OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-21-004

Re: Department of Economic Growth, Tourism and Culture

Prince Edward Island Information and Privacy Commissioner
Denise N. Doiron

August 25, 2021

Summary: An applicant requested access to all records exchanged between a named employee of the Public Body and a named employee of another public body, or that made mention of a named third party individual, for a six month period. The Public Body claimed that some of the responsive records were subject to solicitor-client privilege, pursuant to section 25 of the *Freedom of Information and Protection of Privacy Act*. The applicant objected to the Public Body's claim of solicitor-client privilege on the grounds that none of the parties named in the access to information requests were lawyers.

The Commissioner confirmed that, based on the affidavit and supplementary information provided by the Public Body, the Public Body was authorized to refuse access to the responsive records withheld pursuant to section 25 of the *Freedom of Information and Protection of Privacy Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Cap. F-15.01, sections 7, 25, 53, 60, 65, 67.

Cases Cited: *Alberta (Information and Privacy Commissioner)* v. *University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555

Solosky v. *The Queen,* 1979 CanLII 9 (SCC)

Calgary (Police Service) v. *Alberta (Information and Privacy Commissioner)*, 2019 ABQB 109 (CanLII)

Alpheus Brass et al v. *Her Majesty the Queen et al*, 2011 FC 1102 (CanLII)

Canada (Public Safety and Emergency Preparedness v. *Canada (Information and Privacy Commissioner)*, 2013 FCA 104 (CanLII)

Alberta (Municipal Affairs) v. *Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274 (CanLII)

Order No. FI-19-005**,** *Re: Department of Workforce and Advanced Learning*, 2019 CanLII 32855 (PE IPC)

Calgary (Police Service) v. *Alberta (Information and Privacy Commissioner)*, 2017 ABQB 656 (CanLII)

Order No. 08-05, *Re: Prince Edward Island (Transportation and Public Works)*, 2008 CanLII 67686 (PE IPC)

I. BACKGROUND:

[1] An applicant (the "Applicant") made an access to information request to the Department of Economic Growth, Tourism and Culture (the "Public Body"), pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act,* R.S.P.E.I. 1988, Cap. F-15.01 (the "*FOIPP Act*"). The Applicant requested:

> "All records, in any formats, electronic or otherwise, of [*named employee*] – then CEO of Innovation – which were either sent to – or received from – [*named employee of another Public Body*], or make mention of [*named third party*], from January 1, 2011 to June 1, 2011."

[2] This request was the subject of another review by our office, for deemed refusal. The deemed refusal issue was addressed in a Consent Order, in which the Public Body agreed to process and respond to the request by a specific date. The deemed refusal issue is not an issue for this review. For this reason, it will not be discussed further. It is mentioned here only for context.

[3] The Public Body conducted a search, and located and retrieved 147 pages of responsive records relating to this request. The Public Body decided that they were required or authorized to withhold some information in the responsive records under sections 15 [unreasonable invasion of personal privacy], 20 [cabinet confidences], and 22 [advice from officials] of the *FOIPP Act*. The Public Body also decided that solicitor-client privilege applied to 36 pages of the responsive records, and refused disclosure of all 36 pages in their entirety, pursuant to clause 25(1)(a) of the *FOIPP Act*.

[4] The Applicant objected to the Public Body refusing to disclose the 36 pages over which they claimed solicitor-client privilege. The Applicant then exercised their right, pursuant to section 60 of the *FOIPP Act,* and requested our office to review the Public Body's decision to refuse to disclose these 36 pages pursuant to section 25 of the *FOIPP Act*. The Applicant did not request a review of the Public Body's decision to redact information from the records pursuant to sections 15 [unreasonable invasion of personal privacy], 20 [cabinet confidences], or 22 [advice from officials] of the *FOIPP Act*.

[5] Former Commissioner Karen Rose invited submissions from the parties. The Public Body provided their submissions in relation to section 25, but opted not to provide our office with the records, which is their right for records over which solicitor-client privilege is being claimed.

[6] Although the *FOIPP Act*, at subsection 53(2), gives the Commissioner the authority to require production of records for examination, the Supreme Court of Canada has

instructed that it does not apply to records over which solicitor-client privilege is claimed.

[7] In *Alberta (Information and Privacy Commissioner)* v. *University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555, the issue was a provision in the Alberta legislation that was essentially the same wording as found in subsection 53(2) in our *FOIPP Act*. In that case, the Supreme Court of Canada recognized that the Commissioner generally has authority to require the production of records for the purpose of conducting a review, but directed that such authority does not apply to records subject to solicitor-client privilege unless the legislation specifically states that the Commissioner may require the production of records over which solicitor-client privilege has been claimed. As was the case with the Alberta legislation, our *FOIPP Act* does not specify that the Commissioner has the authority to require a public body to produce records over which the public body has claimed solicitor-client privilege. Therefore, a public body may choose to provide the records over which they claim solicitor-client privilege for the Commissioner to review, but they are not required to do so.

[8] Former Commissioner Rose acknowledged that the Public Body was not required to produce the records the Public Body had refused to disclose to the Applicant for solicitor-client privilege. However, she requested the Public Body provide evidence, with as much detail as possible, to assess their claim under section 25 of the *FOIPP Act*.

[9] The Public Body provided submissions and affidavit evidence. The Public Body requested that the Commissioner receive the affidavit *in camera* [privately]. This would mean that the affidavit would not be provided to the Applicant, nor disclosed in this Order. In the course of the review, the Public Body changed their position and requested only that the description of the records be receive *in camera*. Commissioner Rose agreed to receive this information *in camera*, but this agreement should not be taken as confirmation that the description itself is subject to solicitor-client privilege. That may be an issue for another review, but it is not the issue for this review.

[10] A redacted version of the affidavit and the Public Body's submissions were provided to the Applicant. The Applicant provided response submissions, and we gave the Public Body an opportunity to reply. The Public Body provided reply submissions, including some supplementary information, which the Public Body requested to be received on an *in camera* basis. The supplemental information is a brief description of the context of the records over which solicitor-client privilege was claimed.

[11] Former Commissioner Rose accepted the Public Body's supplementary information *in camera*. The Public Body's reply submissions were provided to the Applicant, excluding the schedule containing the supplementary information. The Applicant was advised that there was some supplementary information provided *in camera*. As no new issues were raised by the Public Body, submissions were closed.

II. RECORDS IN ISSUE

[12] The records in issue in this review are the 36 pages the Public Body withheld from disclosure pursuant to section 25 of the *FOIPP Act*. Throughout this order, I will refer to these pages as "the records in issue".

III. JURISDICTION

[13] The records in issue were in the custody and control of the Public Body, are "records" as defined under the *FOIPP Act*, and are not any of the types of records excluded under section 4 of the *FOIPP Act*. Therefore, the *FOIPP Act* applies to the records in issue. Consequently, I am satisfied that I have jurisdiction in this matter.

IV. ISSUES

[14] The only issue in this review is whether the Public Body properly applied clause 25(1)(a) of the *FOIPP Act* to the records in issue.

V. BURDEN OF PROOF

[15] The *FOIPP Act* places the burden of proof on a specific party, depending on what provision is in issue. Subsection 65(1) of the *FOIPP Act* describes who bears the burden of proof during an inquiry and states, in part:

> 65.(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.
> …

[16] As the review is about a decision of the Public Body to refuse access to a record for solicitor-client privilege, the burden of proof in this review rests with the Public Body.

VI. ANALYSIS

Did the head of the Public Body properly apply clause 25(1)(a) of the FOIPP Act to the records in issue?

[17] The Public Body claims the records in issue are subject to solicitor-client privilege, pursuant to clause 25(1)(a) of the *FOIPP Act*, and has refused the Applicant access to these records. Clause 25(1)(a) of the *FOIPP Act* states:

> 25. Privileged Information
> (1) The head of a public body may refuse to disclose to an applicant
> (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege;
> …

[18] The Applicant objected to the Public Body refusing access to the 36 pages of records under solicitor-client privilege, stating: "given that none of the parties are lawyers, I am challenging this provision."

[19] As this inquiry relates to the decision of the head of the Public Body to refuse the Applicant access to records, it is up to the Public Body to show that they have properly applied clause 25(1)(a) of the *FOIPP Act*, and that the Applicant has no right of access to

the records in issue. The standard of proof the Public Body must meet is a balance of probabilities. In other words, the Public Body must persuade me that it is more likely than not that they applied clause 25(1)(a) of the *FOIPP Act* appropriately.

[20] The Public Body made submissions regarding solicitor-client privilege, and provided an affidavit of the head of the Public Body. The affidavit set out the Public Body's belief that the records qualified for solicitor-client privilege, and claimed solicitor-client privilege over the records. The affidavit included an attached table, labeled Schedule A, which described in general terms the nature of the records over which solicitor-client privilege was claimed.

[21] The Applicant in this matter was unable to provide much in the way of specific evidence, and I did not expect any. Applicants are at a disadvantage when seeking a review of a public body's claim of solicitor-client privilege over a record. Records over which solicitor-client privilege is claimed are typically withheld from an applicant in their entirety, so applicants have little or no information about the content or context of the records. In the present matter, the Public Body withheld, in their entirety, all 36 pages of records over which they claimed solicitor-client privilege. The Applicant therefore had no opportunity to review the surrounding context of the withheld information and generally had very little to go on. Despite the lack of information about the withheld records, the Applicant made fairly extensive submissions regarding solicitor-client privilege in general, which were well thought out and well presented.

[22] Both the Public Body and the Applicant referred to the Supreme Court of Canada case of *Solosky* v. *The Queen* 1979 CanLII 9 (SCC), which is one of the leading Canadian decisions on solicitor-client privilege, and sets out a three-part test for determining if a document meets the criteria for solicitor-client privilege, namely:

> (a) there must be a communication between a solicitor and their client;
> (b) the communication must entail the seeking or giving of legal advice; and
> (c) the communication must be intended to be confidential by the parties.

[23] These criteria, generally known as the *Solosky* test, are the starting point for determining if solicitor-client privilege attaches. There have been many subsequent decisions in Canada that have elaborated upon and expanded the criteria described in the *Solosky* test.

[24] One such decision, which is relevant to the present matter, is *Calgary (Police Service)* v. *Alberta (Information and Privacy Commissioner)*, 2019 ABQB 109 (CanLII), in which the Honourable Mr. Justice R.J. Hall stated at paragraph 6:

> [6] Having heard counsel's submissions and reviewed relevant case law, I have determined, in this case, that the appropriate test for privilege in respect of each of the disputed records, is as follows:
>
> 1) Is there a communication between a solicitor and a client?
> 2) Does the communication entail the seeking, giving or receiving of legal advice?
> 3) Is the communication intended by the parties to be confidential?
> 4) Is the lawyer acting as a lawyer?
> 5) What was the purpose for which the records came into existence?
> 6) Is the particular communication part of a continuum in which legal advice is given?
> 7) Does the particular communication reveal that legal advice has been sought or given?
> 8) If there is any privileged information, can it be reasonably severed from the rest of the record, without revealing the privilege?

[25] The provisions found in Alberta's legislation are substantially similar to those found in our *FOIPP Act*. I consider the additional criteria for consideration set out by the Honourable Mr. Justice R.J. Hall to be relevant considerations in this matter, as well. I do note that the Court in *Calgary (Police Service), supra,* had the records before them to review, which is not the case in the present matter.

[26] The Applicant referred to the *Solosky* test, and submitted that:

> "Given that neither of the parties from which records have been requested are lawyers, it is not possible that any of the 36 pages meet the conditions of the Solosky test if they were direct communications (emails) between the parties, neither of who are lawyers. The only logical possibility that a previous communication between a lawyer and one or both of the parties is if those records were identified as "solicitor-client privileged" was sent via email as an attached document."

[27] Although the Applicant requested records exchanged between two individuals who were not lawyers, this is not solely determinative of whether solicitor-client privilege may apply. Furthermore, the Applicant's access request was not limited to only records exchanged between those two named individuals. The Applicant also requested records that "make mention of" a named third party. This added element opened up a broader range of responsive records, and may have reasonably included records that might be subject to solicitor-client privilege, particularly when looking at the expanded criteria since *Solosky, supra*.

[28] The Applicant also argued that:

> "There are well-established legal precedents that stipulate precise conditions that must be met to establish legitimate solicitor-client privilege. If those conditions are not met, it is not necessary to review the contents of the documents to make a determination that solicitor-client privilege does not attach to those documents.
>
> In the case of these 36 government records, there are only two scenarios to consider:
>
> (A) either the direct communication between the parties was a privileged document; or
>
> (B) one of the two parties sent an attachment that was identified as a solicitor-client privileged document.
>
> For any direct communication between parties to be solicitor-client privileged, one of the parties has to be a lawyer. No party in this FOIPP request is a lawyer, so no direct communication between these parties can be solicitor-client privileged.
>
> For an attached document identified as solicitor-client privilege to retain the solicitor-client privilege after being sent voluntarily to a third party, it would have been necessary for one of the parties to have contracted the other party to serve as a "channel of communication," between that party and his or her lawyer, which almost certainly never happened, and is something that can be easily determined with an inquiry to the public body. Furthermore, the nature of the communication would need to involve a lawyer, whereby that contracted party acted as a "channel" between the other party and his/her lawyer, something that is absent from these email communications. Unless such a formal relationship existed whereby the recipient of those documents was contracted by the sender to act as a "mediator" with that person's lawyer, then according to legal precedent, the necessary conditions for third-party sharing of solicitor-client privileged documents to retain that privilege would not have been met in this case and that privilege is waived.
>
> Given the above, I am therefore asking that you order these documents released to me based on the logical impossibility that the legal conditions required to establish legitimate solicitor-client privilege exists in this case."

[29] With respect, the assessment of solicitor-client privilege is not as narrow as described by the Applicant. It is not necessary that the communication be a direct communication between a lawyer and their client. A document can be solicitor-client privileged in some circumstances even if it is not a direct communication between a lawyer and a client.

[30] One example would be if a client is comprised of more than one individual, members of the client group exchanging documents that discuss legal advice that was given by a lawyer representing the client would qualify for solicitor-client privilege. For clarity, the Public Body did not claim this; I give it merely as an example of a broader application of solicitor-client privilege. Solicitor-client privilege may also apply to internal documents of a public body which reference or discuss a lawyer's legal advice (see: *Alpheus Brass et al* v. *Her Majesty the Queen et al*, 2011 FC 1102 (CanLII), at paragraph 75).

[31] Further, the "channel of communication" as described by the Applicant is narrower than what must be examined when assessing if a particular communication is part of a continuum in which legal advice is sought or given. Solicitor-client privilege will also apply to communications which may reveal the advice sought or received from the lawyer, which include background documents provided by the client to legal counsel to assist legal counsel in formulating and giving advice, or which provide factual assumptions on which legal advice is sought or given. It can also include memos from a client's employee forwarding non-confidential enclosures which indicate how a client may be directing their lawyer.

[32] In *Canada (Public Safety and Emergency Preparedness* v. *Canada (Information and Privacy Commissioner)*, 2013 FCA 104 (CanLII), the Federal Court of Appeal discussed the continuum and stated at paragraphs 26 and 27:

> [26] All communications between a solicitor and a client directly related to the seeking, formulating or giving of legal advice are privileged, along with communications within the continuum in which the solicitor tenders advice. See *Samson Indian Nation and Band* v. *Canada*, 1995 CanLII 3602(FCA), [1995]2 F.C. 762 at paragraph 8.

> [27] Part of the continuum protected by privilege includes "matters great and small at various stages…includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional duty as legal advisor to the client." See *Balabel* v. *Air India* [1988] 2 W.L.R. 1036 at page 1046 per Taylor L.J.; *Three Rivers District Council* v. *Governor and Company of the Bank of England*, [2004] UKHL 48 at paragraph 11.

[33] In a more recent case, *Alberta (Municipal Affairs)* v. *Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274 (CanLII), the Honourable Mr. Justice Mandziuk reviewed whether it is necessary for a communication to be directly between a lawyer and client to constitute a "continuum of legal advice", and stated at paragraphs 17 and 18:

> [17] There are emails in "chains" that are not directly between lawyer and client, or lawyer and lawyer, but have been sent by and received from members of the client group or department. Communications in this category request and give information, make inquiries, answer questions and otherwise relate topically to those in which legal counsel are directly involved.
>
> [18] Those emails form part of a discrete body of communications that includes clearly privileged material. I must take a holistic approach to this question. In these instances, they are "part of a continuum in which legal advice is given": *Calgary (Police Service)* at para 6. What all of them have in common is that they essentially "transmit or comment" on the work products that, I find, are privileged: *Bank of Montreal v Tortora*, 2010 BCSC 1430 at paras 11-12, 14 BCLR (5th) 386.

[34] The Public Body indicated in their submissions that none of the advice that was given or sought was by an internal government lawyer. The Public Body submitted that the communications in the 36 pages of records over which they claimed solicitor-client privilege involved external legal counsel giving advice or being requested to give advice, or whose advice was being communicated amongst departmental employees. This would support that the lawyer was acting as a lawyer, not in some other capacity.

[35] The Public Body referred to the *Solosky* test and argued that the affidavit established that the three criteria had been met, stating:

> "The 36 pages all include information which was communicated to or by a lawyer for the purpose of giving or receiving legal advice or communicating said advice and all communications were intended to be confidential."

[36] The Public Body also referred to the questions set out by the Alberta Court of Queen's Bench in *Calgary Police Services, supra*, and submitted their position that the questions set out were clearly answered in the affidavit.

[37] In matters where legal privilege is claimed, the Commissioner's job as an independent reviewer is more challenging because a public body is not required to produce the records over which solicitor-client privilege is being claimed, to review and verify the public body's claim.

[38] The Public Body chose not to produce to our office the 36 pages of records over which they claimed solicitor-client privilege under clause 25(1)(a) of the *FOIPP Act*. The Public Body provided submissions, and an affidavit of the head of the Public Body which included a schedule (Schedule A) setting out a table of 20 rows, with columns that set out the number of pages of each record, the type of claim (solicitor-client privilege), and a brief description of the record (the method of correspondence, and the professional role of the solicitor involved). The Public Body requested, and former Commissioner Rose agreed, that the description column for each record in Schedule A be kept *in camera*, so the Applicant did not have that information.

[39] As former Commissioner Rose noted in Order FI-19-005, *Re: Department of Workforce and Advanced Learning*, 2019 CanLII 32855 (PE IPC), at paragraph 81:

> "[81] The Public Body's affidavit evidence requires consideration. However, that does not mean that the Commissioner must accept the claim of the Public Body without testing it. Without the records to review, the Commissioner's job is more challenging than simply reviewing the records and determining whether the *Solosky* test is satisfied. The Commissioner must consider the exception and the context, and must rely upon the submissions and evidence offered by the Public Body."

[40] The Public Body's position is that they provided sufficient evidence, which was "clear, cogent and convincing", in its initial affidavit and established that the records are subject to solicitor-client privilege. Respectfully, I disagree.

[41] The Public Body provided minimal information in its affidavit to explain the contents of the records in issue and how solicitor-client privilege would apply. What was described as "details" in the affidavit was more an assertion of privilege, rather than details describing how privilege attached to the records. This assists little in assessing whether the claim of privilege was appropriately applied.

[42] There is a difference between asserting solicitor-client privilege and proving solicitor-client privilege. In *Calgary (Police Service)* v. *Alberta (Information and Privacy Commissioner)*, 2017 ABQB 656 (CanLII), the Court of Queen's Bench of Alberta commented at paragraphs 18-20 about the Supreme Court of Canada decision *Information and Privacy Commissioner of Alberta v. University of Calgary*, *supra*:

> [18] Reviewing those comments by the Supreme Court of Canada in context, and noting that the Supreme Court of Canada was not there determining how solicitor-client privilege was to be proven, I find that those comments of the Supreme Court of Canada relate to the *assertion* of solicitor-client privilege by a party. In relation to an inquiry under the *Act*, all the public body is required to provide to the Commissioner to *assert* privilege is a description of the documents that would be a sufficient description if it was placed in an Affidavit of Records in a civil action.
>
> [19] However, that only relates to what is necessary for a public body to *assert* a claim of privilege.
>
> [20] The task of the Commissioner is to determine whether, in fact, a claim of privilege has been made out. In doing so, the Commissioner must apply the law respecting proof of privilege.

[43] When a public body chooses not to provide to the Commissioner the records over which solicitor-client privilege is claimed, it is more difficult to meet their burden of proof in a review. An assertion of solicitor-client privilege is not sufficient. To meet their burden of proof for a claim of solicitor-client privilege, a public body must present sufficient evidence, which must show on a balance of probabilities that it is more likely than not that the records are subject to solicitor-client privilege.

[44] It may be advisable, in some circumstances, for a public body to provide more evidence in the form of particulars of the records, or severed copies of the records without disclosing the information that is subject to solicitor-client privilege. This is particularly important if the public body is advised that more evidence is needed for the purpose of the review. The risk of a public body not providing enough evidence is that the public body might not persuade the Commissioner that they have properly claimed solicitor-client privilege.

[45] In the present matter, the Public Body chose to provide more detail about the nature and context of the records in its reply submissions. In addition to the reply submissions, the Public Body provided an additional schedule, which it requested be accepted on an *in camera* basis, which former Commissioner Rose accepted. This additional schedule, which was not provided to the Applicant as it was accepted *in camera*, provided additional context around the nature of the records at issue.

[46] I cannot go into details of the nature and context of the records here, as to do so would potentially reveal the nature of the information over which privilege is being claimed. However, there was sufficient detail provided in this supplementary information to assess the Public Body's assertions.

[47] The evidence provided by the Public Body is that most, but not all, of the records in issue in this matter were communications with a lawyer which appear to have involved the giving or receiving of legal advice. I am persuaded that the Public Body appropriately applied clause 25(1)(a) of the *FOIPP Act* to these records when refusing to disclose them to the Applicant.

[48] In their reply submissions, the Public Body acknowledged that not all of the records over which solicitor-client privilege was claimed were direct communications with a lawyer. The Public Body argued that the breadth of solicitor-client privilege attached to continuing communications in which a solicitor or solicitors advise a client and may

include confidential communications among individuals, government groups, divisions or departments who are not lawyers.

[49] I agree that there are circumstances in which communications among employees or staff of a public body and, in some cases, with employees or staff of another public body that has a common legal interest, could qualify for solicitor-client privilege despite not being direct communications with a lawyer. More particularly, solicitor-client privilege would apply if the communications are a part of a continuum in which legal advice is given, or which reveal that legal advice has been sought or given, or which reveal what such legal advice was.

[50] The evidence provided by the Public Body established to my satisfaction that the remainder of the records fall into the continuum of communications category, where the individuals between whom communications are exchanged are not lawyers, but the communications relay information that is legal advice that was sought or given, on a continuum of communication.

[51] I would not describe the evidence presented by the Public Body as "ample evidence". However, that is not the standard that the Public Body is required to provide. The Public Body is merely required to provide sufficient evidence to persuade me that, on a balance of probabilities, they applied clause 25(1)(a) of the *FOIPP Act* appropriately.

[52] While the affidavit on its own was insufficient to persuade me that the Public Body appropriately applied clause 25(1)(a) of the *FOIPP Act* in claiming solicitor-client privilege over the records, the details provided in the supplementary information and the submissions of the Public Body provided the additional information needed to support the Public Body's assertions set out in the affidavit.

[53] The affidavit, considered together with the supplementary details and submissions, provided sufficient evidence to persuade me, on a balance of probabilities, that the

Public Body appropriately applied clause 25(1)(a) of the *FOIPP Act* to all 36 pages of the records in issue in this matter.

[54] Usually, if information a public body is authorized to refuse to disclose can be severed from a record, an applicant has a right of access to the remainder of the record. However, this does not apply to records subject to solicitor-client privilege. If a record is found to be subject to solicitor-client privilege, a public body is entitled to withhold the entire record.

[55] As stated by former Commissioner Judith Haldemann, in Order No. 08-05, *Re: Prince Edward Island (Transportation and Public Works)*, 2008 CanLII 67686 (PE IPC):

> "In the matter of the severance of information from documents subject to solicitor-client privilege, I agree with the Public Body that "severing is not a concept applicable to records subject to solicitor-client privilege". In Blank v. Canada (Minister of Justice), 2007 FCA 87 (CanLII), the Federal Court of Appeal said this (in respect of a section that provides for severance) at paragraph 13:
>
> > ... section 25 must be applied to solicitor-client communications in a manner that recognizes the full extent of the privilege. It is not Parliament's intention to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought."

[56] I did not have the records in issue, and the Public Body is authorized to withhold the entirety of records over which solicitor-client privilege is properly applied. In light of these factors, I did not examine whether portions of the records in issue may be severed.

VII. FINDINGS

[57] Based on the above, I find that the Public Body has properly applied clause 25(1)(a) of the *FOIPP Act* to the records in issue. I find therefore that the Public Body is authorized to refuse to disclose the records in issue to the Applicant.

VIII. ORDER

[58] I confirm the decision of the Public Body to withhold the 36 pages of the responsive records pursuant to clause 25(1)(a) of the *FOIPP Act*.

[59] I thank the parties for their submissions in this matter.

[60] In accordance with section 67 of the *FOIPP Act*, the Commissioner's order is final. However, an application for judicial review of the Order may be made pursuant to section 3 of the *Judicial Review Act*, R.S.P.E.I. 1988, Cap. J-3.

Signed: Denise N. Doiron

Denise N. Doiron
Information and Privacy Commissioner