

Manitoba mbudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2019-0111

MANITOBA INFRASTRUCTURE

ACCESS COMPLAINT: ACCESS REFUSED

PROVISION CONSIDERED: 27(1)(a)

REPORT ISSUED ON SEPTEMBER 17, 2019

SUMMARY: The complainant made a request to Manitoba Infrastructure for a copy of a legal opinion that had been received by the public body. The public body refused access by applying the exception under clause 27(1)(a) of FIPPA (solicitor-client privilege) to the record. The complainant maintained that, as a summary of the opinion had been provided to him, the public body had waived privilege over the information and the exception could not be applied. Our office found that privilege had not been waived and Manitoba Infrastructure's refusal of access to the opinion was authorized under clause 27(1)(a) of FIPPA. The complaint was not supported.

COMPLAINT

On January 25, 2019 Manitoba Infrastructure (the public body) received a request under the Freedom of information and Protection of Privacy Act (FIPPA or the act) for access to the following information:

Manitoba Infrastructure Legal Opinion on US Carriers being exempt from the Safety Fitness Certificate Requirements.

Manitoba Infrastructure issued its access decision on March 11, 2019, and refused access in full. In refusing access, the public body applied clause 27(1)(a) of FIPPA, which reads:

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;*

A complaint concerning the public body's access decision was received in our office on March 18, 2019.

POSITION OF THE COMPLAINANT

In information accompanying his complaint, the complainant stated that even if the information requested was of the type that would be subject to solicitor-client privilege, there had been a waiver of that privilege by the public body, both by disclosure and by reliance on the opinion. The complainant provided our office with evidence which indicated that portions of the requested record had been disclosed verbally on at least two occasions by an employee of the public body. The complainant also provided our office with an email sent to them by the employee which appeared to contain information extracted from the legal opinion at issue.

The complainant also stated that the public body was relying on undisclosed advice from legal counsel to make a regulatory decision affecting them and, in the absence of the opinion, the complainant has been unable to assess the opinion's relevance.

INVESTIGATION AND ANALYSIS**Does clause 27(1)(a) of FIPPA apply to the information withheld by Manitoba Infrastructure?**

Solicitor-client privilege covers all communication of a confidential character between a solicitor and a client related to the seeking, formulating or giving of legal advice and includes both legal advice privilege and litigation privilege. Privilege belongs to the client and it persists in perpetuity unless waived (relinquished) by the client. In the matter at issue, the client is the public body. Clause 27(1)(a) of FIPPA may be applied by a public body to withhold information that is subject to solicitor-client privilege.

Our office contacted Manitoba Infrastructure and we asked the public body to explain how the exception for solicitor-client privilege could be applied to the record at issue, and to address the implications of a potential waiver of privilege as raised by the complainant.

In an investigation about a refusal of access, it is the usual procedure of our office to ask that copies of responsive records be made available for our review of the public body's decision to rely on an exception or exceptions under FIPPA to refuse access. However, mindful of the

unique weight given to solicitor-client privilege in law, our office will consider means other than direct examination of the record at issue by which a public body may establish the application of the exception allowed by clause 27(1)(a) of FIPPA. We explained to the public body that, in the absence of records for review, it is our position that the legal advice branch of solicitor-client privilege may be established by applying the criteria prescribed in *Solosky v R.*¹ In that case, evidence provided to our office must explicitly address for the record at issue that:

- There is a communication between a lawyer and the lawyer's client.
- The communication entails the giving or seeking of legal advice.
- The communication was intended to be confidential.

While a copy of the record at issue was not provided for our review, Manitoba Infrastructure provided us with information about the record. This information was sufficient for our office to conclude that the criteria for establishing solicitor-client privilege as described in *Solosky* had been satisfied. However, if solicitor-client privilege over the opinion could be shown to have been waived by the actions of the public body, the exception under clause 27(1)(a) of FIPPA could not be relied on by the public body to refuse access. Our consideration of whether there was a waiver of privilege follows.

Has there been a waiver of solicitor-client privilege by the public body?

The question to be decided in this matter is, given that a summary of the opinion has been provided to the complainant, whether a waiver of solicitor-client privilege can be determined to have occurred over the entire opinion. If that is the case, the public body may no longer rely on clause 27(1)(a) of FIPPA to refuse access to this information.

Manitoba Infrastructure acknowledged that solicitor-client privilege can be waived in one of two ways: the client (in this case, the public body) is aware of the privilege that attaches to the communication and voluntarily, intentionally and explicitly relinquishes it; or, a waiver of privilege may be implied (suggested by action or effect). One kind of implied waiver may occur through the partial disclosure of privileged information, where voluntary waiver of privilege as to part of a communication is held to be a waiver of privilege as to the entire communication.

Manitoba Infrastructure addressed the incidents which the complainant had described and which, he maintained, were evidence that solicitor-client privilege had been waived by the public body. As the employee named by the complainant no longer worked for the public body, Manitoba Infrastructure acknowledged that it was unable to comment on what, specifically, the employee discussed in verbal conversation with the complainant. However, the public body submitted, the fact that the complainant persisted in seeking information about the opinion, including in the form of a written response to his email, suggests that only minimal and insufficient information

¹ *Solosky v. The Queen*, [1980] 1 SCR 821, 1979 CanLII 9 (SCC).

(the fact that an opinion existed and the public body had relied on it) had been provided through conversation with the public body employee. Furthermore, the public body stated that the decision to provide a summary of the opinion by email was evidence of a clear intention to respond to the complainant's inquiries while at the same time retaining the confidentiality of solicitor-client privilege over the full legal opinion. The public body maintained that, at no time, was there an express intent to waive privilege.

To support its argument that the disclosure of a high-level summary of the opinion did not amount to an implied waiver, the public body relied on *Mackin v. New Brunswick (Attorney General)*², a decision of the New Brunswick Court of Queen's Bench. Our office reviewed this case. In *Mackin*, the court considered whether, in disclosing part of a privileged document, the intention was to mislead the court or another party so as to require the conclusion that privilege over the entire document had been abandoned. We noted that the court in *Mackin* found that no such conclusion could be drawn in the matter before it. In *Mackin*, the court ruled a partial disclosure (the result of an opinion) did not amount to a waiver of privilege over the whole document.

Our office also reviewed a more recent report issued by the information and privacy commissioner (Newfoundland and Labrador) in *College of the North Atlantic (Re)*³ which similarly addressed the question of a waiver of solicitor-client privilege in the access to information context. The commissioner concurred with *Mackin* and found that, even if there had been a partial disclosure of a legal opinion in an email, there was no evidence of intent on the part of the college to waive solicitor-client privilege in relation to the whole of the opinion at issue. Further, the commissioner concluded there was no evidence of an intention to mislead the applicant or promote unfairness through a partial release of privileged information. The commissioner acknowledged that the opinion at issue, the validity of which the applicant could not assess without having access to it, had resulted in an administrative decision which had materially affected the applicant. The commissioner was sympathetic to the applicant's reasons for wishing to gain access to the opinion but concluded that the applicant's wishes were outweighed by the importance that has been assigned to solicitor-client privilege in law, a principle which is protected by the exception to access provided for in legislation.

Our office considered these cases to be applicable in this matter and, in light of the foregoing, our office has concluded that the information which the complainant stated had been shared verbally and the provision of a summary of the opinion to the complainant in an email does not constitute a waiver of solicitor-client privilege over the opinion at issue. Our office found, therefore, that Manitoba Infrastructure's reliance on clause 27(1)(a) of FIPPA to refuse access to the opinion was authorized.

² *Mackin v. New Brunswick (Attorney General)*, 1996 CanLII 4705 (NB QB).

³ *College of the North Atlantic (Re)*, 2008 CanLII 31394 (NL IPC).

Clause 27(1)(a) is a discretionary exception to disclosure under FIPPA. This means that, even though the exception to access can be shown to apply, FIPPA permits the public body the discretion to give rather than withhold access to the information requested. In this instance, even if the exception for information subject to solicitor-client privilege can be shown to apply, the public body is still required to consider whether there are factors, such as fairness and public interest, which weigh in favour of disclosure. Further to our investigation of this matter, our office asked the public body to elaborate on the factors it considered in exercising its discretion to refuse access and advise if it was prepared to exercise its discretion to release of the opinion to the complainant. Our office considered the public body's response and, based on our review, we determined that the exercise of discretion by Manitoba Infrastructure to continue to withhold the information to which clause 27(1)(a) had been applied was reasonable and consistent with the purpose of the exception.

In making its representations, Manitoba Infrastructure further stated that that it also wished to rely on clause 27(1)(b) of FIPPA in refusing access. It reads:

Solicitor-client privilege

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

As we had not been advised that a revised access decision explaining the public body's reliance on this additional exception had been provided to the complainant and we had concluded that clause 27(1)(a) applied to the information at issue, our office did not consider the application of clause 27(1)(b) to refuse access to the information requested.

CONCLUSION

Based on the ombudsman's findings, the complaint of refused access is not supported.

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

September 17, 2019
Manitoba Ombudsman