In addition, it is helpful to have evidence from a lawyer, who as an officer of the court, has a professional duty to ensure that privilege is properly claimed.

[83] I am unable to find a decision where it has been stated categorically, but the preference and the practice in civil litigation appears to be to use affidavits to make a claim of privilege, preferably from counsel. There is an older case where McEachern C.J.B.C. stated that what is required is an oral or written statement of counsel asserting privilege, but oral statements would not normally arise with the IPC (*Delgamuukw v. British Columbia* (1988), 32 B.C.L.R. (2d) 156) (B.C.S.C.); cited in *Keefer Laundry*, at para. 66). An affidavit from the instructing client focusing on the privilege issue (as opposed to the merits of the underlying application) may be a suitable alternative in a minority of cases.

[84] Cross-examination on an affidavit from counsel may arise as an issue but that can be controlled by the requirement that cross-examination has to be ordered by the court (or by the IPC adopting Rule 22-1(4) or putting in place something similar). In addition, counsel may decline to provide answers based on privileged information. An affidavit by the client may be an alternative to one from counsel. In any case, generally, neither evidence from counsel nor from the client results in the waiver of privilege (*Keefer Laundry*, at paras. 84-88).

[85] In my view an affidavit from counsel is the preferred approach and that appears to be the approach of the parties here. There are sharp disagreements about whether the petitioner has made out its claims of solicitor-client privilege but the use of affidavits for that purpose is accepted. The question here is what has to be in the affidavit.

[86] As can be seen, the use of affidavits from lawyers (without the actual document being available) means that some weight has to be given to the judgement of counsel when the IPC is adjudicating claims of solicitor-client privilege. Put another way, it is not open to the IPC to treat a claim of privilege as they would any other claim of an exception to disclosure. The task before an adjudicator is not to get to the bottom of the matter and some deference is owed to the lawyer claiming the privilege. As to the reliability of a lawyer's claim it first of all needs to be recognized that the lawyer's conduct is subject to the standards of the Law Society. It would be a professional error for a lawyer to misrepresent the nature of solicitor-client communications to an agency like the IPC (or to anyone). The corollary of this is that a claim of solicitor-client privilege should be made by counsel only after careful consideration. A claim that cannot be justified, and certainly a spurious one, is a reason for the IPC to request more information and submissions.

[87] As to what is required in the affidavit, that is more complicated. It is clear enough that "absolutely no evidence" will not establish a claim for privilege (*Nanaimo Shipyard Ltd. v. Keith,* 2007 BCSC 9, at para. 15). Beyond that, every case is different and within each case different documents may require different explanations and different levels of explanation. An additional complicating factor is that a claim for solicitor-client privilege may require more protection and, therefore, require the disclosure of less information to demonstrate that privilege than one for litigation privilege (*Stone*, at para. 27; citing *Hetherington*, at paras. 8-10). One case has cautioned that the test for legal advice privilege, litigation privilege and solicitor-client (or "legal advice") privilege are different and can lead to confusion (*Keefer Laundry,* at para. 59).

[88] It follows from the above that, if the parties are expecting a specific road-map about how to make and how to decide a claim of solicitor-client privilege, that is not possible. Each case and perhaps each document will require different levels of disclosure by public bodies and different degrees of intervention by the IPC.

[89] With the above general comments in mind a review of the parties' legal submissions is useful. According to the petitioner there is a presumption in favour of a claim for privilege when counsel assert that claim in an affidavit. They rely on the following stated by the Supreme Court of Canada in *Blood Tribe*:

> [16] It is undisputed that the employer in this case properly asserted by affidavit its solicitor-client privilege. At that stage there was "a presumption of fact, albeit a rebuttable one, to the effect that all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature" (*Foster Wheeler* [2004 SCC 18], at para. 42). There was no cross-examination on the employer's affidavit. There was no basis in fact put forward by the Privacy Commissioner to show that the privilege was not properly claimed. As to the complainant, her concern was about what the employer *did*, not about the legal advice (if any) upon which the employer did it.
>
> [Italics in original, underlined emphasis added.]

[90] I accept the petitioner's point that this is broad language and that it describes a presumption in favour of solicitor-client privilege. In *Blood Tribe*, the Department of Heath claimed privilege over a "bundle of letters" from the Department's solicitors (which were not before either the adjudicator or the court on judicial review). The existence of those letters was disclosed to the Privacy Commissioner, but the Department refused to produce them and challenged the Commissioner's production order on judicial review. In support of its privilege claim over the letters, the Department relied on an affidavit, described as follows (*Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2005 FC 328):

> [6] In an affidavit dated June 5, 2003, Ms. Katie Rabbit-Young Pine attested, on behalf of the Department, that the "information is protected by solicitor-client privilege and the Blood Tribe Department of Health is not prepared to waive that privilege and therefore cannot provide access to these documents to any third party, including the Office of the Privacy Commissioner."
>
> [7] The documents were described specifically in Ms. Rabbit-Young Pine's affidavit as:
>
> a. Letters written by our legal advisors, Walsh Wilkins Creighton LLP, to the Blood Tribe Department of Health;
>
> b. The communications were confidential; and

> c. The communications were received as a direct result of the seeking of legal advice by the Blood Tribe Department of Health and were in the form of legal advice from Walsh Wilkins Creighton LLP.

[91] I take it that Ms. Rabbit-Young Pine was not a lawyer and appears to have been a representative of the Department. Regardless, the affidavit specifically addressed the "bundle of letters" subject to the Department's claim of solicitor-client privilege, which the Supreme Court of Canada concluded was sufficient to create a presumption that the letters were "*prima facie* confidential in nature" (*Blood Tribe*, at paras. 16-17). From *Blood Tribe* it is apparent that if affidavit evidence is relied upon to support a claim of solicitor-client privilege, the evidence should specifically address the documents subject to the privilege claim.

[92] The petitioner also says that once counsel has filed an affidavit supporting the claim for solicitor-client privilege it is not for the IPC to go further and request more information. According to the petitioner that is the effect of the presumption described in *Blood Tribe*. In my view, that may be true when counsel's affidavit adequately sets out the particulars of the claim for the specific document. However, it likely would not be the case where the affidavit is inadequate. It is for the IPC to decide whether the affidavit is adequate (not counsel for the applicant), subject to judicial review on a correctness standard. I add that I do not agree with the petitioner that in all cases simply providing the date of the record and the names of sender and recipient is enough to create a presumption in every case.

[93] I emphasize that the length of the affidavit is not necessarily determinative (the adjudicator in the subject petition at one point raised the number of pages as relevant to the claim for privilege). An affidavit that briefly explains that a specific document contains counsel's opinion to the client about the merits of the underlying action would require very careful consideration by the IPC (and the courts) before deciding it did not support a claim of privilege. Affidavits about claims over other documents will require more explanation. Moreover, a global claim of privilege over a number of documents may justify a claim of solicitor-client privilege for all of the

documents. But something more is required than the assertion that the fact of one privileged attachment in a group of attachments means that all the attachments in the group are privileged. Documents about specific issues require specific claims of privilege. This may be onerous in document-heavy cases but, in my view, solicitor-client privilege is that important.

[94] I next turn to the specific documents at issue between the parties with a view to applying the above analysis.

(d) The documents in dispute

[95] In her decision of October 29, 2019 the adjudicator agreed with the petitioner that it could refuse under s. 14 of the *FIPPA* to disclose some documents. However, she also concluded that the petitioner was required to disclose other documents in four categories. The petitioner says those documents are subject to solicitor-client privilege and s. 14 of the *FIPPA* supports its decision not to disclose them. The onus of proving the documents at issue are subject to solicitor-client privilege lies with the petitioner.

[96] The four categories of documents in dispute are:

(i) An attachment to an email;

(ii) Emails involving employees in ministries other than the petitioner;

(iii) Emails and attachments involving counsel for the ADAG; and

(iv) Emails involving a revenue and taxation lawyer.

[97] The four categories of documents at issue are a small part of a large number of documents, in excess of what appear to be 250 pages. As will be seen there are disputes about the information required for the petitioner to demonstrate solicitor-client privilege. The adjudicator's decision anonymized the names of individuals and I have adopted that practice.

[98] I have been provided with a table prepared by the petitioner which groups the documents and provides a summary for each group. Only six groups of documents are at issue (one of the four categories references three groups of documents and each of the other three categories reference one group). The starting point for the petitioner's claims of solicitor-client privilege is to rely on each summary. I have not been provided with the actual documents at issue.

[99] Four affidavits prepared by the petitioner have also been provided. They are from two lawyers ("KC" and "DP"), one director of indigenous tax policy ("AK") and one strategic advisor of the Ministry of Finance ("RF"). The adjudicator also had these affidavits. Some of the affidavit evidence is general in nature (for example, explaining the process of preparing legislation) and some of it is specific to documents in dispute. The generality of the information for some documents is an issue.

[100] It appears that the four affidavits were submitted to the adjudicator in draft form apparently as part of an *in camera* process so the IPC could look at some information. The covering letter for this from the petitioner refers to exclusions under ss. 12, 13, 16 and 22 and it also requests exclusion of some employment information for privacy reasons. The letter does not refer to s. 14 of the *FIPPA*.

[101] I also have the June 21, 2018 submission from the petitioner to the adjudicator. This is signed by a lawyer with the Legal Services Branch who also assisted in the preparation of the four affidavits. I also have copies of some of the correspondence between the petitioner, the IPC and C.M.

[102] I have concluded above that the standard of review to determine whether the legal doctrine of solicitor-client privilege applies to a document is a question of law and the standard is correctness.

[103] My review of the four categories of communications is as follows.

(i) Email attachment

[104] The table prepared by the petitioner and provided to the adjudicator summarized these communications as follows (names anonymized by me):

> Email chain ending with email from [RF] (of MoF [Ministry of Finance]) to [GM] of the Ministry of Justice dated July 25 2016 regarding MOJ's proposed draft reply to [CM] and discussing legal advice from [DP], LSB legal counsel attaching draft correspondence the Ministry sought and received legal advice from LSB legal counsel, including [KC].
>
> [Pages 242-246 from the total list of documents]

[105] In her decision of October 29, 2019 the adjudicator concluded as follows about these communications (names anonymized by adjudicator; citations removed by me):

> **Email chain and attachment**
>
> [32] The s. 14 records include an email chain between the Policy Analyst and an LSB correspondence coordinator/writer, along with an attachment. In this two-email chain, the Ministry withheld an attachment sent by the LSB correspondence coordinator to the Policy Analyst, but it disclosed what he said to her in his email. The Ministry also partially withheld the Policy Analyst's response on the basis she talks about DP's legal advice to the Ministry. DP confirms he provided the legal advice discussed by the Policy Analyst in this email. I accept that legal advice privilege applies to the information withheld in the Policy Analyst's email because it could allow someone to accurately infer DP's legal advice to the Ministry.
>
> [33] However, for the reasons that follow, I am not satisfied that legal advice privilege applies to the email attachment. The attachment is described in the records table as "draft correspondence the Ministry sought and received legal advice from LSB legal counsel, including [KC]." The Ministry does not provide any specific submissions on this record. Instead, the Ministry argues that attachments to a privileged communication are always privileged. However, there is no presumption of privilege for attachments. Solicitor client privilege does not apply to all communications or documents that pass between a lawyer and their client. Instead, solicitor client privilege may apply if the attachment reveals communications that are protected by privilege or would allow one to infer the content and substance of privileged advice.
>
> [34] In this case, the Ministry did not provide sufficient evidence to establish that the draft correspondence is a privileged communication between the Ministry and a lawyer or that it would reveal such information. The LSB lawyers and the Policy Analyst do not discuss this draft correspondence in their affidavits. The Ministry also does not explain how

> someone looking at the draft correspondence can infer what an LSB lawyer advised about the proposed correspondence and its contents.
>
> [35] Instead, based on information disclosed in the correspondence coordinator's email and the surrounding emails, I can clearly determine that the attachment is correspondence prepared by the Ministry of Justice in response to an email directly from the applicant. In other words, it is the Ministry of Justice's response to the applicant on behalf of its own ministry. The attachment is not draft correspondence that was prepared for the Ministry of Finance by its lawyers. Instead, it is apparent that the Ministry of Justice is showing it to the Policy Analyst because she asked for an opportunity to review it. Therefore, I am not satisfied that the attachment would reveal the Ministry's privileged communication with its lawyers. As a result, I find that Ministry has not proven that s. 14 applies to the attachment.

[106] According to the petitioner, the adjudicator erred because it *did* make submissions about the attachment and she conflated the petitioner's submissions with its evidence. Also, the petitioner accepts that it did say to the adjudicator that attachments to privileged submissions are always privileged. However, it made other submissions including that the attachment was part of the continuum of communications including the email itself. Since there was no evidence to the contrary it was open to the adjudicator to accept counsel's affidavit evidence that the attachment was privileged draft correspondence. According to the petitioner the description of the attachment in the table, set out above, meets the standard required in civil litigation.

[107] The IPC relies on the reasoning and decision of the adjudicator, in particular her conclusion that the petitioner had not provided sufficient information to justify the claim of solicitor-client privilege.

[108] I have carefully reviewed the record in this petition and I am unable to find where the petitioner stated specifically that all attachments to privileged communications are also privileged. It is true that the petitioner cited a number of authorities (including from the IPC) which strongly suggest that attachments to privileged documents are privileged (typically attachments to emails). For example, in the petitioner's June 21, 2018 submission to the adjudicator, at para. 95, there is the following excerpt from a decision by Commissioner Loukidelis (*Order 00-38,*

Inquiry Regarding a Worker's Compensation Board Record, [2000] B.C.I.P.C.D. No. 41 at 14):

> I have no doubt that any documents gathered for or attached to a legal opinion prepared by a lawyer for the lawyer's client would be protected by solicitor-client privilege.

[109] Another decision of the IPC is to the same effect. It stated that attachments that "are an integral part" of providing legal advice are part of the continuum of communications between a solicitor and client (*Order F16-09, Ministry of Justice (Re)*, 2016 BCIPC 11). Among other submissions, the petitioner adopted these approaches and stated they were "appropriate" for the determination of whether the attachments in issue are privileged (para. 98). However, again, I am unable to find where the petitioner's submission was as categorical as described by the adjudicator (and as accepted by the petitioner in this petition).

[110] In any event, I agree with the adjudicator that solicitor-client privilege does not necessarily apply to all attachments, even those attached to genuine legal advice. One can easily pose examples where attachments would likely not be privileged, such as an attachment to a legal opinion that explained the directions to a meeting.

[111] On the other hand, one would expect that an attachment that was an integral part of a legal opinion in the covering email would be privileged. For example, if the attachment would provide some basis for a reader to determine some or all of the opinion or advice then the attachment would be privileged. Presumably, that would apply in most cases of an attachment to a legal opinion. But I do not think that conclusion necessarily follows in every case. The party claiming privilege over an attachment must provide some basis for that claim.

[112] Presumably most cases in dispute will be between these two extremes. The point is that it is the content of a communication and who is communicating, not the form of the communication that determines privilege and confidentiality. In my view that conclusion is consistent with the above decisions of the IPC. I add that it makes no practical sense to parse the contents of attachments in order to sever the parts

that are privileged from the parts that are not. If some of the attachment is part of the legal advice then all of it is protected by solicitor-client privilege.

[113] Returning to the attachment at issue in this petition, the adjudicator accepted that the email itself was privileged but the attached draft correspondence was not. One of her reasons was that the petitioner had not provided "sufficient evidence to establish that the draft correspondence is a privileged communication between the Ministry and a lawyer or that it would reveal such information." The petitioner says it did provide sufficient evidence.

[114] The June 21, 2018 submission from the petitioner included Affidavit #2 from KC. She is a lawyer with the LSB and she provides legal advice to employees of the Government of British Columbia. The primary focus of her affidavit appears to have been with the third category of documents at issue, communications with counsel for the ADAG. This can be determined by her reference to the documents at page 82 of the table prepared by the petitioner. That page is not part of the group of documents in this category (it is part of the third category discussed below).

[115] KC deposes that she has reviewed the documents and attachments and she considers "the entirety of it to be a confidential written communication" to keep her informed about legal advice she was giving. She also deposed:

> 7. The numerous documents that led to the Ministry's creation of the draft correspondence that are attached to page 82 of FIN-2016-63904 are important attachments. This is the case because these numerous documents are relevant to and inform the provision of legal advice in the draft correspondence that is the focus of the email at page 82. These attachments helped enable me to provide legal advice regarding the draft correspondence in that they provided me with the necessary context to do so.
>
> [Emphasis added].

[116] Beginning at para. 95 of its June 21, 2018 submission the petitioner has a section on "Attachments to legal advice." A number of authorities are cited (some are discussed above) and the submission relies on the KC affidavit. The last sentence of the above para. 7 of the affidavit is quoted (at para. 102) and relied on

as the basis for the claim that "various attachments to page 82 of FIN-2016-63904" are privileged.

[117] The problem here is that there is no evidence about the specific email attachment that is at issue here. The evidence of KC and the submission of the petitioner speak only of other documents and attachments, in particular page 82. The affidavit addresses the third category of documents at issue (and discussed below) and not the category at issue here. Paragraph 12 of the affidavit of DP refers to page 242 (part of this category of documents) but there is no discussion of the issue of privilege specific to those documents other than that legal advice was provided to the Ministry.

[118] There is a suggestion by the petitioner that the evidence of KC applies broadly to all of the attachments at issue. As discussed above, that is a possible approach but I conclude that it does not work in this case. Counsel's affidavit is specific to a category of documents and a specific page that is not at issue here. If the submission of the petitioner is that the evidence of privilege over attachments from one category of documents can be transposed to support a claim of privilege over another category of documents, I disagree. Logically and practically, there can be different documents in different categories.

[119] The result is that I conclude that the adjudicator was correct when she decided that the petitioner did not provide sufficient evidence to establish that the attachment to the legitimately excluded email should also be excluded.

[120] As discussed in the authorities there can be significant repercussions if documents that are properly subject to solicitor-client privilege are disclosed. And it has to be recognized that the case law is not always helpful. For this reason the petitioner will have another opportunity to make a submission (including affidavit evidence) to the IPC with respect to the attachment at issue in this category of documents and whether the petitioner can refuse to disclose it under s. 14 of the *FIPPA* (*Keefer Laundry,* at para. 89). The IPC will then make another decision.

[121] As a final matter I note that the adjudicator made some specific findings about the content of the attachment at issue. For example, she stated she could "clearly determine" the origins of the attachment.

[122] For this reason, I requested that counsel provide further submissions regarding whether the adjudicator had the same record as before me. Counsel made further submissions and provided me with an affidavit appending pages 221 to 250 (which included the email attachment at issue) of the Ministry's response to the access applicant's request for records in Public Body File No. FIN-2016-63904. The parties agreed that these records may have affected the Adjudicator's conclusion at para. 35 of her decision; i.e. that she could "clearly determine" from the "surrounding emails" that the email attachment at pages 243-246 was a draft of the Ministry of Justice's response to communication from the access applicant, C.M.

[123] Having reviewed these "surrounding emails," I can now ascertain how the adjudicator was able to "clearly determine" the nature of the attachment as well as her reasons for finding, correctly, that the email attachment was not subject to solicitor-client privilege.

(ii) Emails involving employees in other ministries

[124] The table prepared by the petitioner and provided to the adjudicator summarized these communications as follows (names anonymized by me):

> Email chain including emails with [PF] and [RF] (of MoF [Ministry of Finance]) with [DP], LSB legal counsel dated July 25 2016 seeking legal advice from DP and discussion of framing of questions for legal advice.
>
> Email chain ending with email from [DP], LSB legal counsel, to [RF] (of MoF) dated July 25 2016 seeking legal advice from [DP].
>
> Email chain ending with email from [RF] (of MoF) to [DP], LSB legal counsel, dated July 25 2016 regarding MRDT-SCT Application Approval, seeking legal advice from [DP].
>
> [Pages 58-60, 72-74, 239-241]

[125] The adjudicator's decision of October 29, 2019 discussed these emails in the following terms (names anonymized by the adjudicator, citations removed by me):

Email chains that include unidentified government employees

[36] The records include three email chains described by the Ministry [of Finance] as ending with or including an email between DP and Ministry employee(s) where legal advice is sought from DP. Based on the Ministry's evidence, I conclude the client in these communications is either the Ministry or a Ministry employee. However, the Ministry says these communications also include employees from other government ministries.

[37] I asked the Ministry for more information about the identity of these individuals and their role in these communications because their involvement raised issues about the confidentiality of the solicitor client communications. The Ministry declined to identify these non-Ministry employees or explain their roles in these communications. The Ministry also says "it has already provided substantial explanation about the involvement of various ministries in the responsive records and how other ministries are involved in the Municipal and Regional District Tax."

[38] Communications that include individuals outside of the solicitor client relationship do not typically attract privilege as their presence defeats the necessary requirement of confidentiality. I have no evidence about the identity of these unidentified government employees, what role they played in the solicitor client relationship or what interest they had in the matters being discussed in these emails. In the records table, the Ministry only identified the Policy Analyst and DP as the email participants; there was no mention of any government employees from another ministry. There was also no affidavit evidence that adequately described these records. By refusing to identify all the participants in these communications, the Ministry has provided no evidence that these unaccounted individuals are from ministries involved in the MRDT process.

[39] The Ministry also argues that privilege applies to these communications because the "Province is one indivisible legal entity" and cites a number of authorities to support its position. However, I do not find the authorities cited by the Ministry to be applicable or persuasive at this point because they deal with the waiver of solicitor client communications. The initial issue for these communications that include non-Ministry employees is not waiver, but whether they are privileged in the first place. Waiver involves the disclosure of already privileged information which the Ministry has not established applies to these records.

[40] Ultimately, I find that there is insufficient explanation and evidence before me to support the Ministry's claim that these emails are confidential communications between a solicitor and a client, particularly since the Ministry chose not to identify all of the individuals involved in these communications or explain their roles or responsibilities in relation to these communications.

…

[126] In its submission on this petition, the petitioner emphasizes that all ministries are part of the same entity, the Government of British Columbia. It is agreed that the

issue was privilege itself and not waiver but the evidence before the adjudicator nonetheless supports a claim of privilege. The adjudicator also ignored the reasons that employees in other ministries were copied. And a previous decision of the IPC (*Order F15-41*, *Ministry of Health (Re)*, 2015 BCIPC 44) concluded that providing privileged documents between ministries does not constitute waiver.

[127] The respondent relies on the reasoning and conclusions of the adjudicator. In particular, it is submitted that the petitioner did not identify the individuals in the other ministries or provide information about their roles. As well, the submission by the petitioner that the Government of British Columbia is one entity is not applicable or persuasive.

[128] I begin by noting that the subject matter of the adjudicator's decision is communications with "other employees" or "other ministries". However, there is no reference to other employees or ministries in the summary of the documents in dispute, reproduced above. It is possible that "PF" is an employee in a ministry other than the petitioner or the Ministry of Finance, but that is not explained. There is a reference in the petitioner's submission of June 21, 2018 that its claim of privilege includes "government employees from outside of the Ministry [of Finance]" (para. 107). But there is no connection made to any of the documents at issue.

[129] There is a reference in the first affidavit of DP to providing legal advice to the Ministry of Finance and "other Province employees" as being "confidential in nature" (para. 10). I accept that is an accurate statement but I am unable to find that it has any significant bearing on the documents at issue here. It is very general, it does not reference the documents and, therefore, it is difficult to find how it provides any basis for a claim of solicitor-client privilege for those documents. DP also deposes that he provides legal advice to "employees of Her Majesty the Queen in Right of the Province of British Columbia." That is more general and less helpful.

[130] There is a specific reference to other ministries or other employees in the first affidavit of RF. She explains the reference to the Ministry of Jobs, Tourism and Skills

Training ("JTST") on some records as being the result of the MRDT being a tourism program and the JTST was responsible for tourism at the time the documents at issue were created. JTST and Destination BC co-managed the program "though the Minister of Finance has decision-making ability on all taxation aspects" (para. 10). While this evidence specifically identifies another ministry I cannot take it as meaning anything more than JTST was responsible for tourism at the material times. There is no explanation as to how this relates to solicitor-client privilege or to explain that JTST received legal advice.

[131] The petitioner accepts the adjudicator's conclusion that the issue before her was not waiver but, instead, whether the documents were privileged in the first place. This recognizes that the reliance by the petitioner before the adjudicator on authorities involving waiver was not responsive to the issues before the adjudicator. The petitioner nonetheless submits on this petition that it did provide sufficient evidence to establish that the documents at issue were subject to solicitor-client privilege. I have considered that evidence above and I disagree.

[132] It is true, as suggested by the petitioner, that the summary of the documents in this category contains the name of the sender, the name of the recipient, the date and a brief description of the documents. But, again, the summary does not reference other ministries or other employees. As well, the affidavit evidence relied on by the petitioner is in the most general terms and does not identify the specific documents at issue. In my view a global assertion of privilege that applies to legal counsel across government does not support a claim of solicitor-client privilege for individual documents.

[133] The petitioner also submits that the adjudicator "fundamentally misunderstood" the legal nature of legal advice within government and this "led her to an incorrect finding on the confidentiality aspect of the *Pritchard* test" (para. 90). The affidavit of DP is relied on as establishing the need for confidentiality within government. I do not doubt the need for confidentiality at many levels of government

but in order to demonstrate a claim of solicitor-client privilege over specific documents some evidence is required specifically addressing those documents.

[134] This is true whether the Government of British Columbia as a whole or some other entity is the client. I add that it seems to me that, given the complexities of modern government, there can be interests that are adverse within government. In that circumstance separate and independent legal advice may be required and some information would not be shared between those interests. For example, I note the confidentiality and trust required by the province's Indigenous Tax unit of the Tax Policy Branch, Policy and the Legislation Division of the Ministry of Finance when developing indigenous tax policy, as explained in Affidavit #1 of AK, its director. I take it that some protection of that confidentiality and trust within government is necessary.

[135] I conclude that the evidence in this petition does not support a presumption that the documents at issue are subject to solicitor-client privilege. As with the previous category of documents the petitioner will have the opportunity to provide information on these documents consistent with the above discussion of the authorities.

(iii) ADAG counsel email

[136] The table provided by the petitioner to the IPC described this one communication as follows (names anonymized by me):

> Email from [GM] of the Ministry of Justice to [RF] (of MoF) and [KC], LSB legal counsel, dated July 25 2016 regarding proposed draft correspondence the Ministry sought and received from [KC] on. Attached is the draft correspondence as well as numerous other related correspondence.
>
> [pages 82-218]

[137] In her decision the adjudicator discussed this communication as follows (names anonymized by adjudicator; citations removed by me):

Email and attachments involving KC (the ADAG Lawyer)

[48] The records include an email between the Policy Analyst and LSB's correspondence coordinator/writer. KC is copied on this email and she describes this record as a one-page email with numerous attachments totaling 146 pages. These attachments are broadly described as draft correspondence that the Ministry sent to KC for the purpose of obtaining her legal advice and "numerous other related correspondences" sent to KC that led to the creation of the draft correspondence.

[49] KC says the entire record is a "confidential written communication" that the LSB correspondence coordinator provided to her for the purpose of keeping her informed on a file where she previously gave legal advice to the Ministry. She says the email and the attachments refer to and include draft correspondence she previously provided legal advice on. She explains the attachments gave her the necessary context to provide legal advice regarding the draft correspondence.

[50] The Ministry claims "these communications would, if disclosed, allow an individual to draw accurate inferences as to legal advice sought or provided." The Ministry also says this record was part of the continuum of communication between a lawyer and a client since it was sent to KC "to keep her informed on a matter on which she had provided legal advice."

[51] I am not convinced that legal advice privilege applies to the email. The email in dispute is not between a lawyer and a client. It is a communication from the correspondence coordinator to the Policy Analyst about an attached draft correspondence. The Ministry's evidence is that KC was only copied on the email for information purposes. The courts are clear that an email does not become privileged simply by sending a copy of it to a lawyer. The evidence must establish that the information was provided to the lawyer in a context where it is directly related to the seeking, formulating or giving of legal advice; it is not sufficient that the information is supplied just for the purposes of providing information to a lawyer, as was the case here.

[52] The Ministry claims this record is part of the "continuum of communications" it had with its lawyer KC. A "continuum of communications" involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as "history and background from a client" or communications to clarify or refine the issues or facts. It includes factual information provided by the client to the lawyer at the beginning or throughout the solicitor-client relationship and covers communications at the other end of the continuum, after the client receives the legal advice, such as internal client communications about the legal advice and its implications.

[53] Except for citing a few authorities and some general assertions, the Ministry does not explain how this record fits within a continuum of communications between KC and the Ministry. There is no evidence that further legal advice was being sought or provided on the draft correspondence. Instead, KC says she was copied on the email because she previously provided legal advice on the draft correspondence. Based on this evidence, I find that KC's communications with the Ministry for the purpose of

> seeking and providing legal advice on this matter had already concluded by the time this email was sent. Therefore, it is not clear how this email fits within a necessary exchange of information between KC and the Ministry for the purpose of obtaining and providing legal advice.
>
> [54] The Ministry also does not discuss how the authorities it relies on apply to this specific record. The Ministry cites Order 00-38 and Order F14-35 for the principle that "all information provided by the client to the lawyer for purposes of obtaining legal advice is also privileged." I, generally, do not disagree with that statement of the law; however, the facts regarding this specific record is not the same as in those other decisions. The Ministry's evidence does not establish that this is a record that was provided by a client to a lawyer for the purposes of obtaining legal advice.
>
> [55] The Ministry also cites Order F10-20 for the proposition that s. 14 can apply to emails where a lawyer was simply copied on an email. However, the adjudicator in Order F10-20 had the benefit of seeing the records and was satisfied that the information at issue was clearly part of ongoing communications between a lawyer and client or that its disclosure would reveal legal advice. In this case, for the reasons previously given, I am not persuaded by the Ministry's evidence that the email is a part of a continuum of communications between a solicitor and a client that directly relates to the seeking, formulating or providing of legal advice.
>
> [56] I also find there is insufficient evidence to establish that disclosing the email would reveal legal advice or allow someone to accurately infer any legal advice. There is no evidence that the email contains or discusses KC's legal advice to the Ministry. The Ministry also does not explain how someone looking at the email can accurately infer what KC advised the Ministry about the draft correspondence or any of the other documents. Therefore, considering all the evidence before me, I am not satisfied that legal advice privilege applies to the email.
>
> [57] As for the attachments to this email, KC says the attachments include draft correspondence she previously provided legal advice on. KC explains her responsibilities in reviewing and approving correspondence for the Office of the Assistant Deputy Attorney General to ensure the correspondence is responsive, "legally accurate and complete" and "ready for sign-off." I accept that this draft correspondence was at one time forwarded to KC for the purpose of seeking her legal advice. I also accept that the rest of the attachments were forwarded to KC for the purpose of obtaining her legal advice on the draft correspondence. I conclude, therefore, that privilege applies to the attachments because their disclosure would reveal, or allow someone to accurately infer, what KC was specifically asked to advise on.
>
> [58] For the reasons given, I conclude the Ministry may not withhold the email between the LSB correspondence coordinator and the Policy Analyst, but it may withhold the attachments to this email under s. 14.

[138] The petitioner submits that the affidavit of counsel asserting the privilege with an explanation is sufficient to justify solicitor-client privilege and the adjudicator was

required to presume privilege. Further, the adjudicator erred when she did not accept the communication as part of the continuum of communications and she "unnecessarily parsed every detail" of the petitioner's evidence and submissions.

[139] The respondent relies on the reasoning and conclusions of the adjudicator and emphasizes that KC was only being copied on the email because she had previously been involved. There was no evidence she was being copied for the purpose of providing further legal advice.

[140] The affidavit of KC specifically refers to the documents at issue in this category and identifies a specific page number. She said (names anonymized by me):

> 6. I have reviewed the document and attachments that are the subject of this affidavit. The document at page 82 of the responsive records for FIN-2016-63904 is a one-page email dated July 25, 2016 form [GM], correspondence/Writer with LSB to [RF] of the Ministry and copied to me in my role as legal counsel to the Ministry. The document contains numerous attachments (146 pages in total), including a draft correspondence that I had previously reviewed and provided legal advice on in my role as legal counsel (which is the focus of the email at page 82 of the responsive records) as well as numerous documents that led to the Ministry's creation of this draft correspondence.
>
> 7. The numerous documents that led to the Ministry's creation of the draft correspondence that are attached to page 82 of FIN-2016-63904 are important attachments. This is the case because these numerous documents are relevant to and inform the provision of legal advice in the draft correspondence that is the focus of the email at page 82. These attachments helped me to provide legal advice regarding the draft correspondence in that they provided me with the necessary context to do so.
>
> 8. Based on my review of the document and the attachments, I consider the entirety of it to be a confidential written communication that [GM] provided to me for the purpose of keeping me informed on a file on which I gave legal advice to the Ministry regarding the draft correspondence and the documents that were reviewed in creating and providing legal advice on the draft correspondence.
>
> 9. Given the stated scope of the Applicant's access requests related to this inquiry, I believe that any further disclosure of the details of the attachments would allow the Applicant to accurately infer the nature of the issue being dealt with and the nature of the attachments.

[141] Of the 146 documents in this category the adjudicator concluded that the email was not protected by privilege but the attachments were protected. I do not have any of the documents. The petitioner's submission of June 21, 2018 did not specifically identify the document at issue here but discussed the affidavit of KC in the context of the attachments (para. 102). At one point the adjudicator requested information about the number of pages attached because it was thought to be relevant to making an informed decision. I agree with the petitioner that the number of pages was (and is) not a relevant consideration.

[142] In any event, unlike the evidence regarding the above two categories of documents, in my view, the evidence of KC is specific and it includes some detail that supports the petitioner's claim for solicitor-client privilege over the document in this third category. On the other hand, I am unable to give any significant weight to the reference in para. 12 of the affidavit of DP to pages 146, 161-162, 175 and 176 (part of this category of documents) because there is no discussion of the issue of privilege specific to those pages.

[143] The adjudicator's reasons for not accepting the claim of privilege for the email included her statement that it was "a communication from the correspondence coordinator to the Policy Analyst about an attached draft correspondence" (para. 51). Further, "[t]he Ministry's evidence is that KC was only copied on the email for information purposes." I accept the adjudicator's general point that an email does not become privileged by simply sending it to a lawyer. There must be something in the email that warrants protection by means of solicitor-client privilege. In this regard there is the evidence of KC that disclosing "the entirety" of the documents would allow an outside party to accurately infer the legal advice given.

[144] The adjudicator also stated that the email copied to KC was "just for the purposes of providing information" to her and that is not a reason to accept it is privileged. It is true the email was copied to KC but it is not clear on what basis the adjudicator went to the next step and provided an explanation of the purpose (i.e. just for providing information). It could perhaps be said that copying an email is done

for the purposes of providing information but there are other explanations including being part of a continuum of communications related to legal advice. In addition, I take it that the attachments were also copied to KC but, since they are privileged, this was not done just for providing information. I am unable to find a basis for treating the email itself any differently.

[145] More generally, I do not agree that it is the role of the adjudicator to go behind the evidence of counsel in the circumstances here (unlike the circumstances in the above two categories of documents). If there is some evidence to support a conclusion that the email was for a purpose that does not justify protection by solicitor-client privilege (like the attachments) then that evidence should be stated clearly and considered. In my view it is not for the adjudicator to pose alternative explanations without that evidence in an exercise to get to the bottom of the issue. In a situation like this deference to counsel is required.

[146] Counsel's statement that disclosure of the documents (email and attachments) would permit an accurate inference of the legal advice given is an appropriate basis for a presumption of privilege in the circumstances here. Something more than the adjudicator's suggestion that there is another explanation is required to rebut that presumption.

[147] The petitioner and the adjudicator disagree over the issue of continuum of communications. The former says all of the 146 pages of documents are a continuum and should be protected by privilege. On the other hand, the adjudicator concluded they are not a continuum; the attachments were protected but the email itself was not. On the basis of the information in the record before me I accept the sworn evidence of counsel that the email and attachments are a piece.

[148] For the above reasons I conclude that the adjudicator was not correct about this category of documents. The petitioner is entitled to refuse to disclose them under s. 14 of the *FIPPA*.

(iv) RevTax Emails

[149] The table prepared by the petitioner and provided to the IPC described these communications as follows (names anonymized by me):

> Email chain including email dated July 14, 2016 between [GM] of the Ministry of Justice, [CG] of MoF and [LL], LSB legal counsel, seeking and discussing legal advice regarding appropriate response for Ministry.
>
> [pages 219-220]

[150] The adjudicator's decision on this communication was as follows (names anonymized by adjudicator; citations omitted by me):

> **Email involving LL (other revenue and taxation lawyer)**
>
> [59] In the records table, the Ministry describes one of the s. 14 records as "Email chain including email dated July 14, 2016 between [LSB correspondence coordinator], [Ministry employee] and [LL], LSB legal counsel, seeking and discussing legal advice regarding appropriate response for Ministry." There was no evidence from any of the individuals who participated in this email chain as to the nature or confidentiality of these particular records.
>
> [60] Further, DP's affidavit provides general evidence about the s. 14 information, but he does not specifically address this email chain in his affidavit. Instead, he generally claims that the s. 14 records include emails that reveal confidential legal advice the Ministry received from LL. However, other than saying his views are based on his review of the s. 14 information, DP does not explain or identify what factors led him to form the opinion that what he was reviewing in these emails was legal advice or that the communications were intended to be confidential.
>
> [61] I offered the Ministry two opportunities to provide further information to support its claim of privilege; however, the Ministry declined to do so. The Ministry said absent any evidence to the contrary, DP's sworn evidence about the nature and confidentiality of the records is a sufficient basis to establish that they are privileged. I disagree with the Ministry's position. Past OIPC orders have held that an affiant's assertion that a communication is privileged is not sufficient on its own to establish that fact. Courts have also said that it is open to a decision maker to refuse to accept a lawyer's opinion, when it is unsupported by evidence, on a matter in controversy at an inquiry.
>
> [62] The onus of establishing that privilege applies to these communications rests with the Ministry. I am mindful of the importance of solicitor client privilege; however, a public body runs the risk of not meeting the required burden when it relies on unsupported assertions, fails to adequately describe the records or does not provide sufficient evidence in support of its claim. I find this is what has occurred with respect to this email

> chain. Without more, I am not persuaded that legal advice privilege applies to this record. The Ministry's general assertions regarding privilege and its insufficient affidavit evidence do not satisfy its burden under FIPPA.

[151] According to the petitioner, the adjudicator was provided affidavit evidence from DP about the confidentiality of the communication which included reference to the Law Society's Code of Professional Conduct regarding confidentiality. This was "the best evidence", according to the petitioner. Further, the adjudicator sought excessive levels of detailed information and the petitioner declined to provide further information requested by the adjudicator because it exceeded the requirements of the courts in civil litigation.

[152] The petitioner submits that confidentiality should be presumed in the absence of evidence to contradict it and the petitioner's evidence should be sufficient. However, the petitioner provided no evidence from any of the individuals involved about the nature of the confidentiality of the records at issue. And there was no explanation about what factors supported the claim of solicitor-client privilege or confidentiality.

[153] I have reviewed the affidavit of DP. It includes a number of general matters. For example, DP is a lawyer and he describes the process of providing legal advice within government including when there is a change to legislation or regulations. He described working on taxation issues including the request by the Sunshine Coast Tourism Society's request for the MRDT. His role "consisted of reviewing the Ministry's drafting instructions and providing legal advice," among other things.

[154] DP also discusses what he describes as "Section 14 Information" which is undefined. But, according to para. 10 of his affidavit, it includes discussion between counsel, the formulating or giving of legal advice and communications with "the Ministry and other Province employees" that are "confidential in nature." He describes some of these communications as "falling within the continuum of communications."

[155] There is no specific reference to any documents in the affidavit until the following (names anonymized by me):

> 12. The Section 14 Information also includes instances where the Ministry speaks of legal advice they have received on certain topics and includes instances where the Ministry speaks of the need to seek legal advice on certain issues. I have reviewed the records on each of these matters and am able to confirm that in each instance I or [LL] of the Revenue and Taxation Group or [AM], legislative legal counsel with LSB, did provide legal advice to the Ministry on these matters where we were acting in our role as legal counsel at LSB (see, for example, pages 6, 12 and 19 of FIN-2016-62160; pagesl46 [sic], 161-162, 175, 176 and 226 of FIN-2016-63848, pages 58 and 242 of FIN-2016-63904).

This list of pages does not include the pages that are included in this fourth category of documents. Pages 161-162 are part of the third category of documents, page 58 is part of the second category, and page 242 is part of the first category. It is not known how the other documents relate to the subject petition. The result is that, as the adjudicator found, there is no evidence about the documents at issue here.

[156] I do not agree with the petitioner that the adjudicator was required to presume that the documents in this category were privileged based on this information. This is not the “best evidence” and DP may have read the documents at issue but he does not say so specifically. I accept DP’s legal work is subject to the Law Society’s Code of Professional Conduct but I am at a loss to see how that alone assists the petitioner here. I accept the petitioner’s submission that the documents relate to taxation issues but I do not know that from the summary. DP says he worked on tax issues but he does say the documents at issue are about taxation.

[157] As in the other categories of document, for this category of documents the petitioner relies on the summary in the table it prepared. As can be seen it includes information about names and dates and it identifies the documents as referencing the seeking and discussing of legal advice. I do not agree that this meets the civil litigation standard for information required to establish a claim of solicitor-client privilege.

[158] For the above reasons I conclude that the adjudicator's decision of October 29, 2019 with respect to this fourth category of documents is correct. As with the others three categories above, the petitioner will have the opportunity to provide further information to the IPC and a new decision will be made about that information.

D. SUMMARY

[159] The petitioner seeks an order *certiorari* with respect to parts of the decision of the adjudicator dated October 29, 2019. She found that solicitor-client privilege under s. 14 of *FIPPA* does not apply to four categories of documents. The petitioner was, therefore, required to disclose the documents to the applicant. She agreed with the petitioner that solicitor-client privilege applied to other documents.

[160] It is agreed that the standard of review to be applied to the October 29, 2019 decision is correctness.

[161] The authorities demonstrate that strong protection is to be given to solicitor-client privilege. As well, freedom of information legislation is important enough to be referred to as quasi-constitutional. The issue here is not so much those important legal principles. The issue is what is required by a party, such as the petitioner here, to demonstrate a claim of solicitor-client privilege. This is a complex issue because different documents will require different levels of proof. Some deference to the reasons given by counsel for a claim privilege (usually in the form of an affidavit) is required.

[162] In the four categories of documents at issue in this petition, the petitioner says it provided sufficient information to demonstrate that the documents must be protected by solicitor-client privilege. In her decision of October 29, 2019 the adjudicator concluded there was insufficient support and the documents at issue must be disclosed.

[163] With respect to the first category of documents, it is an attachment to an email. The adjudicator concluded that the email itself is privileged but the attachment is not. There is insufficient evidence to support the petitioner's claim of solicitor-client privilege over this document.

[164] The second category of documents are emails involving employees of government departments other than the petitioner and the Attorney General. There is insufficient evidence to support the petitioner's claim of solicitor-client privilege over these documents.

[165] The third category of documents is an email involving communications with the ADAG. There is sufficient evidence to support the petitioner's claim of solicitor-client privilege over this document.

[166] The fourth category of documents relate to an email with attachments. The adjudicator accepted that the attachments were privileged but the email itself was not. There is insufficient evidence to support the petitioner's claim of solicitor-client privilege over this document.

[167] I conclude that the adjudicator's decision with respect to the documents in categories one, two and four was correct. In light of the importance of solicitor-client privilege the petitioner may provide a further submission to the IPC with further information to justify the privilege for these three groups of documents.

[168] With respect to the adjudicator's decision on the third group of documents, I find that she was not correct. Counsel has provided sufficient evidence to support the petitioner's claim of solicitor-client privilege over these documents. Therefore, the petitioner is justified under s. 14 of the *FIPPA* to refuse to disclose those documents.

[169] In the petition and the response neither party seeks costs.

"J. J. Steeves, J."
The Honourable Mr. Justice Steeves