OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-06

INQUIRY REGARDING SIMON FRASER UNIVERSITY'S SOLICITOR CLIENT PRIVILEGE CLAIM

David Loukidelis, Information and Privacy Commissioner
March 16, 2000

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Summary: SFU withheld records under s. 14, claiming solicitor client privilege. Applicant argued SFU had not established grounds for privilege claim. Grounds for privilege established by SFU for most, but not all, withheld records. SFU held not to be authorized to withhold all records. Communications not privileged simply because records in SFU's custody had been copied to a lawyer. Third party personal information in records ordered severed and withheld from applicant.

Key Words: Solicitor client privilege – unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 22(1).

Authorities Considered: B.C.: Order No. 29-1994; Order No. 325-1999.

Cases Considered: *Kranz* v. *Canada (Attorney General)*, [1999] 4 C.T.C. 93 (B.C.S.C.); *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.); *GWL Properties Ltd.* v. *W.R. Grace & Co. of Canada*, [1992] B.C.J. No. 1761; *Descoteaux* v. *Mierzwinski* (1982), 141 D.L.R. (3D) 540; *B.* v. *Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.); *R.* v. *Campbell*, [1999] 1 S.C.R. 565; *Goldman Sachs & Co.* v. *Anthony Sessions et al.*, [1999] B.C.J. No. 2815 (B.C.S.C.); *Int. Specialized Risk Management (ISRM) Ltd.* v. *Farris Vaughan Wills & Murphy* (1988), 24 B.C.L.R. (2d) 195 (B.C.S.C.).

1.0 INTRODUCTION

This is another case involving solicitor client privilege. The disputed records relate to a harassment investigation conducted by Simon Fraser University ("SFU") a number of years ago. On May 25, 1998, the applicant – who had been the subject of the harassment

investigation – made an access to information request to SFU under the *Freedom of Information and Protection of Privacy Act* ("Act").

The applicant's request was broad. It sought all SFU records pertaining to the applicant and to the harassment investigation. Over the succeeding months, the applicant agreed on a number of occasions to narrow the scope of the access request. SFU also found it necessary to extend the time for responding to the access request. It ultimately responded, in a series of disclosures, beginning on January 28, 1999. SFU withheld information from the applicant under ss. 13(1), 14, 17(1)(c) and 22(1) of the Act.

On June 24, 1999, the applicant sought a review, under s. 52 of the Act, of SFU's application of ss. 14 and 22 of the Act. This order stems from the written inquiry held in this matter. In the inquiry, SFU made a submission which included an affidavit in support of SFU's case. The applicant also made submissions. I asked for, and received, further submissions from the parties on the s. 14 issue in this case.

As part of its further submission, SFU provided further affidavits. For his part, the applicant responded to SFU's further submission on March 7, 2000. I considered the further submissions of both SFU and the applicant respecting application of s. 14 of the Act.

2.0 ISSUES

The main issue in this inquiry, and the only issue identified in the notice of inquiry dated July 22, 1999, is whether SFU was authorized to withhold information under s. 14 of the Act.

There are also three subsidiary issues. The first covers the applicant's complaints that SFU took too long to respond to his access request, that it abused process and thus should not be able to invoke s. 14 of the Act, and that various actors were in a conflict of interest. The second issue is the application of s. 22 of the Act. The portfolio officer's fact report, issued to the parties at the same time as the notice of inquiry, indicates that during the mediation process the parties agreed to a resolution of the application of s. 22. However, other statements in the parties' submissions suggest that the application of s. 22, a mandatory exception, and s. 17, a discretionary exception, has not been resolved. Finally, the burden of proof to establish the s. 14 exception under the Act requires clarification in light of a submission made by SFU.

I will address the subsidiary issues first, then the main issue – solicitor client privilege.

3.0 DISCUSSION

3.1 Applicant's Complaints about Delay and Abuse of Process – In his initial submission, the applicant complained that SFU breached its duties under the Act because of the time it took to begin responding to the applicant's access request. SFU argued there is no purpose in my making a finding on this issue, as it is moot.

Although he raised it a number of times, including in his March 7, 2000 further submission, the applicant did not pursue this point in any detail. It was not mentioned in the notice of inquiry issued by our office and there is no evidence before me that the applicant took issue with that notice of inquiry. I also note that over the seven months between the time the access request was made and the time SFU issued its first response, there were ongoing communications between the parties to clarify and narrow the scope of the applicant's request. In all of these circumstances, I do not consider it is necessary or appropriate for me to make findings on the issue of delay by SFU. Where an applicant or public body raises an issue not set out in a request for review or notice of inquiry, I will generally not deal with it.

In a further submission made after the deadline for submissions set out in the notice of inquiry for this case, the applicant argued that a recent British Columbia court case meant SFU could not rely on s. 14 of the Act because of its alleged abuse of process. The applicant argued this issue again in his (invited) further submission of March 7, 2000. In that later submission, the applicant in some places appeared to be advancing a general abuse of process claim, not just one tied to s. 14. Assuming an 'abuse of process' argument could be dealt with in an inquiry under the Act – in relation to s. 14 or otherwise - in the circumstances I have decided not to consider the applicant's late submission or his March 7, 2000 submission on this point.

I should note, in passing, that I am aware of the recent case principally relied on by the applicant, *Goldman Sachs & Co.* v. *Anthony Sessions et al.*, [1999] B.C.J. No. 2815 (B.C.S.C.). That decision – which is under appeal to the British Columbia Court of Appeal - is of little relevance to this inquiry. To be clear, I have not considered the applicant's late argument on the issue of alleged abuse of process because it was late, but in any case nothing in the record before me suggests any abuse of process by SFU.

Last, the applicant raised, in his request for review, the alleged conflict between the dual roles assumed by SFU's lawyer in investigations and processes involving the applicant. This allegation is not one over which I have any jurisdiction. This is why the issue is not mentioned in the notice of inquiry issued by this office. I have not considered it in this inquiry and make no findings on the point.

3.2 Section 22 and this Inquiry – Despite the statement in the portfolio officer's fact report that, during mediation, the parties resolved the application of s. 22 of the Act, and despite the limitation of the notice of inquiry to s. 14 of the Act, SFU submitted that the records in dispute in this inquiry include some documents "which do not attract solicitor client privilege and which may only be released after review, given that other provisions of the Act may be applicable to them (*e.g.*, section 22 of the Act)." SFU also maintained that some records which require severance of information excepted by s. 14 of the Act may also require severance of information under other exceptions. SFU did not elaborate on the applicability of exceptions other than

s. 14, except to mark the information it had severed under s. 22 on the copies of the disputed records which it submitted for my review. It is clear that SFU wished me to review the records and consider the application of other exceptions under the Act.

The applicant also raised s. 22 of the Act in his reply submission, by challenging SFU's application of that provision as follows:

> … no third party privacy rights are likely at risk because the documents likely refer to either complainants, witnesses or officials of the public body whose identity is already known to the applicant by virtue of documents already disclosed at purported Harassment Panel investigative hearings conducted by the public body.

Because both parties have raised s. 22, and because it is a mandatory exception, I have reviewed its application by SFU to the disputed records. SFU has severed relatively small portions of many of the disputed records, to withhold third party personal information. In my view, it has done this properly under s. 22 of the Act. The fact that the applicant may know, or believe he knows, the identity of the third parties involved does not undermine their right, in the circumstances of this case, to have their names and other identifiers withheld.

To the extent that SFU has asked me in its submission also to review the records for the application of exceptions other than ss. 14 and 22, it is not apparent to me how any other mandatory exception under the Act is relevant to the records and, in my view, it would not be appropriate, or fair to the applicant, for me to explore other discretionary exceptions, on behalf of SFU, as it were. It is the public body's role to invoke discretionary exceptions in proper circumstances and in a timely fashion; the commissioner's role under the Act is one of review of public body decisions. I decline to enter upon such an open-ended consideration of discretionary exceptions not framed in this proceeding.

3.3 Burden of Proof for Section 14 ─ Under s. 57(1) of the Act, SFU bears the burden of establishing that it is authorized to withhold information from the applicant under s. 14 of the Act. However, at pp. 2 and 3 of its initial submission, SFU quoted the following passage from the judgement of Lowry J. in *GWL Properties Ltd.* v. *W.K. Grace & Co. of Canada*, [1992] B.C.J. No. 1761 (B.C.S.C.) (with emphasis added by SFU):

> The existence of the solicitor-client relationship raises a *prima facie* right of privilege with respect to professional communications passing between the solicitor and his client which the parties seeking disclosure must rebut. It [*sic*] must demonstrate either that the protection does not apply to the communications or that it has been waived: *Int. Specialized Risk Management (ISRM) Ltd.* v. *Farris Vaughan Wills & Murphy* (1988), 24 B.C.L.R. (2d) 195 at 198-99 (S.C.).

SFU advanced this passage to support an argument that the applicant, despite s. 57(1) of the Act, has the burden of proof regarding s.14.

My predecessor and the courts have, in previous decisions, agreed that s. 14 of the Act incorporates the common law rules on solicitor client privilege. Is there a conflict between the burden of proof in relation to solicitor client privilege at common law and the burden under s. 57(1)? If there is, which prevails?

The following statement of principle is made at p. 23 of R. Manes and M. Silver, *Solicitor-Client Privilege in Canadian Law* (Butterworths: Toronto, 1993):

> The onus of proving that communications are privileged lies on the party who refuses to produce them. To demonstrate that they are privileged, an affidavit setting out the privilege claim must not only recite that the communications consist of privileged materials, but must also refer to their content to prove the communications are privileged. However, the resisting party need not reveal so much content that the privilege is destroyed.

In a footnote to this passage, the authors say this "statement is obvious but it bears repeating here. The approach taken in every privilege case demonstrates the onus" (fn. 72, p. 24). At p. 34, the text says "the existence of a solicitor-client relationship raises a *prima facie* right to claim privilege with respect to communications passing directly between solicitor and client." A footnote related to this statement (fn. 47, p. 35) comments as follows on *Int. Specialized Risk Management* (cited above):

> The authors are of the view that in so far as the court in *International Specialized Risk Management* applies *Minter* v. *Priest* in such a way as to require the party seeking disclosure to raise a *prima facie* case (as opposed to raising sufficient doubt on the claim for privilege), it does not accord with the weight of authority on this issue.

I do not read *Int. Specialized Risk Management* to say that a party claiming privilege need only establish that a solicitor client relationship existed in order to raise a *prima facie* right of privilege. The passage quoted below, from pp. 198-199 of *Int. Specialized Risk Management*, makes it clear that the *prima facie* "right of privilege" relates only to "communications passing *in confidence* directly between solicitor and client" (emphasis added), for, it may be inferred, the purpose of seeking or giving legal advice.

> As I read the authorities, the existence of a solicitor client relationship raises a *prima facie* right of privilege with respect to professional communications passing directly between solicitor and client, which the party seeking disclosure must rebut by, in turn, raising a *prima facie* case demonstrating either that the protection does not apply to the communications or that it has been waived. See *Minter* v. *Priest*, [1930] A.C. 558 (H.L.), per Lord Atkin at pp. 582-83. The material before me leads irresistibly to the conclusion that at least some of the communications passing between the defendants "regarding the matters in issue" were "communications passing between them in professional confidence" and, as such, were privileged, whether or not litigation was then pending. See *Re Dir. Of Investigation and Research* v. *Can. Safeway Ltd.*, [1972] 3 W.W.R. 547 … . No evidence of any waiver by the client has been adduced, nor has any compelling argument been advanced in support of the proposition that the privilege does not apply.

The following passage appears at p. 200 of the case:

> As noted earlier, the existence of the solicitor-client relationship raises a *prima facie* right of privilege with respect to communications passing in confidence directly between solicitor and client and, since the plaintiff has failed to adduce *prima facie* evidence either that the privilege does not apply or that it has been waived, the claim of privilege must prevail.

This decision, and the cases cited in it, all deal with attempts by a party to legal proceedings to show that documents were not privileged because of some exception to the rule of solicitor client privilege. In *Int. Specialized Risk Management*, the plaintiff argued that communications between agent and principal are not protected by privilege. Wood J. (as he then was) concluded, at p. 198, that the fact the defendant law firm might turn out to be jointly liable with its client did not mean any solicitor client privilege between the law firm and its client was lost.

In my view, a public body in SFU's position must do more than simply establish the existence of a solicitor client relationship. In order to raise the *prima facie* 'right of privilege', it must also provide evidence establishing that the record in question qualifies as a communication between solicitor and client and that the communication was confidential. This is consistent with *B.* v. *Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.), and other cases on solicitor client privilege, which confirm that, even where a solicitor client relationship exists, not all communications between a client and his or her lawyer are protected. If a party resisting disclosure were only required to supply evidence that a solicitor-client relationship exists, the party seeking disclosure would have to prove that the disputed communications were *not* confidential in character or that they were *not* directly related to the seeking, formulating or giving of legal advice. This burden would, in many cases, be difficult (if not impossible) to satisfy by the party seeking disclosure.

The decision in *Int. Specialized Risk Management* does not, therefore, mean SFU need not establish each element of the test for solicitor client privilege. SFU must still provide evidence to support its assertion that all of those elements are present with respect to each disputed record. Only then does the evidentiary onus shift to the applicant to demonstrate why solicitor client privilege does not apply to the disputed records. In my view, this is consistent with the burden of proof in s. 57(1) of the Act.

In the case of s. 14, s. 57(1) recognizes that, as between a public body and an access applicant, the public body is better able to provide evidence, in an inquiry before the commissioner, to justify its decision to apply one or more of the exceptions claimed by the public body. Section 57(1) requires a public body to provide evidence to establish the existence of all of the elements necessary to claim solicitor client privilege. Similarly, *Int. Specialized Risk Management*, and the cases cited in it, do not relieve SFU of the need to provide evidence as to the confidential character of communications directly between SFU and its lawyer in order to raise a *prima facie* right of privilege.

3.4 Relevant Common Law Rules on Solicitor Client Privilege – Again, a number of my predecessor's orders, and a number of court decisions connected with some of those orders, confirm that s. 14 of the Act incorporates the common law rules on solicitor client privilege. Two kinds of legal professional privilege are recognized for the purposes of s. 14. First, a public body may withhold information that consists of, or would reveal, a confidential communication between a lawyer and his or her client directly related to the giving or receiving of legal advice. See, on this point, *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.), which set aside Order No. 29-1994. Second, a public body may withhold a record that was created for the dominant purpose of preparing for, advising on or conducting, litigation that was under way or in reasonable prospect at the time the record was created.

SFU's submissions are not consistent about the kind of legal privilege invoked by it in this inqiury. In its reply submission, SFU said it "is not relying on litigation privilege to support its application of section 14 of the Act to any of the documents put in dispute by the applicant". In its further submission, however, SFU said it wished

> … to reiterate the importance of maintaining the privileged nature of certain documents that relate to reasonably apprehended litigation or to obtaining or receiving legal advice.

A similar statement was made in SFU's initial submission. Despite these inconsistencies, I have found on a close reading of SFU's submissions, and the affidavits it filed, that it has relied almost entirely on the first branch of privilege and not litigation privilege. As a result, all but two of the disputed records can be dealt with on the basis of the first kind of privilege. The exceptions to this are records 206 and 265.

In his further submission, the applicant said SFU had waived reliance on litigation privilege in its initial submission. In my view, the concept of waiver, properly understood, does not apply here. Nor do I think SFU should be prevented from relying on litigation privilege because it initially indicated it would not. While SFU's inconsistent approach to the issue is unfortunate, I note the applicant has had an opportunity to respond on this point and in fact made submissions on its merits. I do not propose to prevent SFU from arguing that litigation privilege justifies the withholding of information here.

SFU cited a number of court cases in which the fundamental importance of solicitor client privilege was stressed. In *GWL Properties Ltd.* v. *W.R. Grace & Co. of Canada*, [1992] B.C.J. No. 1761 (B.C.S.C.), for example, the court said, at p. 2, that "the right to communicate in confidence with one's legal adviser is considered to be a fundamental civil and legal right". The importance of solicitor client privilege is not disputed. The applicant's debate is only with SFU's assertion of privilege in this case.

SFU argued that the evidence establishes that the first kind of solicitor client privilege applies in light of the following statement of principle by the Supreme Court of Canada in *Descoteaux* v. *Mierzwinski* (1982), 141 D.L.R. (3d) 540, at p. 618:

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

Solicitor client privilege was also recently discussed by Burnyeat J. in *Kranz* v. *Attorney General of Canada*, [1999] 4 C.T.C. 93 (B.C.S.C.), who quoted, with approval, the following passage from the judgement of Thackray J. in *B.* v. *Canada*, above:

> As noted above, the privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communications (and papers relating to it) are privileged.
>
> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

This test is the same as that articulated by Thackray J. in *British Columbia (Minister of Environment, Lands and Parks)*, above. Various texts agree with this view. See, for example Manes, above, and *R.* v. *Campbell*, [1999] 1 S.C.R. 565.

3.5 Are the Records Privileged? – In support of its claim of solicitor client privilege, SFU initially submitted the affidavit of Craig Neelands, the Access to Information and Privacy Archivist at SFU. Mr. Neelands deposed he has "personal knowledge" of the facts sworn to in his affidavit (unless otherwise stated).

In paragraph 3 of his affidavit, Mr. Neelands deposed that "SFU retained Ms. Anita Baha [*sic*] to provide legal advice relating to certain complaints and to an investigation respecting" the applicant. In paragraph 4, he said that:

> [w]hen SFU requests or takes legal advice, it expects that the communications it has with its solicitor will be treated in a manner consistent with the right of solicitor-client privilege.

No evidentiary weight can be given to this passage. It does not address the question of whether or not solicitor client privilege exists with respect to the disputed records. It merely says that SFU, according to Mr. Neelands, expects that its communications with its lawyer will be treated in way that is *consistent with* solicitor client privilege.

Paragraph 5 of Mr. Neelands' affidavit reads as follows:

> I have reviewed documents which have been separated into the following categories:
>
> 1. Documents which do not appear to be prepared in confidence for the purpose of requesting or receiving legal advice;
> 2. Documents which include certain solicitor-client communications; and
> 3. Documents which were prepared in confidence for the purpose of obtaining or providing legal advice from or to SFU or prepared in contemplation of litigation.

In the next paragraph, Mr. Neelands deposed that, to "the best of my knowledge", the records numbered 47, 51, 66, 69, 107A, 112, 119A, 119B, 252, 267, 268, 274 and 275 "are properly included in the first category" set out in paragraph 5 of his affidavit. I will refer to these as the "Class 1 Records". In the next paragraph, he swore that, to the best of his knowledge, the records numbered 41, 42, 57, 59, 82, 89B, 91 and 116 are "properly included in the second category" ("Class 2 Records"). (As will be addressed below, however, in its further submission dated February 7, 2000, SFU conceded that the Class 2 Records do not attract solicitor client privilege.) Last, in the eighth paragraph of his affidavit, Mr. Neelands swore that, to best of his knowledge, the third category of records "properly" includes the records numbered 50, 70, 80, 84, 99, 119, 122, 123, 124, 143, 163, 164, 174, 206, 240, 250, 254, 255, 259, 265, 266 and 276 ("Class 3 Records").

Class 1 Records

SFU conceded in its initial submission that the Class 1 Records are not protected by s.14 of the Act and I so find. For the most part, those records consist of letters, written by or to the SFU harassment investigation panel, that are of a strictly factual nature. SFU's original claim of solicitor client privilege appears to have been based on the fact that copies of such letters were provided to SFU's lawyer. The fact that a lawyer has been provided with a copy of a letter written by his or her client to someone else is not, on its own, an adequate basis for a claim of solicitor client privilege. Had it been necessary to do so, I would have found that SFU was not authorized by s.14 to refuse to disclose such records to the applicant.

SFU's position on one of the Class 1 Records, record 69, later changed yet again. Again, in its initial submission, SFU explicitly conceded that record 69 was not privileged. Yet

SFU's further submission lumped record 69 into the class of records that SFU said is privileged. John Stubbs' affidavit evidence is evidence that this record is privileged. As an exception to what I have just said about the Class 1 Records, based on the evidence before me, I find that record 69 is privileged.

Class 2 Records

As was indicated above, in its further submission SFU changed its position and conceded that the Class 2 records are not privileged and I so find. In my view, SFU was, for the following reasons, wise to drop its s. 14 claim respecting the Class 2 Records.

Each of the eight records in the Class 2 Records is a letter. Five of the letters are either headed "confidential" or "absolutely private and confidential". All of the letters but one were written by a member of SFU's staff and were addressed either to other SFU staff or to third parties. None of the letters was addressed directly to Anita Braha, SFU's lawyer. In each case, however, her name appears at the end of the letter as someone to whom a copy or blind copy was to be provided. SFU submitted no evidence to establish whether Anita Braha actually ever received copies of any of these records. The Neelands Affidavit described these records as "[d]ocuments which include certain solicitor-client communications" and as records that "contain information which relates directly or indirectly to solicitor-client communications." These assertions were problematic because they failed to focus upon the elements of solicitor client privilege - described above - which SFU must establish in relation to each of the disputed records. Instead, Mr. Neelands merely offered his opinion, expressed as being to the best of his knowledge, on the very issues of law, or mixed fact and law, which I must decide in this inquiry.

The fact that a letter – even a confidential letter – addressed by a client to someone is copied to the client's lawyer does not, without more, mean the client's copy of the letter is privileged. I have not been able to identify any information within these records which refers to, or recites, confidential communications between Anita Braha and SFU which might attract solicitor client privilege for that reason. If it were necessary to do so, I would have found that the records numbered 41, 42, 59, 82, 89B, 91 and 116 are not protected by s. 14 of the Act.

I would have made the same finding respecting the eighth record, numbered 57. It is a letter written by a third party to the then president of SFU. That letter indicates a copy was sent, or was to be sent, to another person who, other evidence before me shows, was a lawyer acting for the person who wrote this letter. There was no basis in the record for a claim that s. 14 protects this record. It is not a communication between SFU and its lawyer – even by way of copy to her – much less a confidential communication for the purpose of seeking or giving legal advice.

In its further submission SFU also conceded that records 98, 121A, 138 and 155 do not attract solicitor-client privilege. This is puzzling, since these records are not in dispute in this inquiry. They are not found in any of the three classes of records described in the

Neelands affidavit or SFU's initial or reply submissions. Nor are they found in the copies of the disputed records provided to me for the purposes of this inquiry.

Class 3 Records

I have decided that the Class 3 Records are privileged, in whole or in part. Again, the affidavit of Craig Neelands was unhelpful, since it offered an opinion on the very issue before me. Other affidavits filed by SFU sought to address the deficiencies in Mr. Neelands' affidavit. Each of these affidavits dealt with specific records in dispute. The affidavits provided by SFU were sworn by John Stubbs (two affidavits, one of which was submitted *in camera*), John Munro, Gregg MacDonald, Judith Osborne (filed *in camera*) and Christine Eastlick. These affidavits were accompanied by supplemental argument for SFU (to which the applicant responded).

In assessing SFU's s. 14 claims with respect to the Class 3 Records, I have considered these additional affidavits. Copies of the affidavits, with *in camera* material removed, were provided to the applicant. In his further reply submission, the applicant contended, among other things, that the disputed records are not communications between solicitor and client. He noted that some of the records are pieces of correspondence (letters or memos) between SFU staff members. He also said that, unless Anita Braha was acting for the individual SFU staff members, communications between Ms. Braha and a staff member would not be privileged.

First, a record which discloses a confidential communication between solicitor and client, for the purpose of seeking or giving legal advice, may be privileged even if it is not a record signed or sent by one or the other. For example, if a public body employee writes down legal advice that was communicated verbally to the employee, in confidence, by the public body's lawyer, the record is privileged, since it records the verbal communication. Similarly, if a public body employee writes to another employee and sets out, in the communication, legal advice previously given to the public body, in confidence, the record contains legal advice communicated to the public body by the lawyer and is privileged.

Second, there is no evidence to suggest that the SFU representatives with whom SFU's lawyer was dealing were acting in any capacity other than as employees representing SFU. They acted on behalf of SFU in dealing with legal counsel and communications between them and the lawyer will be privileged if the necessary elements of privilege are present in each case.

Turning to the Class 3 Records, the first record in this class, numbered 50, is a note of a telephone call made by Anita Braha to the office of SFU's president, in which legal advice communicated by her is recorded. It is reasonable to conclude that SFU's lawyer communicated this advice in confidence and John Stubbs' affidavit attests to this.

I have dealt with record 69 earlier. Record 70 is a handwritten note made by an unidentified individual. It is a question, perhaps recorded for later reflection, about

whether the writer should follow a certain course of action. The direct evidence as to whether this record was ever communicated to anyone else, much less SFU's lawyer, or that it otherwise relates directly to seeking or receiving legal advice, is found in the affidavits. One of John Stubbs' affidavits includes the following paragraph:

> Documents #50, 69, 70, 80, 84, 99, 119, 122, 123, 124, 143 and 254 were prepared by me or for me by employees of SFU, in confidence, and include express communications relating directly to obtaining legal advice from or to the provision of legal advice by Anita Braha.

This is evidence that the described records "include" communications directly related to the giving or seeking of legal advice. I find records 50, 69, 70, 80 (in part), 84, 99, 119, 122, 123, 124 (in part), 143 and 254 are privileged. The Stubbs affidavit does not specify which parts of each record qualify as communications of that kind. I have, nonetheless, been able to determine, based on the affidavit and the contents of record 70, that it is privileged under s. 14 as a record in relation to confidential solicitor client communications.

Record 80 is a handwritten note, one line of which refers to something said or written by "A.B." about an issue. Although SFU provided no evidence directly on this point, the records before me make it clear that these initials refer to Anita Braha. The one line which contains her advice can be withheld under s. 14 as being in relation to a confidential communication for the purpose of seeking or giving legal advice. The remainder of the note does not fall within that description.

Record 84 is a page on which notes have been made in different hands. One typewritten note also appears on the page. The authors' identities are not known, since SFU provided no evidence directly about that. It is nonetheless evident from the record, and John Stubbs' affidavit, that each of the notes relates directly to the seeking or giving of legal advice and can be withheld under s. 14.

Record 99 consists of 11 pages of handwritten notes. The first page is headed "Procedural Questions … [unintelligible] A.B. etc.". It lists questions the author apparently intended to raise with Anita Braha or to consider further. Existence of a solicitor-client relationship between SFU and Anita Braha is, again, not enough to establish privilege over page 1 of this record, absent evidence that these notes qualify as confidential communications for the purpose of seeking or giving legal advice. That evidence is found in Mr. Stubbs' affidavit in relation to the whole of record 99.

Record 119 is a facsimile cover sheet that contains a message to Anita Braha. That message is almost entirely obscured by three hand-written notes copied over it. The cover sheet and handwritten notes are privileged as records in relation to confidential solicitor client communications.

Record 122 is, like record 50, a note of legal advice communicated by Anita Braha, by telephone, to SFU and is therefore privileged. Similarly, record 123 is also privileged. It is a memorandum to SFU's president from a SFU staff member. The memorandum

reports to the president on the staff member's progress in dealing with tasks assigned to her the previous week at a meeting attended by Anita Braha, among others. Disclosure of the record would reveal confidential communication of legal advice to SFU. This finding is supported by John Stubbs' affidavit.

Record 124 is a typed note, which itself is not privileged. The handwritten annotations to that note record communications to and from Anita Braha and are privileged.

Record 143 records a telephone conversation with a third party about the applicant, but also records confidential communications with SFU's lawyer that are privileged under s. 14.

Records 163 and 164 are, respectively, an e-mail and a handwritten note. They are privileged as records in relation to confidential solicitor client communications. This finding is supported by the affidavit of John Munro.

Record 174 is a letter from SFU to another lawyer retained by SFU, seeking that lawyer's advice on a matter related to the applicant. This record is privileged. This finding is supported by the affidavit of Gregg MacDonald.

Record 206 is a letter from one SFU staff member to another, with a copy shown as being intended for Anita Braha. Record 265 is essentially the same letter as record number 206. In her *in camera* affidavit, Judith Osborne deposed that these records related to ongoing litigation between SFU and the applicant and "include directions to SFU employees" relating to that litigation. Based on this evidence, and the contents of the records themselves, I conclude that these records can be withheld under s. 14 on the basis of litigation privilege.

Five words can be withheld under s. 14 from record 240, as indicated on the severed copy I have given to SFU along with its copy of this order. This is supported by the affidavit of Christine Eastlick.

Record 250 qualifies for protection under s. 14 as a record in relation to a confidential solicitor client communication. This is supported by the *in camera* affidavit of John Stubbs.

Record 254 consists of three pages. The first page is a facsimile transmission sheet addressed to Anita Braha. The other two pages comprise a draft letter. These three pages are privileged under s. 14 as records in relation to solicitor client communications.

Record 255 is a two page opinion letter from Anita Braha to SFU. It is privileged. The same conclusion applies to record 259, which is also an opinion letter from Ms. Braha. Records 266 and 276, which are letters from Anita Braha to SFU, are also privileged.

4.0 CONCLUSION

For the reasons given above, I make the following orders:

1. I find that Simon Fraser University was authorized by s. 14 of the Act to refuse to disclose to the applicant all of records 50, 69, 70, 84, 99, 119, 122, 123, 143, 163, 164, 174, 206, 250, 254, 255, 259, 265, 266 and 276 and, under s. 58(2)(b) of the Act, I confirm its decision in regard to those records.

2. I find that Simon Fraser University was authorized by s. 14 of the Act to refuse to disclose to the applicant the parts indicated in my decision of records 80, 124 and 240 and, under s. 58(2)(b) of the Act, I confirm its decision in regard to these parts of those records. Under s. 58(2)(a) of the Act, and subject to paragraph 4, I require Simon Fraser University to give the applicant access to the remainder of those records. The necessary severances have been marked on the copies of the disputed records which I am returning to Simon Fraser University.

3. I find that Simon Fraser University was not authorized by s. 14 of the Act to refuse to disclose records 41, 42, 47, 51, 57, 59, 66, 82, 89B, 91, 107A, 112, 116, 119A, 119B, 252, 267, 268, 274, and 275 to the applicant. Under s. 58(2)(a) of the Act, and subject to paragraph 4, I require Simon Fraser University to give the applicant access to these records.

4. I find that Simon Fraser University was required by s. 22(1) of the Act to refuse to disclose third party personal information to the applicant and, under s. 58(2)(c) of the Act, I require it to refuse access to such information in the disputed records, other than the names of employees or officials of the public body. The necessary severances are as marked by Simon Fraser University on the copies of the disputed records delivered to me by Simon Fraser University for this inquiry.

March 16, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia