

SAFEGUARDING INDEPENDENT REVIEW OF SOLICITOR-CLIENT PRIVILEGE CLAIMS

Resolution of the Federal, Provincial and Territorial Information and Privacy Commissioners

Iqaluit, Nunavut, October 17-18, 2017

CONTEXT

Canada's federal, provincial and territorial Information and Privacy Commissioners (IPCs) perform a vital oversight function by ensuring that public bodies comply with their obligations under access to information and privacy legislation. IPCs perform an important first level of independent review about the manner in which public bodies process requests for access to information.

The independent review function performed by each of Canada's IPCs fundamentally depends on their ability to examine responsive records over which public bodies claim exemptions, including the exemption for solicitor-client privilege¹, in order to determine that such claims have been properly asserted.

In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (*University of Calgary*), the Supreme Court of Canada recently determined that the legislative language used in Alberta's *Freedom of Information and Protection of Privacy Act* (FOIP) did not express a sufficiently clear and unambiguous intention to empower the Alberta Commissioner to compel records for review when solicitor-client privilege is claimed over those records. The Supreme Court reached this conclusion despite language in FOIP authorizing the Alberta Commissioner to compel the production of records notwithstanding "any privilege of the law of evidence."

IPCs are concerned there is considerable variation in the legislative language used to confer powers, including the power to compel the production of records, upon IPCs at the federal, provincial and territorial levels. Given this variability, Canada's IPCs are concerned about the potential ramifications of the Supreme Court's ruling in *University of Calgary* for the proper functioning of access to information and privacy legislation across the country.

WHEREAS

- Access to information and privacy are quasi-constitutional rights that are fundamental to individual self-determination, democracy, accountability and good government;
- The decisions made by public bodies with respect to the disclosure of information must be independently reviewed in order to ensure that the fundamental objectives of access and privacy legislation at all levels are fulfilled;

¹ In this resolution, the term "solicitor-client privilege" includes litigation privilege

- Canada's IPCs perform an important first level of independent review by reviewing the manner in which public bodies process requests for access to information, including personal information. Canada's IPCs have been tasked by Legislatures and Parliament with overseeing public bodies in this regard;
- Canada's IPCs recognize the importance of the protections afforded by solicitor-client privilege for the proper functioning of Canada's legal system;
- The IPCs have practices and procedures in place to ensure confidentiality and security of information provided to them, including information over which public bodies have claimed solicitor-client privilege;
- Providing IPCs with records over which solicitor-client privilege is claimed for the purposes of independent review does not constitute waiver of this privilege. The IPCs' review of these records is only to confirm whether they are subject to solicitor-client privilege. IPCs do not disclose the records or use them for any other purpose; and
- The Supreme Court has determined that legislative language purporting to set aside solicitor-client privilege must be clear, explicit and unequivocal.

THEREFORE

Where there is any doubt about the adequacy of existing legislative language, Canada's IPCs call upon the governments in such jurisdictions to amend their access to information and privacy legislation to express the unambiguous intention that the associated Commissioner is authorized to compel the production of records over which solicitor-client privilege is claimed in order to determine whether this exemption has been properly asserted.

List of signatories

Suzanne Legault,
Information Commissioner of Canada

Daniel Therrien,
Privacy Commissioner of Canada

Jill Clayton,
Information and Privacy Commissioner of Alberta

Drew McArthur,
Acting Information and Privacy Commissioner for British Columbia

Charlene Paquin,
Ombudsman for Manitoba

Donovan Molloy, Q.C.,
Information and Privacy Commissioner for Newfoundland and Labrador

Elaine Keenan Bengts,
Information and Privacy Commissioner for the Northwest Territories and
Information and Privacy Commissioner for Nunavut

Catherine Tully,
Information and Privacy Commissioner of Nova Scotia

Brian Beamish,
Information and Privacy Commissioner of Ontario

Karen A. Rose,
Information and Privacy Commissioner of Prince Edward Island

Me Jean Chartier,
President, Commission d'accès à l'information du Québec

Ronald J. Kruzeniski, Q.C.,
Information and Privacy Commissioner of Saskatchewan

Diane McLeod-McKay,
Information and Privacy Commissioner of Yukon