



Commissariat à l'information du Canada Office of the Information Commissioner of Canada

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Information Commissioner's Final Report

Institution: Department of Justice Canada

OIC file number: 3215-00879

Institution file number: A-2015-00288

Date: June 25, 2020

Summary

The complaint contested the decision by the Department of Justice Canada (Justice) to withhold the entire content of a Memorandum of Understanding (MOU) for the provision of legal services under section 23 (Legal advice and litigation privilege) of the *Access to Information Act*. Justice could not show that section 23 applied to the entirety of the record at issue – in particular, that the general identifying information such as the title of the MOU and the signature blocks are protected by the solicitor-client privilege. It was also determined that Justice had waived its solicitor-client privilege over some information in the MOU and therefore that particular information was not protected anymore. The complaint is well founded. The Information Commissioner recommended that Justice release part of the record and Justice has communicated its intention to implement this recommendation.

Complaint

The complaint contests the decision by the Department of Justice Canada (Justice) to withhold the entire content of a Memorandum of Understanding (MOU) under section 23 (Legal advice and litigation privilege). This MOU was between Justice and the Department of National Defence and the Canadian Armed Forces (DND) for the provision of legal services.

Investigation

Section 23: Legal advice and litigation privilege

Section 23 allows institutions to refuse to release information subject to solicitor-client privilege, or the professional secrecy of advocates and notaries when the information relates to legal advice given to a client. Section 23 also allows institutions to refuse to release information subject to litigation privilege when the information was prepared or gathered for the purpose of litigation.

To claim this exemption with regard to legal advice, institutions must show the following:

- The information consists of communication between a lawyer or notary and his or her client.
- That communication relates directly to the seeking or giving of legal advice, including all the exchanges of information needed to give legal advice.
- The parties intend the communication and advice to remain confidential.

When these requirements are met, institutions (as the owner of the privilege) must then reasonably exercise their discretion to decide whether to release the information.

Does the information meet the requirements of the exemption?

The investigation showed that part of the information meets the requirements of the exemption.

Justice claimed solicitor-client privilege in the form of legal advice privilege on the MOU and its addendum.

The MOU and its addendum constitute a legal retainer establishing the governance, price and performance regime that governs the relationship between DND and Justice, and would therefore be subject to solicitor-client privilege under normal circumstances.

However, section 23 does not apply to the entirety of the record at issue in this instance. The general identifying information contained in the MOU does not meet the requirements of the exemption as it does not constitute information protected by the solicitor-client privilege. This includes the title of the MOU and the signature blocks for the Deputy Ministers who signed the MOU.

Furthermore, Justice previously waived its solicitor-client privilege over small portions of the MOU, which are found in two documents that were made public by JUS on March 2015 and January 2017:

- 2017 Evaluation Report: https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/about-reports-pubs-audit-eval/284p1258-227-eng.pdf
- 2015 Evaluation Report: <https://www.justice.gc.ca/eng/rp-pr/cp-pm/aud-ver/2015/crpi-aprc.pdf>.

Solicitor-client privilege does not apply to information over which privilege has been waived (*S&K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC), para. 6.).

In light of the above, I conclude that the general identifying information and the information for which the privilege has been waived do not meet the requirements of section 23.

Section 25 of the Act requires severance of non-exempt information in records that contain information that is exempt under the Act, where the non-exempt material can reasonably be severed from the exempt material (*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, paras. 229-238.). In my view, Justice has not disclosed all the information it could have reasonably severed from the exempted information, as required by section 25.

Did the institution reasonably exercise its discretion to release the information?

Justice was required to reasonably exercise its discretion to decide whether to release the information protected by section 23. In doing so, it had to consider all the relevant factors for and against disclosure (*Canada (Information Commissioner) v. Canada (Prime Minister)*, 2019 FCA 95, para. 83).

Based on Justice's representations and the evidence before me, I am satisfied that all relevant factors were considered in Justice's exercise of discretion. Thus, to the extent that solicitor-client privilege applies to the rest of the record, I find that Justice reasonably exercised its discretion when it decided not to release the rest of the information at issue.

That said, in the spirit of transparency and accountability that underlies the Act, I informed the Minister of Justice that, in my view, the exercise of discretion should be reconsidered to release the rest of the information protected by section 23. This is taking into account: the fact that the MOU is a standard document, and the fact that Justice's mandate as the main provider of legal services to federal government departments is widely known.

Results

The complaint is well founded.

Recommendation

On February 13, 2020, I provided my initial report to Justice, setting out my finding and my recommendations to release part of the record.

I recommended that Justice:

1. Disclose all general identifying information, including the title, and signature blocks, that were originally withheld;
2. Disclose all of the information over which solicitor-client privilege was waived, in the 2015 and 2017 Evaluation Reports;
3. Reconsider its exercise of discretion in light of the considerations mentioned in my report;

On March 5, 2020, Justice provided notice that it would implement my recommendations to disclose all general identifying information and all information over which solicitor-client privilege was waived.

Section 41 of the Act provides a right to the complainant who receives this report to apply to the Federal Court for a review. The complainant must apply for this review within 35 business days after the date of this report and must serve a copy of the application for review to the relevant parties, as per [section 43](#).



Caroline Maynard
Information Commissioner of Canada