Information and Privacy Law
Update for FOI Officers

"No Responsive Records"
and
Confidential Advice

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Prepared for the Local Government Management Association of British Columbia
Conference June 2016

Duty to Assist FOI Applicants

As we know, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), **section 4,** a person who makes a request under section 5 (in writing, with enough detail to allow an experienced employee to identify the records sought with reasonable effort) has a right to any record in the custody or under the control of a public body, *unless* the information is excepted from disclosure under Part 2, Division 2 (sections 12 through 22.1).

British Columbia's Information and Privacy Commissioner has expressed her concern that increasingly, government information and privacy officers are telling FOI applicants that "no records were found" that respond to their requests. These concerns are described in two Investigation Reports by Commissioner Denham:

2013, IR F13-01 *Increase in No Responsive Records*; and

2015 IR F15-03 "Access Denied Records Retention and Disposal Practices of the Government", (in relation to three complaints about the processing of access requests two ministries and the Premier's office).

Apparently, some emails were being deleted before a request could ever be made, and in one case, it is alleged that an employee deleted emails *after* a request had been made, which would have contained responsive information.

The Commissioner is concerned that "oral government" is defeating the accountability purpose of the Act as set out in section 2 (1).

Former Commissioner Loukidelis was retained by the government to make recommendations to address the concerns set out in the 2015 Report, which were presented in December 2015 in a document entitled "*Implementing Investigation Report F15-03*". He noted that it is not useful to retain records that have no real value, being truly "transitory" in nature; while recommending improvements to government policy and records management training for all public servants and political staff so as to assist in a manner that is both comprehensive *and* efficient. This paper includes helpful guidelines in identifying the kinds of records that need not be retained.

Records Existing at Time of FOI Request

Defeating a search for records that exist at the time a request for access is made could carry a risk that one might be charged with false statements or attempting to mislead (FIPPA s 74).

As well, under local government legislation, a person must not interfere with, hinder or obstruct officers and employees in performing their work functions [CC s 153, LGA 242]

Under the current FIPPA, public bodies are not required to document communications, or to retain records that have not been requested, except in the case of personal information: Section 31 requires the public body to retain the information for at least one year after being used by or on behalf of the public body to make a decision directly affecting the individual, so that he or she has a reasonable opportunity to obtain access to it.

The position of a public body's "head" under FIPPA can be difficult when information that has been requested is of a sensitive nature, as people both within and outside a local government organization can have very different ideas about what information should be protected and what should be revealed.

In working with information and privacy officers acting for local government, I have found that the section 6 obligation to "make every reasonable effort to assist applicants, to respond without delay to each, and to do so openly, accurately and completely" typically is taken very seriously. It is the basis for many of the calls for legal advice and is commonly kept in mind when advice is given.

"Out of Scope" or Not Responsive to Access Request

For many years, it has been the practice of information and privacy officers that in searching and reviewing records, if information appears that is not related to the request, it is redacted from that which is considered for release.

The reasoning is that if information is found within a file or document that is not related to what the FOI applicant is after, it is not necessary to even consider whether it should be released or withheld under a section of Part 2, and whether to consult other managers, the governing body, or third parties who may have an interest in the decision.

It was thought that a redaction with the simple note, "out of scope" or "not responsive" to the request for access was a sufficient and reasonable explanation. Presumably, the notes are made honestly and in good faith and in the interest of efficiency.

Delegates of the Commissioner, making orders pursuant to inquiries into issues of access, did not appear to take issue with this practice until 2014.

In OIPC Order F14-27, involving records requested of the Vancouver Island Health Authority (VIHA), Adjudicator Alexander decided that as a public body, the VIHA could not, under FIPPA 4 (1) and (2), withhold information as being "out of scope", or in other words, not responsive to the FOI applicant's request for information, if that information appeared on the same record as responsive information.

The public body was ordered to "process" the applicant's request for the information it had marked "out of scope", and to advise the applicant as to whether that information was subject to an exception from disclosure.

Not having been notified that the subject of "out of scope" parts of the records would even be considered at the Inquiry, the VIHA sought judicial review of the order. It argued that that it was effectively denied the right to address that issue in submissions to be made for the Inquiry. (An important aspect of procedural fairness is the right to know the case you have to meet, and to be given an opportunity to address all material issues).

Instead of proceeding to court, however, the parties agreed to have the matter reconsidered. In Order 15-23, Deputy Commissioner McEvoy ordered the VIHA to process the information redacted as non-responsive.

He explained that FIPPA section 4, which provides a right of access to any record except information excepted from disclosure under Division 2, should be read in conjunction with section 8 (contents of response).

If access to a record **or part of a record** is to be refused, section 8 (1)(c) (i) requires the head to tell the applicant "the reasons for the refusal *and the provision of this Act on which the refusal is based*."

Thus, "record" is interpreted as a physical thing on which information is recorded, and distinct from the "information" that may appear on it.

The Deputy Commissioner reasoned that if *any* of the contents of a record reasonably relate to the request, the record is responsive and must be processed in its entirety.

The Deputy Commissioner suggested in Order F15-23 that the public body head can advise the applicant the record contains non-responsive information and explain why the applicant may not be interested in that. Possibly, the applicant may agree that such information need not be processed. The applicant could always make a second request after assessing the records that he or she does receive.

This Order was followed by several similar orders in 2015 where public bodies had severed and withheld information as "non-responsive" or "out of scope" in relation to the applicant's request. See Orders F15-23 through F15-26.

Further, in Order F15-56, the City of New Westminster was ordered to process information relating to the minutes of a closed meeting of City Council, as well as the agenda, including the portions that were unrelated to the applicant's request. (Assuming the procedures under section 91 of the *Community Charter* for closing a meeting are observed, generally speaking, in-camera minutes might be withheld under 12 (3)(b) of FIPPA).

In Order F15-33, the City of Vancouver had by mistake identified records as being responsive, and later found they were not. They were withheld from the applicant as not being

within the scope of the request. The matter went to an inquiry. Adjudicator Flanagan reviewed the records and agreed they *could* be withheld because they did not respond.

In another Order, F16-03, the City of Nanaimo had argued that 35 pages of records and information did not respond either because they post-dated the request or did not include what the applicant had requested, which was "anything with my name on it". Adjudicator Francis reviewed them and agreed that they were not responsive, but wrote, in a footnote:

> Normally, the OIPC would not entertain a public body's claim that records are not responsive to a request because FIPPA does not authorize a public body to sever and withhold portions of responsive records on the basis that they are outside the scope of an applicant's request. See Order F15-23, 2015 BCIPC 25 (CanLII), on this point. However, in these circumstances, where the applicant is prepared to accept the OIPC's assessment, I have dealt with this issue.

In light of these decisions, it may now be necessary to process an entire record even if it contains only a line or two of information responding to the applicant's request.

A question that arises for FOI officers is what constitutes an entire "record". The word is defined under FIPPA as follows:

> **"record"** includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;…

Even with this definition in mind, it may be difficult to discern whether such items as entire phone book, a single page, a report complete with schedules and appendices, or a stream of email or text messages amount to a separate record, the entirety of which must be reviewed and processed even though only a single sentence may relate to a request for access.

Comment

To my knowledge, the issue has not been addressed by a court. With respect, it is submitted that:

- Decisions made by the heads of public bodies should be *presumed* to have been made honestly and in good faith unless or until there is some reasonable basis for doubt.
- Processing information that is not responsive to an access request not only imposes an impractical and unnecessary burden on the public body, it may also confuse or mislead the FOI applicant as to the nature of the information being withheld.

- Unless the FOI applicant is told the *genuine reason* for withholding information that appears within a record – i.e., that it is not related to what they asked for – the applicant may well assume it *was* relevant, but is being withheld nonetheless.
- The applicant who, in reviewing received information, suspects that information withheld may indeed be relevant can make a second request.

Advice or Recommendations

FIPPA 13 (1) provides that the head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

Subsection (2) lists various kinds of information that must not be refused under (1) as advice or recommendations.

Unlike other provisions in Part 2 of FIPPA that we might rely on for withholding a record, section 13 (1) is not a harm-based exception. It is not necessary to prove harm, but only to show the information is "advice or recommendations" and is not of the kind listed in 13 (2).

The purpose of 13 (1) has been identified by former Commissioners and the courts as encouraging frankness in the providing of advice and recommendations, as promoting good decision making by public bodies.

In 2002, the issue came before our Court of Appeal in *College of Physicians and Surgeons*. The Court noted that harm to deliberative processes could occur if such records were subject to excessive scrutiny. Madam Justice Levine wrote:

> [105]…s. 13 of the Act recognizes that some deliberative secrecy fosters the decision-making process, by keeping investigations and deliberations focused on the substantive issues, free of disruption from extensive and routine inquiries.

The above passage was cited in Orders F14-17 and F15-37 involving the Ministry of Health and the City of Vancouver respectively.

John Doe Goes to Ottawa

The rationale of the BC Court of Appeal in *College of Physicians* was also expressed by the Supreme Court of Canada in 2014, in relation to a similar provision in Ontario's *Information and Privacy Act*: *John Doe v Ontario (Minister of Finance)* 2014 SCC 36

John Doe was a tax lawyer. Changes to Ontario's corporate tax legislation closed some "tax loopholes" retroactively. John Doe wanted records that dealt with the retroactivity, the

date of amendments to the legislation, and all records showing why some provisions would *not* be retroactive.

The records in issue were drafts of policy options as to tax legislation, prepared by a public servant – versions of a paper that formed part of the briefings for a minister, but that had never been actually communicated to that official.

Ontario's Information and Privacy Commissioner had held that to qualify as information that could be withheld under the Ontario version of FIPPA for "advice or recommendations", the information must meet certain qualifiers. It must have been communicated to the final decision-maker, and it must have recommended a single course of action.

On judicial review, the Court at first level agreed with the Commissioner, but the Ontario Court of Appeal reversed the decision, reasoning that the qualifiers imposed by the Commissioner would have rendered the withholding authority as virtually meaningless. John Doe appealed to the Supreme Court of Canada. Arguments in support of his position were made by Ontario's Commissioner and his counterparts from Nova Scotia, PEI, B.C. and the Civil Liberties Association as interveners. The Supreme Court of Canada dismissed the appeal. It held that it does not matter whether, as advice or recommendation, the information had actually reached the minister.

It also reasoned, as did the B.C. Court of Appeal in 2002, that "advice" is a kind of information that is distinct from "recommendations".

The Court noted that:

> [26] Policy options…would include matters such as the public servant's identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.
>
> [27] Records containing policy options can take many forms. They might include the full range of policy options for a given decision, comprising all conceivable alternatives, or may only list a subset …that in the public servant's opinion are most worthy of consideration. They can also include the advantages and disadvantages of each option. ….
>
> [45] Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 86; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 44-45).The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring (disclosure) risks introducing actual

or perceived partisan considerations into public servants' participation in the decision-making process".

Decisions of the BC Information and Privacy Commissioner have generally acknowledged the court rulings and the purpose of section 13 (1).

If it is not apparent during an OIPC inquiry that the public body has *properly exercised* its discretion to withhold or release information on this basis, however, the Adjudicator might order that this be done, as in Order F14-17 (Ministry of Health). Relevant factors to consider would include:

- the age of the record,
- its nature and sensitivity,
- past practice in releasing similar information,
- the purpose of the legislation, and
- the applicant's right to access his own information.

What Cannot be Withheld as Advice or Recommendations

Through sections 13 (2), FIPPA guards against the possibility that "advice and recommendations" could be cited excessively to avoid scrutiny of various kinds of information that may influence government decision making. The list in subsection 13 (2) is extensive:

- Factual material
  Note: If so intertwined with advice that it cannot be viewed separately, factual information may be protected under 13 (1)
- Public opinion poll
- Statistical survey
- Appraisal
- Economic forecast
- Environmental impact statement
- Final report or audit on PB's performance or efficiency or on its policies or programs
- Consumer tests report or PB equipment test report
- Feasibility or technical study re policy or project
- Report on field research undertaken before policy or program is formulated
- Report of task force, committee, council or similar body established to consider any matter & make reports or recommendations
- plan or proposal for new or changed program or activity if approved or rejected by FOI head
- Information cited publicly by FOI head as basis of a decision
- Adjudicative or discretionary decision affecting Applicant's rights

Solicitor-Client Privilege

Section 14 of FIPPA provides:

> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

There are two branches to solicitor-client privilege – legal advice and litigation privilege. These are treated differently in law. The Commissioner expects us to state which branch of privilege is being invoked when we cite section 14 to withhold information that is subject to the privilege.

Litigation privilege covers information that is gathered by a lawyer for the dominant purpose of litigation, whether current or in reasonable prospect. Some information gathered for this purpose may lose privilege when all litigation, possibility of appeals and related procedures are finally complete. See *Blank v. Canada* 2006 SCC 39.

This paper focuses on the other, broader branch of the privilege, that being professional legal advice, which involves confidential communications between a lawyer and his or her client or agent for his client, that is related (directly or indirectly) to the seeking, formulating and giving of legal advice.

Who has a right to the Privilege?

As legal privilege belongs to the client, only the client may waive it.

In a local government context, the "client" is, by default, the governing body: the Council of a municipality (*Community Charter* section 114) and the Board of a Regional District (*Local Government Act* section 194).

FIPPA section 44 (2.1) provides that if a person discloses a record that is subject to solicitor client privilege to the Commissioner at the *request* of the Commissioner, or in response to an *order* of the Commissioner pursuant to an investigation, audit or an inquiry, the solicitor client privilege is not affected.

Ideally, however, the governing body will have voted on any decision to release information that is related to the seeking, formulating or providing of legal advice - and will have obtained legal advice in advance of any such release. Thus if as a result of an inquiry, an order is made to release the information, the local government will have expressed a definitive position, at least on a preliminary basis. This may help inform a decision to seek a review of the decision by the court. Section 59 requires that the head of a public body (or the service provider to whom the order is directed) must comply with an order not later than 30 days after being given a copy of the order *unless* an application for judicial review is brought before that period ends.

Purpose of Solicitor-Client Privilege

The purpose of legal privilege has been stated repeatedly by the courts.

In the case of ***R. v. McClure*****,** 2001, the Supreme Court of Canada confirmed that solicitor-client privilege is a fundamental civil and legal right in Canada, and is essential to the effective operation of our legal system. It described the purpose as follows:

> "Free and candid communication between the lawyer and client protects the legal rights of the citizen. It is essential for the lawyer to know all of the facts of the client's position. The existence of a fundamental right to privilege between the two encourages disclosure within the confines of the relationship. The danger in eroding solicitor-client privilege is the potential to stifle communication between the lawyer and client…"

While not absolute, solicitor-client privilege:

> [35]…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.

Facts associated with legal advice: Legal Fees

Generally, solicitor-client privilege covers factual information given and received in confidence as part of the necessary exchange of information between solicitor and client for the purpose of providing legal advice: ***B.C. (Minister of Environment) v. B.C. (Information and Privacy Commissioner)*** 1995 (B.C. Supreme Court). See also ***Descoteaux v. Mierzwinski*** [1982] 1 S.C.R. 860 (Supreme Court of Canada).

Whether the privilege extends to legal invoices and accounts, as factual information related to professional legal advice, has been the source of different results between decisions of Commissioners and the courts.

In the early case of ***Legal Services Society v. B.C. (IPC)*** 1996, a reporter sought records showing the sum total amounts of legal aid money paid for legal defence services in two murder cases. Disclosure of this information would reveal that the clients could show they qualified for legal aid – a matter that was privileged itself under the *Legal Services Society Act*. FIPPA had only recently become law (1994). Former Commissioner Flaherty considered that the Act had created a new form of public accountability that displaced at least some aspects of legal privilege. He interpreted the general right to know how public funds are being used as a "balancing of rights" in relation to section 14. He ordered disclosure, on the assumption that it would not expose the legal advice itself.

On judicial review, Mr. Justice Lowry applied the strict standard of "correctness" to the Commissioner's order – not merely reasonableness – and quashed it. The court held that section 14 caused no loss of common law privilege and did not allow for any balancing of rights or compromise. Lowry J. noted that the Supreme Court of Canada had said, in ***Descoteaux*** (above), that communications need not contain legal advice to attract the privilege. It is enough if they relate to obtaining that advice and are made in confidence.

A similar approach was taken by Mr. Justice Holmes of the B.C. Supreme Court in setting aside a similar order for access, this time involving an MIA invoice showing the lump sum interim billing of legal services to the District of North Vancouver by its solicitors, in relation to a lawsuit: ***Municipal Insurance Association (BC) Ltd. & North Vancouver (District) v. British Columbia (information and Privacy Commissioner)*** (1996) 31 BCLR (3d) 203. Holmes J. reiterated the purpose of section 14:

> [18] The common law principles of solicitor/client privilege are incorporated into the Act, and any decision of the Commissioner at variance with the common law principles are subject to correction by the Courts…
>
> [47] I find North Vancouver's being required to disclose the amount of its interim legal costs in the course of ongoing litigation would result in the disclosure of important detail in relation to its retainer and to prejudice its right to communicate with counsel in confidence to obtain information necessary to understand its position in the lawsuit and enable reasoned instructions to be formulated and given.

As to what information might be discerned from a total fee amount, he wrote:

> [48] Knowledgeable counsel….could reach some reasonably educated conclusions as to detail of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated.

Holmes J. provided some examples, noting that they were "not exhaustive". Among them:

- state of preparation for trial;
- whether the costs of an expert opinion were incurred;
- expectation of compromise, settlement, or capitulation;
- whether a co-defendant might be relying upon another to carry the defence burden;
- involvement of senior counsel;
- frequency and currency of payments; and
- future costs that might be predicted prior to conclusion of a matter.

The issue of legal account information came around again in ***Legal Services Society v. B.C. (I.P.C.)*** 2001 BCSC 203, affirmed on appeal: 2003 BCCA 278. The Commissioner had ordered the Society to disclose records to a reporter, listing "the top five immigration billers and the top five criminal billers, by name and amount billed" for 1998. The Society disclosed the amounts but refused the names. Again, it was argued that the public had a right to know how its tax dollars were spent, and the Commissioner had reasoned that since no specifics on cases were requested, there could be no breach of client confidentiality.

The court set aside the disclosure order, with the Court of Appeal confirming that the standard of review on a question of FIPPA s. 14 is legal correctness.

The court noted that legal aid clients could be identified by combining the requested billing information with case information available at Court registries.

The court held that the focus should be not on whether an ordinary person might derive privileged information, but rather on the "assiduous, vigorous seeker" of information.

Legal Privilege as a Constitutional Right

The ***Canadian Charter of Rights and Freedoms,*** s. 8, provides that everyone has the right to be secure against unreasonable search and seizure.

In ***Lavallee, Rackel & Heintz v. Canada (AG)*** 2002 SCC 61, a part of Canada's *Criminal Code* was struck down as being unconstitutional for allowing a procedure by which a law office could be searched, under warrant, in criminal investigations.

The Supreme Court of Canada held that solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance, meaning that any legislative provision that interferes with professional secrecy more than is absolutely necessary will be treated as unreasonable under section 8 of the *Charter*.

In the case of ***Maranda v. Richer***, 2003 SCC 67, Richer, acting as a Justice of the Peace, issued a warrant to search, without notice, Maranda's law office for documents relating to fees and disbursements billed to his client. He sought to have the order quashed and the search declared unlawful. The Attorney General argued that the fee amount was only "neutral information", as being only "incidental to the solicitor-client relationship, and not informing third parties about the content of their communications.

The Supreme Court held that the lawyer's billing information *was* privileged and that the search and seizure was unreasonable and abusive, both as to failure of notice and because it did not minimize impairment of the privilege.

The fact of the legal account is connected to the solicitor-client relationship and is presumed privileged. Impairment of the privilege should be kept to a minimum and only as necessary.

In a 2010 decision of B.C.'s Acting Information and Privacy Commissioner, Order F10-19, the ***Board of Education of the Central Coast School District*** was ordered to release the total amount of legal fees spent in legal fees to defend claims brought by the FOI applicant (who had been declared a vexatious litigant in a previous case 2007 BCSC 457, affirmed 2009 BCCA 256). The School District sought judicial review.

The court dealt with a number of issues as to the Commissioner's jurisdiction. One that is of some significance, given decisions that have followed, is that Mr. Justice Butler held that the applicant need not be burdened with convincing the Commissioner to set aside the presumption of confidentiality:

> 112 The principle set forth in *Maranda* can be upheld and applied without placing, in every case, an evidentiary burden or a requirement to make submissions, on an access applicant. So long as the test is properly applied – privilege is presumed; and there is no possibility that an assiduous inquirer, aware of background information, could use the information requested to deduce or otherwise acquire privileged information – then it may be possible to reach a conclusion that the documents are not privileged.

School District No. 49 (Central Coast) v. B.C. **(IPC)** 2012 BCSC 427

In the result, the court held that the aggregate of legal fees incurred by the Board *was* subject to privilege, and that the Acting Commissioner had erred in ordering disclosure.

OIPC decisions generally have protected what are clearly legal *communications,* although if the matter goes to an inquiry, the Adjudicator may order it disclosed so as to determine whether the privilege applies. [Mere inspection by the Commissioner has been a matter of debate – some think it would be better to refer questions of this nature to the Court, as the Court itself suggested in the case of ***Canada (Privacy Commissioner) v. Blood Tribe Department of Health*** in 2008 SCC 44)].

In relation to legal fees, despite the court decisions in *Maranda* and *Central Coast School Board* , orders issued by our OIPC have been mixed in relation to legal fees.

In some, billings in total amounts have been treated as privileged, as in Order F13-03, re ***College of Psychologists*****.** Where the invoices include specific information such as dates and description of services provided, the right to withhold under section 14 is confirmed: Order F14-16, re ***Private Career Training Institutions Agency***.

More recently, however, there have been decisions where the public body is ordered to disclose total amounts of legal fees: Order F15-16 re ***Private Career Training Institutions Agency***.

In Order F15-31, the ***City of Richmond*** was ordered to disclose total amount paid to settle disputes with 2 former employees, as well as aggregate legal fees. (The City has applied for judicial review).

In Order F15-61, re ***Victoria Police Department***, the Department was ordered to disclose two figures showing the amount of legal costs incurred by the BC Association of Municipal Chiefs of Police on behalf of some of its members in dealing with an FOI request.

In Order F15-64, the ***Ministry of Health*** was ordered to disclose the total amount of legal fees paid respecting an investigation into a data breach.

In each case where disclosure is ordered, it is not the FOI applicant but the Adjudicator who makes the argument for disclosure, citing decisions from the courts and Commissioners of other provinces as precedent. It is then decided that the amounts are "neutral information", i.e., the adjudicator is unable to image how privileged advice *could* be derived from knowing the legal fees. Thus the presumption of privilege has been overcome (rebutted) and disclosure is ordered. It is not obvious why the disclosure is necessary (let alone "*absolutely* necessary"). If the matter goes to judicial review, the public body may expect to encounter further arguments by the Commissioner in support of the adjudicator's decision.

Very recently, the Supreme Court of Canada issued two decisions, reiterating the purposes of solicitor-client privilege, even as to the associated "facts" of accounting records: ***Canada (AG) v. Chambre des notaires du Quebec*** 2016 SCC 20; and ***Canada (AG) v. Thompson*** 2016 SCC 21.

The federal *Income Tax Act* had defined "solicitor-client privilege" in s. 232 (1) as excluding "an accounting record of a lawyer". As such, a lawyer could be compelled to disclose that information for investigation by Canada Revenue.

The court in each case held that the exception was constitutionally invalid as violating section 8 of the Charter.

Clarifying that there is no reduced expectation of privacy in an administrative or civil law context, as compared to a criminal matter, the Court stressed that a client consulting a legal adviser feel confident that there is little danger that information will be disclosed, regardless of context.

The court also rejected the argument that information found in accounting records amounts only to facts rather than communications, and as such is not protected under solicitor-client privilege. The line between facts and communications may be blurred, and certain facts, if disclosed, "can sometimes speak volumes about a communication". The headnotes of the *Thompson* case include the following statement:

> Solicitor-client privilege has evolved from being treated as a mere evidentiary rule to being considered a rule of substance and, now, a principle of fundamental justice. An

> intrusion on solicitor-client privilege must be permitted only if doing so is absolutely necessary to achieve the ends of the enabling legislation. This Court has rejected a category-based approach to solicitor-client privilege that distinguishes between a fact and a communication. In this case, absent proof to the contrary, all of the information sought is *prima facie* privileged.

Comment

With respect, and recognizing the importance of transparency in government decision making, it is my view that recent decisions ordering the disclosure of facts associated with legal communication, such as aggregate legal fees, represents a category-based approach, the absolute necessity of which is not apparent in furthering the purpose of section 14 as an exception to rights of access, intended to preserve the fundamental, common law right of privilege.

This approach undermines the purpose of solicitor-client privilege, which is prospective: to encourage candid communication between lawyer and client so as to obtain appropriate advice. The message to be taken from recent OIPC orders is that the common law right of the *public body* to legal privilege is considerably less certain than that of its private sector counterparts. Its right to privilege can be eroded: first, by having the information scrutinized by a body that interprets that right narrowly, and next, by an order to disclose. The public body is at a disadvantage compared to private bodies. The prospect of unlimited disclosure may hinder or distort legal communications and related measures that could otherwise be helpful. Ultimately, the erosion of legal privilege may have negative effects on the public the organization is intended to serve.