

Manitoba mbudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASES 2013-0285 and 2013-0286

THE CITY OF WINNIPEG

ACCESS COMPLAINT: REFUSED ACCESS

PROVISIONS CONSIDERED: 27(1)(a)

MANITOBA OMBUDSMAN CASE CONSIDERED: 2010-0332

OTHER CASES CONSIDERED:

BLANK V. CANADA (MINISTER OF JUSTICE), [2006] 2 (SCC)

INTERPROVINCIAL PIPE LINE INC. V. M.N.R., [1996] 1 FC 367.

PHILLIP SERVICES CORP. V. ONTARIO SECURITIES COMMISSION, (2005), 77 O.R.
(3D) 209 (DIV. CT.)

REPORT ISSUED ON JANUARY 31, 2014

SUMMARY: The complainant made a request to the City of Winnipeg under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the ‘act’) for access to a report created as a result of a review of a city land sale/swap and a land appraisal by an outside law firm. In a separate request, the complainant asked for access to the contract with the law firm and any invoice generated in connection with the review. The city refused access under clause 27(1)(a) of FIPPA on the basis that the information requested was subject to solicitor-client privilege which resulted in a complaint of refused access being made to the ombudsman. Our office found that the city’s decision to refuse access was in accordance with the provisions of FIPPA.

COMPLAINT

On May 27, 2013 the City of Winnipeg received two requests under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the ‘act’) for access to the following:

‘Review Land Sale Swap/Appraisal Review for Fire Stations Approved by CFO by Fillmore Riley Report’

- and -

'Invoice and Contract between City and Fillmore Riley for Review Land Sale Swap/Appraisal Review for Fire Stations Approved by CFO'

The public body responded to the requests by letter dated June 18, 2013 and advised the complainant that her requests for access were refused under clause 27(1)(a) of FIPPA on the basis that the information requested was subject to solicitor-client privilege.

Under subsection 59(1) of FIPPA a person who has requested access to a record may make a complaint to the ombudsman about any decision, act or failure to act that relates to the request. A complaint of refused access was received in our office on August 19, 2013.

POSITION OF THE CITY OF WINNIPEG

The city advised the complainant and confirmed to our office that the [Fillmore Riley] review report and any contract pertained to the provision of legal advice to the city by a lawyer retained by the city for the purpose of giving legal advice and, as such, the FIPPA exception protecting solicitor-client privilege applies.

ANALYSIS OF ISSUES AND FINDINGS

Production and Examination of Records at Issue

One of the purposes of FIPPA is to allow any person a right of access to records in the custody or under the control of a public body, subject to limited and specific exceptions as set out in the legislation. FIPPA also provides for an independent review by the ombudsman of the decisions of public bodies concerning the application of exceptions to access under the act and for the resolution of complaints made against public bodies under FIPPA. Under subsection 50(2) of FIPPA, the ombudsman may require any record in the custody or under the control of a public body that is considered relevant to an investigation to be produced for examination, either by obtaining a copy or examining the record on site at the public body. This ability to gather evidence, which pertains despite any other enactment or any privilege of the law of evidence, is required so the acts and decisions of public bodies may be properly reviewed. This would include reviewing whether the assertion of solicitor-client privilege is appropriate in any given instance.

Public bodies in Manitoba (and elsewhere in Canada) have called into question the authority of the ombudsman (or commissioners elsewhere) to compel the production of records over which the solicitor-client privilege is claimed. The ombudsman does not agree that the authority to compel the production of records at issue in an investigation is in any way limited with regard to records that may fall under the solicitor-client privilege exception. However, similar to commissioners elsewhere in Canada, the ombudsman has noted and carefully considered the concerns of public bodies with regard to providing for review by our office¹ those records over

¹ This matter was discussed extensively in our Investigation Report on Case 2010-0332.

which solicitor-client privilege is claimed. Public bodies have expressed concerns that the production of these records for the limited purpose of review by our office could be construed by the courts as a waiver of solicitor-client privilege for other purposes as well. Our office is sensitive to the confidential nature of the solicitor-client relationship which has been described by the Supreme Court of Canada as follows:

*...solicitor-client privilege...has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship.
...The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions...²*

The approach to considering claims of solicitor-client privilege taken by the OIPC offices in both Alberta and British Columbia is one where records are reviewed only if the claim of privilege cannot be established by consideration of the circumstances surrounding the creation, purpose and/or use of the records.³ This is consistent with the comments of Harrington, J.A. in *Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Attorney General)* when considering if document production is absolutely necessary in all cases.

Justice Harrington writes:

The following points are obiter dicta. They relate to matters that provided context for this decision. The Court is concerned by the possibility of misuse of authority conferred by the legislation. One form of misuse would be for the DOJ to claim a “blanket” privilege for files which, while they contain some privileged documents, also contain others for which privilege clearly does not attach. Another form of misuse of authority would arise if the Information Commissioner demanded to have documents produced that he could reasonably conclude, without inspecting them, were covered by solicitor-client privilege.

The city did not provide a detailed description of the contents of the review report or any associated contract or invoice for our review although it did describe the purposes for which the report was created. In the course of our investigation, our office obtained additional information regarding the records at issue from the *Confidential Report to Winnipeg City Council Re: New Fire Paramedic Stations Construction Project October 7, 2013* (the ‘EY Report’). This report was provided to the City of Winnipeg council on October 21, 2013 and made available to the public at the same time. The record that is the subject of the complainant’s access to information request (‘Review Land Sale Swap/Appraisal’) is referenced on the list of materials reviewed (Item #7)⁴ by the independent auditors EY (previously known as Ernst & Young) in preparing the EY report. On page twelve of the EY report it states:

² *Ontario (Public Safety and Security) v. Criminal Lawyer’s Association, 2010 SCC 23* as cited by *MANITOBA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY RESOURCE MANUAL, 2nd Edition* (http://www.gov.mb.ca/chc/fippa/public_bodies/resource_manual), p. 5-233.

³ Alberta OIPC, “Solicitor-Client Privilege Protocol”, October 2008; British Columbia OIPC Practice Note, “Information Protected by Solicitor-Client privilege under the Freedom of Information and Protection of Privacy Act and the Personal Information Protection Act”, May 2009

⁴ Fillmore Riley memorandum Draft No. 1 dated September 13, 2012 from Lionel J. Martens to Michael Ruta CFO, regarding Fire Station Review. Information from the review report is extensively referenced in the EY Report

The law firm Fillmore Riley was retained by the City to examine the LOI [letter of Intent] and the registering of the caveat by the City.

This is the review report that is the subject of the complainant's request. Corporate commercial, bank and subordinated lending and real estate transactions are listed on the Fillmore Riley web pages as a practice specialties of the lawyer named in the EY report as authoring a review report draft. The EY report also states:

We do not express a legal opinion on the legal issues related to the LOI but do reference the reader to comments by Fillmore Riley referenced in this report...

These statements support the city's position that Fillmore Riley was contracted to provide legal advice and the review report and associated contract for services requested by the complainant may be subject to solicitor-client privilege. Having information concerning the purpose and use of the records at issue was sufficient for our office to determine whether or not the records were subject to solicitor-client privilege and we determined that it was not necessary to view the actual records. The city was not requested to forward copies of the records at issue for review by our office.

Solicitor-Client Privilege

The city has claimed the exception allowed under clause 27(1)(a) of FIPPA to refuse access to the review report produced by the law firm Fillmore Riley and any associated contract for services or invoice. Subsection 27(1) of FIPPA reads as follows:

Solicitor-client privilege

27(1) The head of a public body may refuse to disclose to an applicant

- (a) information that is subject to solicitor-client privilege;*
- (b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence; or*
- (c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney-General or the public body and any other person in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence.*

Subsection 27(1) of FIPPA provides the head of a public body with the discretion to refuse to disclose information in a record if the information is subject to solicitor-client privilege. The exceptions to access allowed by subsection 27(1) of FIPPA are class exceptions in that they protect a certain type or kind of information in a record. In order for the exception to apply, the information in the record need only fall within one of the clauses listed in subsection 27(1).

including a summary of key points from the review document in 'Appendix B – Summary of Significant Chronological Events'.

The application of subsection 27(1) of FIPPA requires two distinct determinations by the head of a public body. First, the head must determine if the information in the requested records is subject to solicitor-client privilege. Secondly, the exception for information subject to solicitor-client privilege is discretionary. The use of the words 'may refuse' rather than the word 'shall refuse' permits the public body to disclose information in a record, even though the information falls within the exception. The head of a public body may decide, after considering all relevant factors, that it is appropriate and reasonable to waive privilege and release the requested information. The public body has the burden of showing that the information falls within the scope of the exception and that the head (or his or her delegate) has properly exercised their discretion in deciding not to disclose the information. This exception to disclosure does not contain a reasonable expectation of harm test. Therefore, there does not have to be a reasonable expectation of harm resulting from release in order for the city to elect not to release information subject to solicitor-client privilege.

Does clause 27(1)(a) apply to the review report?

The ombudsman has concluded in previous investigation reports issued by this office that solicitor-client privilege protects all communications of a confidential character between a client and legal advisor that are related to the seeking, formulating or giving of legal advice or legal services. This includes the legal advisor's working papers which are directly related to the legal advice or assistance. It is important to note that the privilege belongs to the client, not the solicitor, and that it is not diminished in any way by the fact that the client is a public body. In the context of subsection 27(1)(a) of FIPPA, solicitor-client privilege is interpreted as including both legal advice privilege and litigation privilege.⁵ Legal advice privilege applies whether or not litigation is contemplated. To apply the exception for solicitor-client privilege the information must meet the three following criteria:

- all the information must be of a confidential nature;
- the information must be between a client and a legal advisor; and
- the communication must have been made for the purpose of requesting, formulating or giving legal advice or assistance.

The public policy rationale behind legal advice privilege is that it is intended to facilitate full and frank consideration and discussion of the circumstances in which legal advice is sought, in order that the advice might be informed and effective.

The city provided our office with limited written representations explaining its reliance on clause 27(1)(a). However, in further verbal communication with our office concerning this complaint the city has consistently maintained that the review report was created for the purpose of giving legal advice or assistance to a client (the city) from a legal advisor (Fillmore Riley) and that the city has always considered this communication to be confidential. Based on the circumstances of its creation and the description of the information contained in the review report, our office accepts that the review report was legal advice provided to the city by a law firm contracted for that purpose on a confidential basis.

⁵ *Blank v. Canada (Minister of Justice)*, [2006] 2 (SCC)

Did the city waive solicitor-client privilege in relation to the Fillmore Riley review report?

While solicitor-client privilege can be shown to have pertained to the Fillmore Riley review report at the time of its creation and delivery to the city, solicitor-client privilege would not continue to apply to the information requested if it can be shown to have been waived by the client (the city) at some point prior to the complainant's request. Solicitor-client privilege may be expressly waived by the client or it may be deemed to have been waived when the privileged information is disclosed in some manner by the client outside of the solicitor-client relationship. Since the Fillmore Riley review report had clearly been released to EY and since portions of the review report were included in the EY report that was released to the public, our office needed to consider whether there had been a waiver of privilege which would affect the city's ability to rely on clause 27(1)(a) of FIPPA to refuse access.

EY is a professional services firm providing independent assurance (including financial audit), tax, consulting and advisory services. EY was retained by the city some time after September 24, 2012 when city council accepted the city auditor's recommendation to conduct an independent review of the circumstances around the construction of four new Winnipeg Fire Paramedic Service stations. As already noted, a copy of the Fillmore Riley review report was provided to EY by the city and portions of the review report appear in the EY report.

Our office asked the city to provide representations about whether the provision of a copy of the review report to EY constituted a waiver of privilege. The city responded:

[EY] was retained to conduct an audit on behalf of the City and was therefore an agent of the City...the City was not releasing the [Fillmore Riley] Report to the public or a member of the public.

There is a concept of limited waiver in Canadian law. The Federal Court of Canada has found⁶ that the disclosure of privileged material by a corporation to an auditor involves only a limited waiver of privilege for the purpose of the audit and not for any other purpose. The court suggested that it might be prudent for clients to document their intentions when providing privileged information to auditors, by way of a "limited waiver" letter as part of the terms of the audit engagement. Recently lower courts, including the Ontario Divisional Court, have ruled that a limited waiver can apply even if the client fails to document its intention.⁷ The concept of limited waiver is compatible with the advice of the *Manitoba FIPPA Resource Manual*⁸ which states:

⁶ *Interprovincial Pipe Line Inc. v. M.N.R.*, [1996] 1 FC 367.

⁷ *Phillip Services Corp. v. Ontario Securities Commission*, (2005), 77 O.R. (3d) 209 (Div. Ct.), para 47.

⁸ *MANITOBA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY RESOURCE MANUAL*, 2nd Edition (http://www.gov.mb.ca/chc/fippa/public_bodies/resource_manual). While our office is not bound by the information contained in the resource manual, we do consider it from time to time, as it was created by the government as a reference to assist public bodies in meeting the requirements of FIPPA.

*Usually, a public body will be considered to have waived solicitor-client privilege if the information has been disclosed to a party with **a separate interest from that of the public body** [emphasis ours].*

The ombudsman has concluded that the provision of the Fillmore Riley review report to EY did not constitute a waiver of privilege beyond the limited waiver of privilege as required by the terms of the audit engagement with EY. Therefore, the city was still able to rely on this provision when it issued its response to the complainant's request. As the public release of the EY report (containing sections of the Fillmore Riley review report) post-dated the city's response, it also did not affect the city's ability to rely on clause 27(1)(a) of FIPPA.

The Exercise of Discretion

The exercise of discretion takes place as part of any decision concerning the disclosure of a record over which solicitor-client privilege is claimed. At the time of the complainant's initial request, the city determined that the Fillmore Riley review report was subject to solicitor-client privilege and, after exercising its discretion, chose not to give access to the record. At the time that the complainant made her request (May 27, 2013), the EY Report had not yet been presented to city council (this did not occur until October 7, 2013).

Following the release of the EY report and as portions of the Fillmore Riley review report were included in the EY report, our office considered whether the city might now wish to exercise its discretion to waive solicitor-client privilege with regard to the review report and release the requested review report to the complainant. Our office communicated this request to the city which replied:

...the City considers that the entirety of the [Fillmore Riley] Report was privileged and, although it must concede that those portions of the [Fillmore Riley] Report that were publically released have lost any privilege associated with them, the City's position is that the remainder of the [Fillmore Riley] Report remains privileged legal advice.

Our office concluded that the city has appropriately exercised its discretion in deciding not to release the Fillmore Riley review report to the complainant. Our office notes that at the time the request was made solicitor-client privilege still pertained to the entire review report.

Does clause 27(1)(a) apply to the Fillmore Riley contract for services and any associated invoices?

A contract for legal services will generally contain certain standard clauses. It can be expected to identify the parties to the contract, to summarize the agreed upon services to be performed, the responsibilities of the lawyer(s) and the client(s) with regard to the execution of the contract and the compensation to be paid. An invoice for legal services may contain a description of the legal services performed as well as the amounts billed for those services. In its response to the complainant's request the city stated:

The contract you are requesting was with a lawyer employed...to provide legal advice...As a result, this FIPPA exception [solicitor-client privilege under clause 27(1)(a)] applies.

Even without examining the contract for services with Fillmore Riley, our office is able to conclude that a detailed summary of services to be performed (along with the responsibilities of the lawyer and client with regard to the execution of a contract for services) would reveal details about the nature of the legal advice being sought and thus expose information that is protected by solicitor-client privilege. As previously noted solicitor-client privilege protects all communications of a confidential character between a client and legal advisor that are related to the seeking, formulating or giving of legal advice or legal services. This includes contracts for the provision of legal services. Our office concludes that the contract for legal services between the city and Fillmore Riley contains information excepted from access under clause 27(1)(a) of FIPPA.

Privilege may not protect from disclosure certain information incidentally arising during the course of the solicitor-client relationship. For example, invoices submitted by a lawyer may in some cases be amenable to severance in order to remove from them the nature of the advice or other communication protected by solicitor-client privilege and then the amount on an invoice may be disclosed. For example, total legal costs that would not reveal directly or indirectly any information protected by solicitor-client privilege could be released.

However, our office notes that in this case the total amount paid by the city to Fillmore Riley under the terms of the contract for the 'Review Land Sale Swap/Appraisal' was made public on April 24, 2013 when the city accounts for 2012 were presented to a meeting of city council. In fact, the complainant advised us that it was the information in those accounts that led her to make the FIPPA requests that are the subject of this investigation. Our office concluded that information that was subject to solicitor-client privilege could be severed from any invoice and the total amount could be disclosed. However, the total amount was already known to the complainant by virtue of it being publicly available. As subsection 6(2) of FIPPA states that the right of access to information allowed by the act does not apply to information that is publicly available, this information was not at issue in our investigation.

SUMMARY OF FINDINGS

The ombudsman found that:

1. In this case, for the purposes of our investigation, it is not necessary for our office to review the particular incident report over which privilege was claimed.
2. The city did not waive solicitor-client privilege over the withheld information by supplying a copy of the information to its independent auditors EY.
3. The exception under clause 27(1)(a) of FIPPA applied to the Fillmore Riley review report and information concerning legal advice contained in the city's contract with Fillmore Riley for legal services and any associated invoices.

4. Information that was subject to solicitor-client privilege could be severed from any invoice and the total amount could be disclosed. However, this information was already known to the complainant and it is publicly available. Therefore, under subsection 6(2) of FIPPA, the right of access to information allowed by the act does not apply to this information.
5. The city appropriately exercised its discretion in its initial decision to refuse access to the Fillmore Riley review report and any associated contract and invoices. Provision of a copy of the review report to city auditors EY did not constitute a waiver of privilege. Therefore, the city appropriately exercised its discretion in its decision to continue to withhold those portions of the Fillmore Riley review report and any associated contract and invoices over which privilege had not been waived.

CONCLUSION

Based on the ombudsman's findings, the complaints of refused access are not supported.

In accordance with subsection 67(3) of *The Freedom of Information and Protection of Privacy Act*, the complainant may appeal the City of Winnipeg's decision to refuse access to the Court of Queen's Bench within 30 days of receiving this report.

January 31, 2014
Manitoba Ombudsman