Date: 20090126

Docket: T-1291-07

Citation: 2009 FC 77

Ottawa, Ontario, January 26, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

KEITH N. MURCHISON

Applicant

and

EXPORT DEVELOPMENT CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant is seeking a review of the claims for an exemption asserted by the respondent on nearly 900 pages of information listed in response to a request made under the *Privacy Act*, R.S.C. c. P-21. For the reasons that follow, the applicant's application is allowed with respect to many of the documents withheld from him.

Background

[2] Mr. Murchison was an employee of Export Development Corporation (EDC) for almost three years from August 1979 to May 1982. He resigned to pursue opportunities in the private

sector. Over the course of the next seven years, he worked for Northern Telecom and BCI Inc., and later for a brokerage associated with Lloyd's of London, which was active in the Canadian trade insurance market at the time.

[3] Mr. Murchison sought reemployment with EDC in 1989, believing that his private sector experience would make him an attractive candidate for a managerial position. By his count, he has since made at least 26 formal applications for employment with EDC; none have been successful.

[4] In light of the repeated rejections of his applications over the course of some 15 years, Mr. Murchison began to question whether his human resources file contained unfavorable information that was standing in the way of his rehire. Accordingly, in September of 2004, he contacted the Human Resources Department of EDC seeking access to his personnel file, and followed-up with a written request to that effect on September 28, 2004. In response, EDC retrieved Mr. Murchison's personnel file from National Archives, and delivered a copy of its 157 pages to him on October 29, 2004.

[5] Mr. Murchison discovered that his file did indeed contain negative information, in the form of a handwritten note prepared by Mr. Wayne Hughes, formerly an EDC Human Resources Manager, who had been tasked with inquiring into Mr. Murchison's suitability when he first expressed interest in being rehired in 1989. The note purports to record the negative comments and recollections of five individuals from EDC who were questioned as to their view of Mr. Murchison's suitability for reemployment. Mr. Murchison firmly believes that the information set

out in the note was a fabrication designed to sabotage his prospects with EDC, and he considers that it should never have been appended to his archived personnel file. Regardless of motivation, Mr. Murchison considers the negative comments that are recorded to be false. In October of 2006, he commenced an action in the Ontario Superior Court against EDC and others claiming damages for the alleged impact of this information on him. That litigation is ongoing.

[6] On November 4, 2004, several days after receiving his personnel file, he wrote to the Human Resources Department of EDC to communicate his concerns over its contents, and to suggest that the offending materials be expunged and efforts undertaken to clear his name. He also expressed the view that "it will be necessary for some proper restitution to be made, in consideration of the financial effects of this reckless, unconscionable effort to poison my career potential." EDC responded by letter dated November 30, 2004, informing Mr. Murchison that it was unlikely that his file had been consulted in connection with any job application and that "as a gesture of good faith," EDC was prepared to destroy the entire contents of his career file. There followed a meeting and a series of written and oral exchanges between Mr. Murchison and EDC with a view to a resolution, but by early January 2005 none had been reached. Mr. Murchison changed tack and decided to approach the Acting President of EDC, Mr. Gilles Ross, directly. He also filed a request under the *Privacy Act*, R.S.C. 1985, c. P-21, with National Archives Canada, seeking to examine the original of his file. The file had to be retrieved from EDC, and it was not until the third week of April 2005 - well beyond the 30-day statutory deadline - that it was actually produced by National Archives for inspection, whereupon Mr. Murchison discovered that the original file included three pages which had not been included in the copy supplied to him by EDC. Around this time, he also met with Mr.

Ross and another EDC executive in its legal department, Mr. John Peters, but despite the "upbeat" tenor of the meeting, from that point on EDC declined to deal directly with Mr. Murchison, referring him instead to Cavanagh Williams, counsel of record in this proceeding and the firm which had been retained by EDC in connection with Mr. Murchison's allegations. This notwithstanding, Mr. Murchison continued to petition EDC directly up until October 2, 2006, shortly before he filed his action for damages in the Ontario Superior Court.

[7] It was in this context, prior to the commencement of litigation but after the involvement of outside counsel on behalf of EDC, that Mr. Murchison filed a request with EDC under subsection 12(1) of the *Privacy Act*, for disclosure of his personal information. It is that request, dated October 17, 2005, and the response to it that form the basis of the matter now before this Court. In the request, Mr. Murchison indicated that he was seeking disclosure of the following:

> All documents and records pertaining to me other than those in the possession of National Archives as of Oct 17, 2005, including, but not limited to all briefing notes, meeting minutes, correspondances (*sic*) and reviews involving W. Hughes, W. Musgrove, J. Graves, P. Foran, J. Olts, A.I. Gillespie, L. Landry, R. Richardson, C. Caldwell, J. Christie, D. Blair, M. Cammaert, R. Wright, G. Ross, S. Picard, J. Peters, A. Lawford and external consultants, legal counsel, Int'l Trade Canada officials, etc.
>
> *Note: A formal request was made under the Privacy Act in Sept (*sic*) of 2004. The current request is made to obtain documents not furnished under that earlier request including those wrongfully withheld and those arising in the subsequent interval.

[8] The request was amended by Mr. Murchison on or about November 7, 2005, to include information "from Staffing Files, maintained in EDC's Human Resources group – including those

in respect of a Financial Services Manager's position for which I applied in June of 2004 (ref 000127) and a Customer Services Director position which I applied for in May of this year."

[9] Mr. Murchison's request was handled by Mr. Serge Picard, Assistant Secretary, Legal Counsel and Privacy Coordinator of EDC. Mr. Murchison's request under the *Privacy Act* was the first such request received by EDC in over two decades and this may go some way to explain the process followed by EDC in responding to it. On October 27, 2005, Mr. Picard sent out an e-mail to 18 individuals, whom he believed might have relevant records in their control, reproducing Mr. Murchison's request as set out in his correspondence dated October 17, 2005, and directing as follows:

> (a) Contact me if the request is unclear or confusing.
> (b) Inform me if you believe another individual/department has relevant records.
> (c) In the event that you designate an individual or coordinate the response of your department/division, provide me with the name of the individual.
> (d) Forward to me the records that are within the scope of the request by October 31, 2005.
> (e) Contact me immediately if you cannot meet the deadline.
>
> I will review with legal counsel the documents, indicate any exemptions that may apply and return the documents to you for your review and approval.
>
> Note: relevant records include e-mail messages, documents stored on individual or network drives and documents in databases.

[10] In response, Mr. Picard received approximately 4000 pages of documents which he states that he personally reviewed, "line by line and page by page." In his review, Mr. Picard first determined that a large number of the documents, or portions thereof, did not contain Mr.

Murchison's "personal information" within the meaning of section 3 of the *Privacy Act.* He then determined that of the balance of the documents, a number could be exempted from disclosure in accordance with the solicitor-client exemption set out at section 27 of the Act.

[11] Mr. Gilles Ross, who had received a written delegation of authority from EDC President Rob Wright, authorized the exemptions and redactions advised by Mr. Picard, and proceeded to release a document package of approximately 3,756 pages to Mr. Murchison under cover of letter dated December 13, 2005. Approximately 836 pages of the 3756 pages disclosed were fully or partially redacted because EDC asserted solicitor-client privilege over their contents, while some 126 pages were fully or partially redacted on the grounds that they contained what EDC termed "non-personal" information.

[12] On December 14, 2005, the day after he received the package of documents, Mr. Murchison addressed a letter of complaint to the Office of the Privacy Commissioner (OPC), challenging EDC's assertions of solicitor-client privilege over select information and requesting that the OPC intervene to have all documents that had been withheld or redacted released in full. The week before he had filed a complaint with respect to EDC's failure to respond to his disclosure request within the applicable 30-day time limit.

[13] The OPC launched an investigation and concluded that a number of the fully or partially redacted documents which EDC had indicated contained "non-personal information" did in fact contain Mr. Murchison's personal information. This conclusion and the specific pages concerned

were noted in a letter dated January 26, 2006, which the OPC sent to the attention of Mr. Picard. Mr. Murchison was not provided a copy, and only obtained one sometime later through a separate and subsequent *Privacy Act* request.

[14] Following discussions with the OPC in relation to Mr. Murchison's complaint, EDC made two further releases of documents, on February 3, 2006 and again on December 19, 2006. Both releases came under cover of letter signed by Mr. Picard. The first release included documents EDC had, by its own admission, mistakenly withheld. At this time, Mr. Picard also affirmed that a number of the pages referenced in the December 13, 2005 disclosure, did not in fact exist (namely, pages 2204-2303, 2511, 2512, 3887-3890, 3956 and 3957). The second release included some 30 documents which had previously been fully or partially redacted, either on the basis of solicitor-client privilege or as "non-personal" information.

[15] On March 30, 2007, allegedly as the result of further discussions with the OPC, EDC Vice President, Legal Services, Mr. Jim McArdle, wrote to Mr. Murchison to inform him that EDC was now asserting solicitor-client privilege over a number of documents or portions thereof which up until then had been withheld on the basis asserted in Gilles Ross' letter of December 13, 2005, namely that they did not contain Mr. Murchison's personal information. Mr. Murchison correctly notes that the documents listed by Mr. McArdle in this respect closely match those which the OPC had referenced in its January 26, 2006 letter to EDC as being documents that did in fact contain personal information of Mr. Murchison. In short, Mr. Murchison submits that when the OPC reviewed and disagreed with EDC's exemption of certain documents on the basis that they did not

contain his personal information, EDC simply switched the basis for the exemptions to solicitor-client privilege.

[16] On May 16, 2007, the OPC wrote to Mr. Murchison informing him that it considered his complaint to have been resolved. The letter included the following passages, which bear reproduction in full:

> We noted in the course of examining the information withheld by EDC, some information was excluded pursuant to section 12(1) of the *Privacy Act*. Section 12(1) of the *Act* entitles an individual to request access to one's own personal information. Occasionally, there are files or documents under the control of a government institution that contain references to other individuals, not connected to the subject matter of the access request. This occurred in your case: some documents in your file contained information about other individuals and information of a non-personal information. (*sic*) Thus, you do not have a right of access to it.
>
> That being said, we noted some pages did contain your personal information and as a result of our intervention EDC released additional information to you on December 19, 2006. It also informed you that information previously removed under section 12(1) was now exempted under section 27. On March 30, 2007 EDC further advised you that some of the information that was not released to you in response to your request of October 17, 2005 because EDC determined the information was not your personal information, is now being withheld from disclosure in accordance with section 27 of the *Act*.
>
> Section 27 of the *Privacy Act* permits a federal institution to withhold from disclosure any personal information which is subject to solicitor-client privilege. This privilege extends to information prepared by or for a solicitor for the purpose of providing advice, or for litigation purposes. As a result of our representations made on your behalf, EDC agreed to revoke this section on a number of pages and disclosed that information to you on December 19, 2006. I am satisfied that the remaining information withheld under this provision is properly exempted.

> When you reviewed the documentation, you noticed some inconsistencies in the records and concluded that EDC had purposefully withheld information. We noted that administrative processing errors occurred in the page numbering and photocopying which resulted in some inconsistencies in the records. You were informed of some of these processing errors in EDC's letter of February 2, 2006.
>
> I am of the view that you did not initially receive all of the information to which you were entitled and I have therefore concluded that this complaint is well-founded. However, now that additional information has been provided to you, I consider the matter resolved.

[17] Not being satisfied with the response from EDC, even after the intervention of the OPC, Mr. Murchison commenced an application for review by this Court pursuant to section 41 of the Act. That provision reads as follows:

41. Any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.	41. L'individu qui s'est vu refuser communication de renseignements personnels demandés en vertu du paragraphe 12(1) et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à la protection de la vie privée peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 35(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

The Standard of Review Under Section 41

[18] Mr. Murchison was refused access to the all or part of the documents subject to this application either on the basis that they were not his personal information or on the basis that they contained information subject to solicitor-client privilege. The first is a claim for a section 12(1) exemption on the ground that the information is not personal information within the meaning of section 3 of the Act. Those sections read as follows:

12. (1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act has a right to and shall, on request, be given access to	12. (1) Sous réserve des autres dispositions de la présente loi, tout citoyen canadien et tout résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* ont le droit de se faire communiquer sur demande :
(a) any personal information about the individual contained in a personal information bank; and	*a*) les renseignements personnels le concernant et versés dans un fichier de renseignements personnels;
(b) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.	*b*) les autres renseignements personnels le concernant et relevant d'une institution fédérale, dans la mesure où il peut fournir sur leur localisation des indications suffisamment précises pour que l'institution fédérale puisse les retrouver sans problèmes sérieux.
3. "personal information" means information about an identifiable individual that is	3. «renseignements personnels » Les renseignements, quels que soient leur forme et leur support,

recorded in any form including, without restricting the generality of the foregoing,

concernant un individu identifiable, notamment :

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

a) les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

b) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;

(c) any identifying number, symbol or other particular assigned to the individual,

c) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;

(d) the address, fingerprints or blood type of the individual,

d) son adresse, ses empreintes digitales ou son groupe sanguin;

(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

e) ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

(f) correspondence sent to a government institution by

f) toute correspondance de nature, implicitement ou

the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;

(g) the views or opinions of another individual about the individual,

g) les idées ou opinions d'autrui sur lui;

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

h) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa *e*), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

but, for the purposes of sections 7, 8 and 26 and section 19 of the Access to Information Act, does not include

toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant :

(j) information about an

j) un cadre ou employé, actuel

individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the

ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :

(i) le fait même qu'il est ou a été employé par l'institution,

(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,

(iii) la classification, l'éventail des salaires et les attributions de son poste,

(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,

(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

k) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les

individual and the opinions or views of the individual given in the course of the performance of those services,	idées et opinions personnelles qu'il a exprimées au cours de la prestation;
(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and	*l*) des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;
(m) information about an individual who has been dead for more than twenty years;	*m*) un individu décédé depuis plus de vingt ans.

The second is a claim for an exemption pursuant to section 27 of the Act on the ground that the information may be withheld on the basis that it is subject to solicitor-client privilege. Section 27 reads as follows:

27. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) that is subject to solicitor-client privilege.	27. Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) qui sont protégés par le secret professionnel qui lie un avocat à son client.

[19] It has been held that a review of a claim for an exemption pursuant to section 12 of the Act is to be determined on the standard of correctness: See *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66, 2003 SCC 8

and *Elomari v. Canadian Space Agency*, [2006] F.C.J. 1100, 2006 FC 863. The same standard has been applied with respect to a review of a claim for an exemption pursuant to section 27 of the Act: See *Gauthier v. Canada (Minister of Justice)*, [2004] F.C.J. No. 794, 2004 FC 655. I concur with the analysis and the conclusions reached by Justice Tremblay-Lamer and Justice Mosley in the above-referenced decisions of this Court. Accordingly, the claims for exemption advanced by EDC will be examined on the standard of correctness.

[20] In addition to the claim that the exemptions asserted by EDC were incorrect, Mr. Murchison made a number of submissions that require the Court's attention prior to reviewing the documents at issue and the exemptions claimed for each.

Issues Raised By The Applicant

Whether EDC Waived Or Lost The Ability To Claim Any Exemption Because It Responded Late?

[21] Mr. Murchison submits that EDC has lost or waived the right to claim any exemption from disclosure as it failed to respond within the 30-day period provided in sections 14 and 16 of the Act.

[22] Section 14 of the Act provides that the head of the institution that receives a request for access to personal information shall respond within 30 days. It reads as follows:

14. Where access to personal information is requested under subsection 12(1), the head of the government institution to which the request is made shall,	14. Le responsable de l'institution fédérale à qui est faite une demande de communication de renseignements personnels en vertu du paragraphe 12(1) est

subject to section 15, within thirty days after the request is received,	tenu, dans les trente jours suivant sa réception, sous réserve de l'article 15 :
(*a*) give written notice to the individual who made the request as to whether or not access to the information or a part thereof will be given; and	*a*) d'aviser par écrit la personne qui a fait la demande de ce qu'il sera donné ou non communication totale ou partielle des renseignements personnels;
(*b*) if access is to be given, give the individual who made the request access to the information or the part thereof.	*b*) le cas échéant, de procéder à la communication.

[23] Section 16 of the Act provides that where access to the personal information is refused, the head of the institution shall state the reasons why access has been refused. Section 16 specifically provides that this notice is to be incorporated into the response under subsection 14(a) of the Act. Section 16 reads as follows:

16. (1) Where the head of a government institution refuses to give access to any personal information requested under subsection 12(1), the head of the institution shall state in the notice given under paragraph 14(*a*)	16. (1) En cas de refus de communication de renseignements personnels demandés en vertu du paragraphe 12(1), l'avis prévu à l'alinéa 14*a*) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à la protection de la vie privée et, d'autre part :
(*a*) that the personal information does not exist, or	*a*) soit le fait que le dossier n'existe pas;
(*b*) the specific provision of	*b*) soit la disposition précise

this Act on which the refusal was based or the provision on which a refusal could reasonably be expected to be based if the information existed,	de la présente loi sur laquelle se fonde le refus ou sur laquelle il pourrait vraisemblablement se fonder si les renseignements existaient.
and shall state in the notice that the individual who made the request has a right to make a complaint to the Privacy Commissioner about the refusal.	
(2) The head of a government institution may but is not required to indicate under subsection (1) whether personal information exists.	(2) Le paragraphe (1) n'oblige pas le responsable de l'institution fédérale à faire état de l'existence des renseignements personnels demandés.
(3) Where the head of a government institution fails to give access to any personal information requested under subsection 12(1) within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.	(3) Le défaut de communication de renseignements personnels demandés en vertu du paragraphe 12(1) dans les délais prévus par la présente loi vaut décision de refus de communication.

[24] Mr. Murchison submits that read together, sections 14 and 16 require that the head of the institution to which an access request is made must respond within 30 days. In this case, EDC failed to respond within the 30-day period. Mr. Murchison submits that if the head has failed to respond within that time frame, the right to refuse disclosure has been lost and cannot later be asserted. As a result, he submits, all personal information must be disclosed. He submitted that "it is time for this Court to rule boldly on this issue" and hold that if there is no response within the 30-

day period stipulated by the Act, any right to refuse to provide access to personal information is forfeited.

[25] EDC submits that subsection 16(3) is a full response to Mr. Murchison's submission. Subsection 16(3) provides that when an institution has failed to provide access to the requested personal information within the 30-day period, the institution is deemed to have refused access. Pursuant to subsection 29(1) of the Act, the requesting person then has a right to file a complaint with the OPC, which in this case is exactly what Mr. Murchison did. EDC submits that the filing of a complaint is the requester's sole remedy. It further submits that there is no time limitation provided in the Act restricting an institution's right to claim an exemption. Accordingly, it argues, it was open to EDC to raise a claim of an exemption from disclosure at any time.

[26] It is my view that Mr. Murchison's submission that EDC has lost the right to exempt any document from access cannot be maintained. Exemptions under the Act are set out in sections 18 to 28. These include information banks exempted by order of the Governor in Council (section 18), information subject to what may be described as governmental privilege (sections 19 to 25), personal information of another (section 26), information that is subject to solicitor-client privilege (section 27), and medical records where disclosure is not in the best interests of the person making the request (section 28). None of the exemptions in these sections stipulates when the exemption must be claimed. More importantly, there is no requirement in those sections or elsewhere in the Act that the institution must make the claim for an exemption within the 30-day response period or forever lose the right to claim it.

[27] Justice Dubé in *Longaphy v. Canada (Solicitor General)*, [1995] F.C.J. No. 1429, characterized the purpose of the *Privacy Act* in this way:

> … I must bear in mind that the purpose of the Act is to protect the privacy of individuals. The right of access given to any person to his personal information must be exercised in light of several considerations: the right of others to the privacy of their own data, due respect for confidentiality, and the lawful execution of investigations pertaining to the prevention of crime and the enforcement of laws in Canada.

The purpose mentioned by Justice Dubé would be greatly compromised if the applicant's submissions were accepted, because the considerations Justice Dubé references would be entirely cast aside. The Act provides a balance between a person's right to access his or her own personal information and the considerations mentioned above. If those considerations fall by the wayside simply because a request for personal information gets no response within the fixed period, then the balance in the Act would be lost – the scale tips irrevocable in favour of the requesting party.

[28] In my view, it would require clear and express language in the Act to find that personal information of others, government secrets and confidences, and documents subject to solicitor-client privilege, had to be disclosed merely because the institution failed to assert an exemption within the 30-day period. The considerations in play are simply too important to be forfeited through what might be inadvertence or delay on the part of an institution. While I appreciate the applicant's frustration with the delays that occurred in responding to his request, delay alone does not prevent the respondent from asserting the exemptions available to it under the Act.

[29] The Federal Court of Appeal, albeit with reference to the *Access to Information Act*, R.S.C. 1985, c. A-1, has also rejected the assertion that a failure to reply and thus a deemed refusal prevents the party from subsequently asserting a claim for an exemption available under legislation. In *Canada (Information Commissioner of Canada) v. Canada (Minister of National Defence)*, [1999] F.C.J. No. 522, the Court writes:

> [The Commissioner] submits that the effect of the deemed refusal is to prevent the institution from subsequently invoking the exceptions set out in the Act and consequently that the Commissioner's initial investigation allowed him to decide on the merits of the complaint. This argument cannot succeed.

[30] Bearing in mind Justice Laforest's comment in *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403, at para. 43, to the effect that the *Access to Information Act* and the *Privacy Act* should be approached as a "seamless code", I am of the view that the Federal Court of Appeal's comments in the passage quoted above govern here. Accordingly, that EDC claimed the exemption after the time for an initial response is not fatal if the factual basis for an exemption is shown.

Whether Solicitor-Client Privilege Has Been Properly Claimed?

[31] Mr. Murchison submits that EDC has improperly claimed solicitor-client privilege over many, if not all, of the documents. He submits that the claim is improper on a number of grounds: (i) that the claim was advanced prior to there being any pending litigation from him; (ii) that some of the solicitors providing the advice are not members of the Law Society of Upper Canada and thus cannot claim the privilege because the advice was given to the respondent in the Province of Ontario; and (iii) that some of those providing the advice were engaged in roles other than that of a solicitor.

[32] The judgment of the Supreme Court of Canada in *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, provides a valuable summary of the law of solicitor-client privilege. The solicitor providing the advice need not be in private practice. Advice provided by an in-house government lawyer to his or her client, a governmental agency, attracts solicitor-client privilege: *R. v. Campbell*, [1999] 1 S.C.R. 565. However, the Supreme Court has cautioned that when dealing with communications from lawyers who are in-house, one must be mindful that they often occupy other roles. Therefore, when in-house lawyers give advice outside the realm of their legal responsibilities, such advice is not protected by the privilege. As the Court observed:

> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.

[33] In this case, there are six individuals who, during the relevant period, had legal responsibilities within the respondent's operations. Two of those occupied only a legal role:

- Anthony Abraham was Senior Legal Counsel prior to his appointment in 2001 as Assistant General Counsel. His only role within EDC is as a lawyer. He is a member of the Law Society of Upper Canada.
- John Peters was Legal Counsel prior to his appointment in 1999 as Senior Legal Counsel. He too is a member of the Law Society of Upper Canada.

Four others had legal and additional administrative responsibilities:

- James (Jim) McArdle was Senior Legal Counsel prior to his appointment in 2001 as General Counsel and Senior Assistant Secretary. In 2006 he was appointed Senior VP Legal Services and Secretary to EDC. He is a member of the Law Society of Upper Canada.
- John Pallascio was Senior Legal Counsel prior to his appointment in 2001 as Assistant General Counsel. In 2006 he was appointed General Counsel and Assistant Secretary of EDC. He is a member of the Barreau du Québec.
- Serge Picard is Assistant Secretary, Legal Counsel and Privacy Coordinator. Accordingly, solicitor-client privilege can only attach to advice given as a part of his responsibilities as Legal Counsel to EDC. He is a member of the Barreau du Québec.
- Gilles Ross retired in February 2006 from EDC and his position as Senior VP Legal Services and Secretary. Accordingly, solicitor-client privilege can only attach to advice given as a part of his responsibilities as Senior VP Legal Services to EDC. He is a member of the Barreau du Québec.

In my view, because Anthony Abraham and John Peters occupy only one role, a legal one, correspondence to and from them need only be examined to ascertain if it otherwise meets the definition of solicitor-client privilege as discussed below. On the other hand, correspondence to or from the other four lawyers cannot be so approached, as it may have been sent to or by them in their non-legal role. These situations require an examination of the subject matter of the advice, the circumstances in which it was sought and rendered, and the role in which the individual was providing it.

[34] Mr. Murchison's submission that in this case, privilege can only attach to communications to or from lawyers who are members of the Law Society of Upper Canada, cannot be maintained. A claim of solicitor-client privilege will not fail simply because the solicitor in the relationship is licensed in another Province than that in which the issue has arisen. On this point I am in agreement with the Manitoba Court of Queen's Bench in *Gower v. Tolko Manitoba Inc.,* (1999), 181 D.L.R. (4th) 353, aff'd (2001), 196 D.L.R. (4th) 716, where it noted that "to hold otherwise would be to ignore the realities of modern practice of law."

[35] In considering whether a document is exempt from inspection on the basis of solicitor-client privilege under section 27 of the Act, one must consider, but must also look beyond, what is known as litigation privilege. The distinctive scope, purpose and rationale of the litigation privilege were detailed by Justice Fish in *Blank v. Canada (Minister of Justice),* 2006 SCC 39. The Court recites with approval the following description of the distinction between solicitor-client and litigation privilege provided by Justice Sharpe before his appointment to the bench: "Claiming Privilege in the Discovery Process", in *Law in Transition: Evidence*, [1984] *Special Lectures, L.S.U.C.* 163, at pp. 164-65:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the

> context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client)

[36] This explanation was also cited with approval by Justice Carthy of the Ontario Court of Appeal in *General Accident Assurance Co. v. Chrusz* (2000), 45 O.R. (3d) 321. That case dealt, in part, with the issue of documentary discovery in the litigation process and claims of litigation privilege. Justice Carthy observed that “there is nothing sacrosanct about this form of privilege” and that the modern trend is in the direction of complete discovery. He held that “there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client.”

[37] I am of the view that these observations of Justice Carthy are equally apt when examining claims under the *Privacy Act*. The *Privacy Act* is quasi-constitutional legislation; it serves as a

reminder of the extent to which protection of privacy is necessary to the preservation of a free and democratic society: See *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403, at p. 434. It is consistent with this fundamental principle that disclosure to a Canadian citizen of his personal information being held by the Government or a government organization be the rule, provided the disclosure does not impact the solicitor's obligation to adequately serve his client in the litigation process. Accordingly, in my view, the mere fact that there was contemplated litigation between Mr. Murchison and EDC does not carry the result that every communication that included a solicitor of EDC is subject to litigation privilege.

[38] Both parties devoted considerable time in their submissions as to when litigation privilege was triggered in this case. In my view, the focus on litigation privilege was largely misplaced, even accepting that in light of *Blank,* above, section 27 of the *Privacy Act* should be taken to refer broadly to both litigation privilege and solicitor-client privilege. I say misplaced, because in this case, it is my view that the exemptions claimed under section 27 mainly relate to solicitor-client privilege in the narrower sense, i.e., communications relating to legal advice. As is described later, the majority of the documents which were claimed to be exempt from disclosure on the basis of privilege were sent or copied to the in-house solicitors for EDC with no connection to the giving or receiving of legal advice. Further, in my opinion, the disclosure of these documents, with rare exceptions, would not in any way impair EDC's solicitors ability to adequately serve EDC in the litigation now underway between it and Mr. Murchison.

[39] Litigation privilege, where it properly exempts a document from disclosure, applies only after the date on which litigation was commenced or was reasonably anticipated. On November 4, 2004, the applicant wrote to the respondent registering his complaint with respect to what he described as an inaccurate portrayal of his work with EDC. After outlining his expectation that the offending information be extracted from his personnel file, that persons who have relied on it be advised that it is not the view of EDC, and that he be provided with proper restitution, he concludes by writing:

> I would expect you to address these needs because it is the right thing to do and I have full confidence that you, and other members of the EDC's management team, will do so – acting in good faith and signalling the integrity of the Corporation's current HR practise. However, we are each aware that there are equally compelling technical and legal reasons to do so, on a priority basis. My strong preference is to remain on the path of a good will solution and I look forward to discussing this important situation with you, in the very near term.

On December 7, 2004, the applicant provided the respondent with a detailed chronology of events, which he subsequently updated on January 7, 2005. In that document, he writes:

> In the event that the parties are not in a position to arrive at the intended goodwill-based solution I also reserve the right to withdraw this document (which is provided here without prejudice) and issue an unabridged Chronology which more fully examines the legal significances of these circumstances, and identifies where, on advice from counsel, I may have specific legal rights of action.

[40] Serge Picard, Assistant Secretary, Legal Counsel and Privacy Coordinator for the respondent, in an affidavit sworn August 29, 2007, attests, after referencing the November 4, 2004 letter from the applicant that "[a]s of November 4, 2004, EDC considered that litigation was

reasonably contemplated and was, in fact, probable." EDC retained external counsel in January 2005, after receipt of the chronology referenced above.

[41] Mr. Murchison submits that it remained his hope and expectation that this matter would be settled without resort to litigation. He submits that the action he commenced against the respondent in the Ontario Superior Court was launched only to preserve his right of action given an impending limitation period. This notwithstanding, I find that litigation was contemplated by the applicant as early as November 4, 2004. That the applicant may have hoped that litigation could be avoided does not change the fact that if a resolution could not be otherwise achieved, the evidence is that he was contemplating litigation to achieve one. Further, in my view, a reasonable person reading the applicant's correspondence reproduced above would have concluded that litigation was contemplated. Thus where litigation privilege may be properly asserted it must be with respect to personal information on and after November 4, 2004.

[42] As previously noted, the best discussion of solicitor-client privilege is that of the Supreme Court of Canada in *Pritchard*, above. It is worth repeating here in its entirety.

> 14 Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function: see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 46.
>
> 15 Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837, as: "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties". Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any

consultation for legal advice, whether litigious or not: see *Solosky*, at p. 834. [Emphasis added.]

16 Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, the scope of the privilege was described, at p. 893, as attaching "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". The scope of the privilege does not extend to communications: (1) where legal advice is not sought or offered; (2) where it is not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct: see *Solosky, supra*, at p. 835. [Emphasis added.]

17 As stated in *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2:

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.

The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction.

18 In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, this Court confirmed that the privilege must be nearly absolute and that exceptions to it will be rare. Speaking for the Court on this point, Arbour J. reiterated what was stated in *McClure*:

> ... solicitor-client privilege 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. [Emphasis in original.]

(Arbour J. in *Lavallee, supra*, at para. 36, citing Major J. in *McClure*, at para. 35.)

[43] Because the privilege extends beyond situations of anticipated or actual litigation, the privilege may be claimed whenever there is a communication between the client, EDC, and its solicitors. Unlike litigation privilege which expires with the litigation that underlies it, solicitor-client privilege continues: See *Blank*, above. EDC, like many large organizations, has a number of in-house lawyers to whom it turns for legal advice. Only a few of the questioned documents were authored by or sent to EDC's external counsel. The vast majority of the questioned documents on which EDC claims solicitor-client privilege are documents sent to and from in-house lawyers. All such communications are subject to the privilege provided that, as set out in *Solosky*, above, legal advice was sought or offered, it was intended to be confidential, and it does not have the purpose of furthering unlawful conduct.

[44] Applying the principles in *Solosky*, above, a communication is not subject to solicitor-client privilege merely because it has been copied or sent to a solicitor for informational purposes. Were it otherwise, one could defeat the purposes of the *Privacy Act* by routing all correspondence to in-house counsel, in addition to the other recipients. In this case many of the documents at issue are copies of email messages that were sent to many persons within EDC, including one or more of its solicitors. In my view, unless the email message seeks, provides, or recites legal advice, it should be disclosed if it contains Mr. Murchison's personal information.

[45] In a similar vein, it is my view that a document that would otherwise be subject to disclosure should not be withheld merely because it has been attached to or enclosed with a properly exempted document. This conforms to the notion that "no automatic privilege attaches to documents which are not otherwise privileged simply because they come into the hands of a party's lawyer", as it was put by Justice Heneghan of this Court in *Belgravia Investments Ltd. v. Canada,* 2002 FCT 649, at para. 46. For example, policies of EDC that are publicly accessible do not become exempt on grounds of solicitor-client privilege merely because they have been enclosed with a letter from the client to the solicitor, even if they may later be considered by the lawyer when providing legal advice to the client. Likewise, privilege does not attach to a document that would otherwise be without exemption, such as a case authority, merely because it is enclosed with a lawyer's opinion letter to his or her client, even if it is a case that the lawyer references in the legal opinion. These attachments and enclosure are discrete documents that, save for an exceptional circumstance where they would truly allow one to infer the content and substance of the privileged advice, must be considered on their own and apart from the correspondence to which they are attached or in which they are enclosed. To paraphrase the Ontario Court of Appeal's discussion of the discoverability of public documents appended to a lawyer's brief in *General Accident Assurance Co. v. Chrusz* (2000), 45 O.R. (3d) 321, at para. 39, in this case the disclosure of public documents appended to privileged communications does little to impinge upon counsel's freedom to prepare in privacy and weighs heavily in the scales supporting fairness.

[46] Accordingly, I have ordered the disclosure of attachments and enclosures to properly exempted documents because one cannot infer the advice from the attachment or enclosure and the

claim of solicitor-client privilege does not extend from the exempted document to the attachment or enclosure. It might well be said that the attachment and enclosure, in most cases, is not personal information of Mr. Murchison; however, that exemption is not available to the respondent as EDC made no claim that the document was exempted on the basis of subsection 12(1) of the Act as non-personal information.

Whether EDC Failed To Comply With Treasury Board Guidelines

[47] The applicant submits that the document prepared by Treasury Board of Canada Secretariat entitled 'Privacy and Data Protection – Policies and Publications'[1] ought to have been followed and observed by EDC in responding to the applicant's request. He submits that this policy was breached in several respects, one of the more significant being that EDC failed to record the administrative actions, deliberations and decisions taken and its reasoning when processing the access request. He submits that as a result of these breaches, he has been denied fairness in the procedure followed as it is impossible to ascertain with certainty the veracity and legitimacy of the claims now being advanced by EDC.

[48] The respondent submits that the Treasury Board policy and procedure is not binding on it. It further submits that even if it were, nothing flows from its failure to follow the Guidelines. The respondent cites as support the statement of Justice Rothstein of the Federal Court - Trial Division (as he then was) in *Canada Post Corp. v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320, wherein at paragraph 43 he writes with respect to the *Access to Information and Privacy Policies*

[1] http://www.tbs-sct.gc.ca/pubs_pol/gospubs/TBM_128/siglist_e.asp

and Guidelines: "I accept that the guidelines may be an aid to the interpretation of the Access to Information Act. I also recognize that the guidelines represent only the opinion of the Treasury Board or its officials and that they are nor binding on government institutions, applicants for access or the court." That statement was cited with approval by the Federal Court of Appeal in *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 950, 2002 FCA 270 at paragraph 37.

[49] In my view, these comments by themselves do not go very far in assisting the respondent, in that Justice Rothstein and Justice Décary were speaking only to the portions of the Guidelines setting out Treasury Board's interpretation of sections and phrases of the Act. It is well-established that secondary sources such as government publications are only aids to statutory interpretation and are not binding. Unlike the situation in the *Canada Post* case, here the applicant argues that EDC, as a governmental institution, was obliged to follow the administrative procedures set out in the Guidelines when responding to access requests.

[50] In my view, the Guidelines, for the purposes relevant to this application, is intended to be just that – a guideline. Many provisions in the Guidelines contain mandatory wording, for example section 5 of Chapter 1-1 provides that "Government institutions, in addition to the requirements of the *Privacy Act*, <u>must</u> ensure …" (emphasis added). However, the provisions of Chapter 2-6 dealing with the right of access to personal information, do not use mandatory language. The Introduction to Chapter 2 states that "[t]he purpose of this section of the Privacy volume is to provide guidelines for the interpretation and application of the Act and the relevant regulations and

policies." Accordingly, there is no legal requirement that a governmental institution such as EDC which, at the relevant time was covered by the Guidelines, meticulously observe these Guidelines. They are intended only as an aid to the administration of the Act and policies. Thus, failure to comply has no legal consequence for the institution. This conclusion accords with the broader and "fundamental" principle that administrative guidelines, which are not regulations and do not have force of law, do not create rights in third parties: See *Maple Lodge Farms Ltd. v. Canada,* [1981] 1 F.C. 500, at para. 29, aff'd on this point, [1982] S.C.J. No. 57. At the same time, it might equally be said, as the applicant did, that had EDC followed the Guidelines and maintained a record of its actions and decisions in responding to his request, there would not have been some of the gaps in information that are now evident – such as initially claiming that some 100 pages were exempted as being non-personal information, only to later claim that those pages never existed.

Whether Exhibit 'E' Is Invalid As It Is Not The Work Product Of The Affiant

[51] Serge Picard, the Assistant Secretary, Legal Counsel and Privacy Coordinator of EDC swore an affidavit that includes Exhibit E, described as a chart "which lists each document which, in relation to the applicant's October 17, 2005 request, as amended on November 7, 2005, for personal information under the Privacy Act, EDC either withheld or redacted prior to release and with respect to which EDC understands the applicant is seeking an order … which would compel EDC … to release the document in its entirety." The chart has four columns. The first identifies the document by page number; the next describes the reasons for refusing release; the next sets out the respondent's position on the document as referred to in its letters dated February 3, 2006, December

19, 2006 and March 20, 2007; and the last provides a brief description of the document and the basis for the withholding.

[52] The applicant objects to the admission of this document on the basis that it was not prepared by Mr. Picard but was prepared for him. It is submitted that Mr. Picard has no personal and direct knowledge of the statements contained therein. Mr. Picard acknowledges in his affidavit that the chart was prepared by the solicitors for EDC in this application “for the court’s ease of reference”; however, he also states that he has reviewed the chart and is satisfied as to its accuracy.

[53] In my view, the applicant’s objection is misguided. It is common for counsel to summarize information by way of charts and the like, for the benefit of the Court. Such aids are appreciated. Usually they are prepared and provided to the Court during oral submissions; they rarely are included as a part of an affidavit. Including them in an affidavit does not, in the circumstances described above, transform an aid into dispositive evidence. In any event, in reviewing the respondent’s position on the documents at issue I will be guided by the position of the respondent as set out in its various items of correspondence, not by this documentary aid.

Whether Those Who Responded On Behalf Of EDC after December 15, 2005, Had Authority To Do So

[54] The applicant submits that only the Head of the Institution and those to whom he or she has delegated authority may validly claim an exemption from access under the Act. He submits that only the letter dated December 13, 2005, signed by Gilles Ross, Senior Vice-President, Legal

Services and Secretary, was signed by a person having delegated authority. That delegation was made by the President in a memorandum signed on December 12, 2005.

[55] The respondent provided documentary evidence of another delegation of authority, namely from the President to J. McArdle, Senior Vice-President, Legal Services and Secretariat dated March 9, 2007. Mr. McArdle responded to the applicant in correspondence dated March 30, 2007.

[56] In addition to the responses from Mr. Ross and Mr. McArdle, the applicant was provided with responses dated February 3, 2006 and December 19, 2006 from Serge Picard. The respondent submits that while no delegation was provided to Mr. Picard, as it was for the others, only his letter dated December 19, 2006 actually claimed any exemption. His February 3, 2006 letter amends the exemption claims made by Mr. Ross in his letter dated December 13, 2005, in that it releases information that was previously claimed as exempted. The respondent therefore submits that the only exemptions claimed by someone without delegated authority were those set out in Mr. Picard's letter dated December 19, 2006.

[57] The December 19, 2006 letter releases all or part of many of the documents previously claimed as exempt. Only a few pages are claimed as exempt from access and in each case the page had been previously claimed as exempt but Mr. Picard amended the basis for the exemption claim. Specifically, he references all or part of the following pages, which had been formerly exempted as being non-personal information, as being subject to solicitor-client privilege: namely information on pages 375, 391, 864, 2904, 1543, 1608, 1943 and 1947.

[58] In my view, the applicant's submission is well-founded. The sections of the Act dealing with refusals to disclose personal information all specifically state that it is the head of the institution that may refuse disclosure. It follows that a statement by an officer or employee of the institution who is not the head of the institution as defined in the Act, or to whom authority has not been delegated by the head of the institution, is without effect. Accordingly, the letters of Mr. Picard dated February 3, 2006 and December 19, 2006, to the extent that they purport to assert an exemption, are of no force or effect.

[59] Although the claim of solicitor-client privilege asserted by Mr. Picard is invalid, the content of the document in question may have been previously and validly asserted by the respondent to be subject to solicitor –client privilege. This is because many of the documents contained in the nearly 4000 pages are email messages that have been produced numerous times. Accordingly, where it is ordered that any document invalidly claimed as privileged by Mr. Picard be disclosed, the respondent, if it is of the view that the content was validly claimed as privileged on another document, will be provided with a reasonable period of time to establish that to the Court's satisfaction. I reserve the right, in that circumstance, to order that the document, or a part of it, not be disclosed.

Whether The Respondent's Redaction Was Over-reaching

[60] Mr. Murchison submits that when redaction of exempted material is appropriate, that redaction must be limited to the specific information subject to the exemption. He points out that in many of the documents produced to him in redacted form, the redaction extends to the entire content of the document. He submits that the respondent over-reached in this regard and, as an example, submitted that the "to" and "from" and "re" lines on email correspondence should not have been redacted even if the substantive content was exempt from disclosure.

[61] Mr. Murchison submits that the Court ought to be guided by the judgment of the Court of Appeal in *Davidson v. Canada (Solicitor General)*, [1989] 2 F.C. 341 (C.A.), in which the Court held that exemptions are to be strictly interpreted as exceptions to the general purpose of the *Privacy Act*, which, in part, is to provide persons with a right of access to personal information about themselves that is held by a government institution. He further relies on the reasons of my colleagues Justice Mosley in *Blank v. Canada (Minister of Justice)*, [2005] F.C.J. No. 1927, and Justice O'Keefe in *Blank v. Canada (Minister of Justice)*, [2006] F.C.J. No. 1110. In both of those cases the Court endorsed the view that redaction is to be as limited as possible. However, neither case involved the *Privacy Act* but involved a review under the provisions of the *Access to Information Act*, R.S.C. 1985, c. A-1. Section 25 of that Act specifically provides for the disclosure of any part of the record which can reasonably be severed from those parts of the record which contain information or material exempt from disclosure. There is no corresponding provision in the *Privacy Act*; as such it may be submitted that these authorities are not of assistance in this application.

[62] In my view, while the *Privacy Act* contains no provision similar to section 25 of the *Access to Information Act*, the purposes of the *Privacy Act*, as set forth in section 2, does support the applicant's position that the redactions ought to be reasonably limited when there is a claim made of solicitor-client privilege. Justice Mosley in *Blank*, above, examined the general law of solicitor-client privilege and stated, at paragraphs 26 to 29, as follows:

> 26 The general proposition as stated by Wigmore at 8 Wigmore, *Evidence* para 2292 (McNaughton rev. 1961) is that solicitor-client privilege covers the entire communication:
>
> > [w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived
>
> 27 The scope of the privilege is wide and encompasses all information passed between the lawyer and client. This conception of the broad scope of solicitor-client privilege has been endorsed recently by the Supreme Court in *Pritchard*, *supra* at paragraph 16.
>
> 28 However, "not all communications between a lawyer and client are privileged - only those ... where the [client] has sought legal advice": *Davies v. American Home Assurance Co.* (2002), 60 O.R. (3d) 512 at 519. As well, in order to be privileged the communication must be in the course of seeking legal advice and with the intention that it be confidential: John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 642.
>
> 29 Solicitor-client privilege "extends to communications in whatever form, but does not extend to facts which may be referred to in those communications if they are otherwise discoverable and relevant": *General Accident v. Chrusz* (1999), 45 O.R. (3d) 321 at 347. Thus, where a communication between solicitor and client takes place for the purpose of conveying or receiving information on matters of fact, the communication is not privileged and may be obtained on discovery in civil proceedings. (see Ronald D. Manes &

> Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at 127). However, "[a] privileged communication does not lose its privilege merely because it contains matters of fact which are not privileged. In this situation, the matters of fact can be severed from the privileged communication for the purposes of discovery.": *ibid*, at 132.

[63] Associate Chief Justice Jerome had occasion to examine the issue of redaction under the *Access to Information Act* in *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551. That decision, although involving an application under the *Access to Information Act*, involved the exclusion of personal information as defined in the *Privacy Act*, and thus, to some extent, both Acts were in play. The Associate Chief Justice held that a reasonableness test is to be applied when examining whether a more surgical redaction is possible.

> One of the considerations which influences me is that these statutes do not, in my view, mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. There are two problems with this kind of procedure. First, the resulting document may be meaningless or misleading as the information it contains is taken totally out of context. Second, even if not technically exempt, the remaining information may provide clues to the content of the deleted portions. Especially when dealing with personal information, in my opinion, it is preferable to delete an entire passage in order to protect the privacy of the individual rather than disclosing certain non-exempt words or phrases.
>
> Indeed, Parliament seems to have intended that severance of exempt and non-exempt portions be attempted only when the result is a reasonable fulfillment of the purposes of these statutes. …
>
> Disconnected snippets of releasable information taken from otherwise exempt passages are not, in my view, reasonably severable.

[64] I agree. The purpose of the *Privacy Act* is not met or advanced by providing access to isolated words or phrases that have no meaning in isolation or that do not provide "information" to the requester. In this respect, it is very unlikely that the header information of an otherwise exempted email message, for example, will provide any meaningful information to the requesting party. The same principle applies in much the same way whether the exemption is claimed on the basis of solicitor-client privilege or on the basis that the information is not personal information of the requesting party.

[65] When an institution claims that the information is not personal information of the requester, that claim must be closely examined. It is one thing to say that it is not the requester's personal information as defined in the Act and quite another to exempt it in the basis that it is personal information both of the requester and of a third party. The Federal Court of Appeal has observed that the same information may be personal to more than one individual: See *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 950. Accordingly, when there is a claim for an exemption on the basis of subsection 12(1), care must be taken that the redaction has not been made too broadly simply because the information could also be said to be another's personal information.

Whether The Respondent Could Change The Basis Of The Exemption

[66] As noted, the OPC determined that some of the documents withheld by EDC on the basis that they contained only non-personal information did in fact contain personal information and ought to be disclosed. In response, the respondent took the position that many of those documents

were subject to solicitor-client privilege and refused disclosure on this new claim for exemption. The applicant submits that the respondent cannot change the basis of the claimed exemption. He relies on the decision in *Davidson v. Canada (Solicitor General)*, [1987] 3 F.C. 15 and, specifically, the statement of Associate Chief Justice Jerome in paragraph 9 that “the respondent cannot rely on exemptions not identified in the notice of refusal issued under section 14.”

[67] The Court of Appeal dismissed an appeal of that decision: [1989] 2 F.C. 341. However, while it agreed with Associate Chief Justice Jerome that the respondent was bound by the grounds of exemption asserted by it, it was made clear that the grounds to which the respondent was bound were those advanced before the matter reached the Federal Court. Justice McGuigan makes that point when discussing the reason why the respondent cannot change the ground of exemption once the matter is before the Court:

> …[I]f new grounds of exemption were allowed to be introduced before the judge after the completion of the Commissioner's investigation into wholly other grounds, as is the issue in the case at bar, the complainant would be denied entirely the benefit of the Commissioner's procedures. He would thus be cut down from two levels of protection to one. No case could better illustrate than the present one the advantages of a two-stage process, because it was only at the second stage that the fatal flaw in the initial ground was discovered.

That the parties would be denied the benefit of the OPC review process is the rationale for refusing the respondent the right to change its grounds of non-disclosure after that process has been completed. To hold otherwise and hold the respondent to the grounds advanced before the OPC had been engaged would reduce the role of the OPC to one of little or no consequence. Indeed, what would be the point of encouraging the respondent to re-examine its position if it were bound by

exemptions already asserted? Further, if the respondent fails to provide the response required in the Act under section 14 within the applicable time limit, would it then be precluded from asserting an otherwise legitimate exemption? I have already discussed why I am of the view that such a position is untenable.

[68] Accordingly, in my view, the respondent was entitled to amend the ground of exemption up to the point when this application was filed with the Court.

Other Observations

[69] As is noted above, the respondent originally claimed 100 pages were exempted as being non-personal information, only to later claim that those pages never existed; these are pages 2204 to 2303. It was understandable that Mr. Murchison was suspicious of this later claim in light of the assurances given that Mr. Picard had reviewed each and every page prior to disclosure. I have reviewed the disclosed materials both from the respondent and from the Commission, neither of which contains the 100 "missing" pages, and accept the respondent's explanation that this was the result of a clerical error when numbering the pages. The person who did the numbering simply skipped from page 2203 to page 2304. There is no evidence that these 100 pages ever existed and there is nothing in the sequence of documents to suggest that the respondent's explanation is not credible.

[70] There were a few pages that EDC had originally claimed to be exempt from disclosure on the basis that they contained non-personal information. Subsequently the respondent stated that the

page was blank. Again, this change in characterization reasonably roused Mr. Murchison's suspicions. Having reviewed the materials in the record, including the documents of the OPC, I can find nothing to suggest that this too was other than a clerical error on the part of the respondent and that the pages, in fact, are blank.

Conclusion

[71] Having reviewed the more than 900 pages in dispute which are attached to Mr. Picard's affidavit sworn November 1, 2007, I have determined that EDC has improperly claimed an exemption to disclosure over many of them. The basis on which I hold that the information contained in these documents is to be disclosed, with only a few exceptions, is for one or more of the following reasons:

(a) The document is a non-privileged attachment or enclosure to a privileged document and the exemption asserted was solicitor-client privilege;

(b) The document is sent to or from an employee of EDC who is a lawyer but who also fills a non-legal role at EDC, such as Mr. Picard, and on the balance of probabilities, the document was sent to or from him in his non-legal role;

(c) The document is an email message that has been copied to an in-house EDC lawyer and there is no request advanced for legal advice;

(d) The document is sent to or from an employee of EDC who is a lawyer but there is no request advanced for legal advice and no legal advice offered;

(e) The only valid exemption claimed by EDC was under subsection 12(1), but the information has been held to constitute personal information of Mr. Murchison;

(f) EDC agreed to release the document to Mr. Murchison (these were usually blank pages over which an exemption had been claimed);

(g) The redaction made by EDC is too broad and the non-exempted information is ordered released; and

(h) The document contains no solicitor-client privileged information.

[72] Attached as Schedule A to these Reasons is a listing of documents previously exempted, in whole or in part that, in whole or in part, are found not to be validly subject to the exemption claimed and that are to be released to Mr. Murchison.

[73] Mr. Murchison has been partially successful in this application as many documents previously withheld from him are ordered to be disclosed. On the other hand, it has only been a partial victory and many of his submissions to the Court were rejected. In these circumstances, I am of the view that there ought not to be any order as to costs. Each party is to bear his or its own costs.

ORDER

THIS COURT ORDERS AND ADJUDGES that:

1. The information contained in the documents listed in Schedule A to this Order, which was previously redacted by the respondent, shall be released by the respondent to the applicant to the extent indicated in Schedule A and subject to an order to withhold disclosure of any document listed under heading "I" if it is established to the satisfaction of the Court by the respondent within 30 days hereof, that the respondent has made a previous and valid claim that the information is subject to solicitor-client privilege;

2. Disclosure of these materials need not be made for a period of thirty (30) days after the date of this Order in case an appeal is filed; and

3. As success was divided, each party shall bear its own costs.

"Russel W. Zinn"
Judge

Docket : T-1291-07

SCHEDULE "A" TO THE REASONS FOR ORDER AND ORDER DATED JANUARY 26, 2009

The redacted portions of the following pages (identified by the handwritten number on the lower right corner from Exhibit "1" to the Confidential Affidavit of Serge Picard, sworn the 1st day of November, 2007, are to be released in whole (or where indicated, in part) for the reasons provided at the heading of each section.

A. The document is a non-privileged attachment or enclosure to a privileged document:

Pages Nos. 2038 to 2082 inclusive, 2159, 2160, 2742 to 2758 inclusive, 3759 to 3802 inclusive, 3845, 3846, 3847, 3849 to 3885 inclusive, 3909 to 3939 inclusive, and 3948 to 3952 inclusive.

B. The document is sent to or from an employee of EDC who is a lawyer who also fills a non-legal role at EDC and, on the balance of probabilities, the email is being sent to or from the employee in the non-legal role:

Pages Nos. 722, 724, 726, 728, 730, 731, 854, 855, 862, 865 to 872 inclusive, 1506, 1507, 1544 to 1549 inclusive, 1609, 1610, 1632, 1937, 1938, 1944, 1948, 1950, 1951, 1953, 2000, 2003, 2006, 2203, 2315, 2533, 2541, 2542, 2544, 3727, 3891, 3907, 3955.

C. The document is an email copied to an in-house EDC lawyer with no request for legal advice:

Pages Nos. 628, 638, 641, 741, 1956, 2533, 2860.

D. The document is sent to or from an employee of EDC who is a lawyer, but there is no request for legal advice and no legal advice offered:

Pages Nos. 307, 308, 383, 731, 769, 795, 797, 803, 1453, 1594, 1597, 1696, 1856, 1878, 1955, 1978, 2374, 2543, 2853, 2958, 3606, 3637, 3638, 3654, 3664, 3685, 3953.

E. The only exemption claimed by EDC was under subsection 12(1), but the information is personal information of Mr. Murchison:

Pages Nos. 383, 837, 841 to 843 inclusive, 1926, 1997, 1998*

F. EDC agreed to release the document:

Pages Nos. 568, 1737, 3758, 3760, 3762, 3764, 3770, 3773, 3887, 3888, 3889, 3890, 3956, 3957.

G. The redaction made by EDC is too broad:

Page Nos. 434, 3030: only last sentence in email sent April 6, 2005, 8:28 AM, should be redacted.

Page Nos. 648, 651: only the first sentence in the second paragraph of email sent December 6, 2004, 4:48 PM, should be redacted.

Page Nos. 676, 677, 678, 679, 680, 681, 682, 685, 809, 814, 1992, 2308, 2508: only the second full sentence (beginning with word “Please”) in email sent November 23, 2004, 2:20 PM, should be redacted.

Page No. 2506: only the first 3 email messages from the top of the page, as well as the second full sentence in email sent November 23, 2004, 2:20 PM, should be redacted.

Page No. 766: Only the email message sent December 6, 2004, 4:48 PM, should be redacted.

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* see comment under “G” in relation to this document.

Page No. 778: Only the lower portion of the page, following the words "we have draft ready to go", should be redacted.

Page No. 830: Only the bracketed phrase following the word "Keith" and preceding the word "acknowledging" should be redacted.

Page No. 876: The second to last sentence, beginning "Michelle" and ending "Nothing", should be released.

Page Nos. 1165, 3954: Only the email sent October 18, 2005, 7:18 PM, should be redacted.

Page No. 1226: Only handwritten notes should be redacted.

Page No. 1520: Only top half of page should be redacted; everything following the words "Blair, Daniel" in bold should be released.

Page No. 1533: Only top four lines should be redacted.

Page Nos. 694, 696, 698, 700, 701, 824, 1596, 1631, 1993, 2311, 3727: Only email sent November 18, 2004, 12:00 PM, should be redacted.

Page No. 699: Only the first 6 lines of text from the top should be redacted.

Page No. 1883: Only the first 7 lines of text from the top should be redacted.

Page Nos. 712, 849, 1936, 1998: Only the name of the third party referenced as the successful candidate in email sent October 20, 2004, at 11:27AM, should be redacted.

Page No. 1949: Only the first 2 email messages at top should be redacted.

Page No. 2002: Only the first 3 email messages at top should be redacted.

Page No. 2004: Only first email message at top should be redacted.

Page No. 2542: Only email message sent October 18, 2005, 6:39 PM, should be redacted.

Page Nos. 307-308, 2775, 3232: Only emails dated February 1, 2005, 2:02 PM, and Feb 1, 2005, 11:50 AM should be redacted.

Page No. 2959: Only email sent Jan 14, 2005, 6:58 PM, should be redacted.

H. The document contains no solicitor-client privileged information:

Pages Nos. 616, 628, 715, 723, 732, 761, 762, 763, 1451, 1452, 1467, 1649, 1650, 1653, 1654, 2313, 2958, 3009, 3010, 3226 to 3231 inclusive, 3728, 3897, 3907, 3945.

I. The document contains personal information of the applicant:

The claim for solicitor-client privilege made by Mr. Picard in his letters of Feb. 3, 2006 and December 19, 2006, has been held to be invalid, as it was made without proper delegation of authority. Thus the document must be released, unless within 30 days of this Order the respondent satisfies the Court that the information on the page is subject to a valid claim of solicitor-client privilege previously asserted with respect to another page:

Pages Nos. 308, 375, 391, 864, 1543, 1608, 1943, 1947, 2904.

J. Miscellaneous:

Page No. 779: EDC has note that reads: "Note: EDC has been unable to locate the clean copy of document no. 799. See affidavit of Serge Picard, paragraph 30(a), sworn Aug. 29, 2007." The OPC has a clean copy of this page in its materials which the Court had reviewed. It is the same as EDC page 794 and the redaction done on page 794 is found to be appropriate.

Page No 3811: EDC has note that reads: "Note: EDC has been unable to locate the clean copy of document no. 3811. See affidavit of Serge Picard, paragraph 30(a), sworn Aug. 29,

2007." The OPC has a clean copy of this page in its materials which the Court has reviewed; it qualifies for solicitor-client privilege.

Page No. 3887: This is a blank page in EDC's unredacted document package. It is not in the Privacy Commissioner's package at all.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1291-07
STYLE OF CAUSE:	KEITH N. MURCHISON v. EXPORT DEVELOPMENT CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 21, 2008
REASONS FOR ORDER AND ORDER:	ZINN J.
DATED:	January 26, 2009

APPEARANCES:

Keith N. Murchison	FOR THE APPLICANT
Heather J. Williams Chris Merrick	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Keith N. Murchison Ottawa, Ontario	SELF REPRESENTED APPLICANT
CAVANAGH WILLIAMS Barristers and Solicitors Ottawa, Ontario	FOR THE RESPONDENT