

Producing Records to the Commissioner

Restoring Independent
and Effective Oversight
under the FOIP Act

April 2017

A Special Report and Request for Legislative Amendment
Submitted to the Legislative Assembly of Alberta



Office of the Information and
Privacy Commissioner of Alberta

Introduction

Two recent developments have compromised the operation of the *Freedom of Information and Protection of Privacy Act* (FOIP Act) and my ability to perform my functions as an Officer of the Legislature under that statute.

First, the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary*¹ (U of C case) said that the Legislature did not use the right words in the FOIP Act² to allow me to require public bodies to give me records over which public bodies are claiming solicitor-client privilege. Those records are often very important evidence in matters that I have to decide. This includes when I conduct independent reviews of decisions that records are subject to solicitor-client privilege and do not have to be disclosed to a citizen who requests access, and when I investigate public bodies to ensure they comply with their obligations under the FOIP Act.

Second, public bodies have not been giving me those records when I need them as evidence for decisions I must make. During the time that the U of C case was making its way through the court system, many public bodies, especially government, were refusing to provide me with records over which solicitor-client privilege and other similar privileges were being claimed. This happened despite a 2008 letter from the then-Minister of Justice and Attorney General to the former Commissioner, saying that, “You currently have the power to compel production of all records subject to review, even where such records are subject to privilege.”³ In addition, the Court of Queen’s Bench had said that as Commissioner, I had the power to require that those records be provided to me for my review.⁴

After the Supreme Court of Canada issued its decision in November 2016, I issued a public statement in which I said that I would be writing to government with options for proceeding on this matter.⁵ However, as an independent Officer of the Legislature who reports to the

1 *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] 2 SCR 555, 2016 SCC 53 (CanLII), <http://canlii.ca/t/gvskr>.

2 Related to “Powers of Commissioner in conducting investigations or inquiries”, Section 56(3) of the FOIP Act reads that the Commissioner may require any record “despite any other enactment or any privilege of the law of evidence”.

3 A copy of this letter is attached as Appendix 1.

4 *University of Calgary v JR*, 2013 ABQB 652 (CanLII), <http://canlii.ca/t/g1t5g>.

5 “Commissioner Issues Statement in Response to Supreme Court of Canada Decision”, Office of the Information and Privacy Commissioner, November 25, 2016, retrieved from <https://www.oipc.ab.ca/news-and-events/news-releases/2016/commissioner-issues-statement-in-response-to-supreme-court-of-canada-decision.aspx>.

Legislative Assembly and not to government, and whose ability to perform core functions as an Officer of the Legislature has been compromised, I have decided instead to submit this special report to the body to which I report.

The Legislature established the position of Information and Privacy Commissioner to provide for an accessible, affordable and timely process for reviewing access to information decisions made by public bodies. The Legislature now has an opportunity to clearly state its intentions about how decisions involving solicitor-client privilege, and other similar privileges, are to be made.⁶ If the Legislature decides that its own Officer is to have that power (as was previously assumed to be the case), then this is the Legislature's opportunity to amend the FOIP Act and "get the words right". I am requesting that the FOIP Act be amended to explicitly state that I have the power to require public bodies to produce to me records over which solicitor-client privilege and other similar privileges are claimed, when in my opinion it is necessary to review those records (such as when a public body does not provide enough evidence to satisfy me that the records are privileged).

The Legislature established the position of Information and Privacy Commissioner to provide for an accessible, affordable and timely process for reviewing access to information decisions made by public bodies.

This report provides background information for this important issue and my request for amendment, as well as a brief explanation of access to information and the role my office plays.

The Importance of Access to Information

Access to information enhances citizens' trust in government.

Transparency in the functioning of government permits citizens to participate in their democracy and promotes government accountability. For this reason, the right of access has been deemed quasi-constitutional by the Supreme Court of Canada.⁷

⁶ Other privileges that may give rise to similar contention are litigation privilege and informer privilege.

⁷ *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773, 2002 SCC 53 (CanLII), <http://canlii.ca/t/51qz>.

In *Dagg v. Canada (Minister of Finance)*, La Forest said:⁸

The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.

As Rowat explains in a classic article:⁹

Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

A formal right to access information is not useful for these purposes if it is not accessible to citizens. As well, access to information often is not valuable or meaningful unless it is timely. If it takes months or even years to obtain information, the information may not be useful once it is received.

Access to Information in Alberta

Since 1995, Alberta citizens – including individuals, community and advocacy groups, businesses, media, and elected officials – have had the right to ask government and other public bodies for information about public bodies’ programs and activities. Individuals may also ask for their own personal information.

The FOIP Act provides this right of access to citizens and sets out specific exceptions under which records do not have to be disclosed in response to a request for access.

Citizens request access to information from public bodies. If a citizen is dissatisfied with a public body’s decision, they have a right to ask my office to review that decision. My office was established to be more accessible, affordable and timely for citizens than using the courts to make these decisions.

Since 1995, Alberta citizens including individuals, community and advocacy groups, businesses, media, and elected officials have had the right to ask government and other public bodies for information about public bodies’ programs and activities.

⁸ *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403, 1997 CanLII 358 (SCC), <http://canlii.ca/t/1fr0r>, para. 61.

⁹ Professor Donald C. Rowat *How Much Administrative Secrecy?* (1965), 31 Can. J. of Econ. and Pol. Sci. 479, at p. 480.

When a citizen asks for a review of a public body’s access decision, there is usually an initial phase in which the matter is informally mediated by my office to see if a resolution can be achieved. If the matter is not resolved, the citizen can request a formal inquiry. If the matter goes to inquiry, I or my delegated Adjudicators may issue an order that is binding on the public body and is enforceable in the Court.

When my office conducts a review of an access decision, the records are important and valuable evidence for determining whether they do or do not meet the criteria of an exception. For this reason, when the Legislature enacted the FOIP Act, it gave me the power to look at all records that are requested, and to require the records be given to me when not provided voluntarily.

One of the exceptions to disclosing records to a citizen who has asked for them is when the records are subject to “solicitor-client privilege”. Public bodies often claim this exception.¹⁰ If, after a review by my office, the claim for solicitor-client privilege is upheld, the records are not disclosed.

The FOIP Act’s wording is that I have the power to decide whether records meet the criteria for privilege as an exception to disclosure, and that I have the power to require the records to be provided to me “despite any privilege of the law of evidence”.¹¹

For nearly 18 years, public bodies accepted that the Legislature intended... that my predecessors and I could review records over which solicitor-client privilege was being claimed..

For nearly 18 years, public bodies accepted that the Legislature intended by this that my predecessors and I could review records over which solicitor-client privilege was being claimed, and they routinely gave my office such records to help me to decide whether to either confirm or deny a claim of solicitor-client privilege. As already noted, in 2008, the then-Minister of Justice and Attorney General wrote to the former Commissioner, saying that, “You currently have the power to compel production of all records subject to review, even where such records are subject to privilege.”¹²

¹⁰ There are approximately 80-90 files in the office that involve claims that this privilege applies.

¹¹ This provision is contained in section 56(3) of the FOIP Act.

¹² A copy of this letter is attached as Appendix 1.

Despite the common understanding that I had this power, my office does not routinely require production of records alleged to be subject to solicitor-client privilege. Since 2008, my office has had in place a process for dealing specifically with records over which solicitor-client privilege has been claimed, to ensure that my office is not requiring those records to be produced unless it is necessary to review those records to decide whether they are privileged. The current process allows public bodies to instead provide an affidavit and includes a schedule in which the public body lists the records for which the privilege is claimed, along with the description for each record. The test to be met for each claim of privilege is set out. The description for each record must be sufficient to meet that test, without revealing the privileged information. In many cases, this is sufficient evidence for the purposes of my decisions.

The power to review records as evidence for investigations is also important when performing my responsibilities of ensuring that public bodies have put in place appropriate measures for dealing with access requests and protecting privacy. My recent Investigation Report F2017-IR-03 of the government into the issue of delays and possible political interference in the access request response process has been thwarted by the refusal of the former and current governments to give me access to records.¹³

Alberta (Information and Privacy Commissioner) v. University of Calgary

Despite the longstanding assumption by my office and public bodies that I may require records over which solicitor-client privilege is claimed, in November 2016, the Supreme Court of Canada decided that the Legislature had not used the right language in the FOIP Act to show that it intended to give the Commissioner the power to require those records. The Court said that I did not have the power, but it did not say how I was to decide the issue when I do not have sufficient evidence in the absence of the records.

The Court's decision was based largely on the idea that solicitor-client privilege is not just a rule of evidence, and has evolved into a substantive rule. The substantive rule contemplates that legislative provisions can override solicitor-client privilege, but the words used must be clear. The Court said that the words "solicitor-client privilege" do not necessarily need to be used, but that the words "despite any privilege of the law of evidence" were not clear enough.

¹³ This investigation report is available at www.oipc.ab.ca.

In the result, unless more specific language is put in place, either I will have to decide whether records are subject to solicitor-client privilege in the absence of conclusive evidence (which is untenable), or decisions about solicitor-client privilege will have to be transferred to the courts.

Request for Legislative Amendment

I am requesting that the Legislature amend the FOIP Act to state:

- That I have the power to require public bodies to produce to me records over which solicitor-client privilege and other similar privileges (e.g., litigation privilege, informer privilege) are claimed.
- That I may require those records when, in my opinion, it is necessary to perform my functions (such as when a public body does not provide enough evidence to satisfy me that the records are privileged).
- That solicitor-client privilege or other legal privilege is not waived when the privileged records are provided to me.
- That I may not disclose to the Minister of Justice and Solicitor General, as evidence of an offence, records to which solicitor-client privilege applies.¹⁴

The amendments I request will enable me to continue to achieve a fundamental purpose of the FOIP Act: to ensure citizens who wish to participate in the democratic process and hold their government to account have the means to obtain information from public bodies in an accessible, affordable and timely way.

The alternative is to transfer the power of the Commissioner under the FOIP Act to the courts, and have the courts decide whether a public body properly applied solicitor-client privilege to records when responding to an access request.

...to ensure citizens who wish to participate in the democratic process and hold their government to account have the means to obtain information from public bodies in an accessible, affordable and timely way.

¹⁴ The third and fourth requested amendments are already contained in the *Personal Information Protection Act*, which applies to private sector organizations in Alberta, in section 38.1 and section 41(3.2), respectively.

In my view, this approach is not feasible in light of the following disadvantages:

- It requires the Court to decide the issue when the Alberta Court of Appeal has already stated that, “Further, in this day of increasingly scarce judicial resources, judges should not be bogged down regularly by the need to examine volumes of records to assess privilege”.¹⁵
- It requires increased resources of the Court at a time when those resources are stretched to the limit.¹⁶
- It requires that the Court have an expedited process to avoid lengthy delays (i.e., it currently takes a year to get before the Court on judicial reviews of my decisions).
- It increases the cost for public bodies, my office and citizens, and it will increase the number of unrepresented litigants before the Court.
- It entails multiple decision makers in a single case, as well as multiple appeal routes, unduly complicating and protracting the process.
- It permits the Court to decide an issue that it may not have constitutional jurisdiction to decide, such as when I require records to perform my function as an Officer of the Legislature in holding the government to account, and the government will not provide those records. This could be seen as a “dispute between the legislative and executive branches” of government, which is unenforceable by the Court.¹⁷
- It requires judges of the Court appointed as Adjudicators under section 75 of the FOIP Act to follow this same procedure, as Adjudicators appointed under section 75 have only those powers that I have under the FOIP Act.

15 *Canadian Natural Resources Limited v ShawCor Ltd.*, 2014 ABCA 289 (CanLII), para. 65, <http://canlii.ca/t/g90h9>.

16 (1) “Alberta to invest \$14.5-million to ease court delays”, *The Globe and Mail*, March 9, 2017, retrieved from www.theglobeandmail.com/news/politics/alberta-to-invest-145-million-to-ease-court-delays/article34262631/. (2) “Courts shaken by search for solutions to delays: A heretical idea is gaining traction as lawmakers seek to overhaul an unwieldy system: Maybe the justice system cannot do everything. Maybe it cannot prosecute every crime, Sean Fine reports”, *The Globe and Mail*, March 12, 2017, retrieved from www.theglobeandmail.com/news/national/courts-shaken-by-search-for-solutions-to-delays/article34275019/. (3) “Lengthy court delays reach ‘crisis’ level, justices and lawyers open 2017 calendars”, *Calgary Herald*, October 27, 2015, retrieved from <http://calgaryherald.com/news/local-news/lengthy-court-delays-reach-crisis-level-justices-and-lawyers-open-2017-calendars>.

17 *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49, 1989 CanLII 73 (SCC), <http://canlii.ca/t/1ft4w>.

I previously laid out some of these disadvantages to government in my March 13, 2015 letter to the then-Minister of Justice and Solicitor General, concerning my office's investigation of possible political interference in the access request response process. In that letter, I said:

The involvement of the Courts at the front end of my Office's processes, rather than at the back end [through judicial review], will have a significant impact on my ability to perform my legislated functions as the independent oversight body for the FOIP Act, in the following ways:

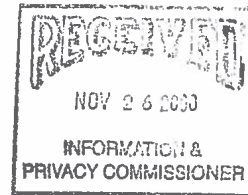
- it will add considerable time to the length of investigations and reviews, thereby delaying access to information and resolution of complaints;
- the process will be significantly more formal, requiring legal representation for all parties and deterring many applicants and complainants;
- the costs for applicants/complainants, public bodies and my office will increase dramatically;
- the already-burdened Courts will be required to accommodate an increased workload of cases that were formerly handled solely by my office as a quasi-judicial tribunal, resulting in further delays.

In summary, I respectfully request that the FOIP Act be amended to explicitly state that I have the power to require public bodies to produce to me records over which solicitor-client privilege and other similar privileges are claimed, when in my opinion it is necessary to review those records (such as when a public body does not provide enough evidence to satisfy me that the records are privileged).

Jill Clayton

Information and Privacy Commissioner of Alberta

Appendix 1: Letter from the former Minister of Justice and Attorney General



AR 30981

NOV 25 2008

Mr. Frank Work, Q.C.
Information and Privacy Commissioner
#410, 9925 - 109 Street NW
Edmonton, AB T5K 2J8

Dear Mr. Work:

Thank you for your letter dated October 28, 2008 regarding the Solicitor-Client Privilege Adjudication Protocol you have recently adopted.

Solicitor-client privilege is a fundamental part of our legal system and ought to be protected wherever possible. I wonder however whether your protocol is unnecessarily complex.

You currently have the power to compel production of all records subject to review, even where such records are subject to privilege. The wording used in our various privacy statutes closely resembles what is present in the federal *Privacy Act*. While the Supreme Court unfortunately declined to consider the true effect of such wording, it is noteworthy that they did recognize that the intent is to enable the production of privileged records. As a result, you have such a power until a Court determines otherwise.

In the interim, the *Blood Tribe* decision offers some important comments on when such a power, if it is present, ought to be exercised. The suggestion is that the power to compel the production of privileged records should only be exercised judiciously and not as a rule. To that extent, your protocol for not demanding routine production of records over which solicitor-client privilege has been claimed is prudent.

I wonder whether the three options you provided under the protocol are not unnecessarily complicated. The decision in the *Blood Tribe* case would seem to suggest that the second option is the appropriate one. An attempt should be made to resolve the issue of privilege through evidence and argument first and that production of such records for your review should only be done as a last resort. I appreciate your attempt to answer all possible situations that may arise in this regard, however am concerned that in doing so the protocol has been rendered unnecessarily complex.

Thank you for the opportunity to provide you with my comments.

Yours truly,



Alison Redford, Q.C.
Minister

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