ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2011-006

December 7, 2011

Borden Ladner Gervais LLP

Case File Number P1498

Office URL: www.oipc.ab.ca

Summary: An Applicant made a request to a law firm for his personal information in a client file. The file had been created by the law firm in the course of representing a client opposed in interest to the Applicant in a legal dispute.

The law firm withheld most of the documents that it had located that it considered to be responsive to the Applicant's request on the basis that they were subject to solicitor-client privilege. The Commissioner accepted the law firm's document-by-document affidavit attesting that all the documents that it had located and for which it was claiming privilege were subject to solicitor-client privilege.

Some emails between the law firm and the Applicant had not been included in the law firm's list of documents which it was withholding on the basis of privilege. Some of these emails had been provided to the Applicant, but other emails the law firm had sent to the Applicant had not been provided to him. The Commissioner put further questions to the law firm about these emails, and about the nature of the search it had conducted in response to the Applicant's access request. In its response, the law firm did not explain whether the emails sent to the Applicant by it had been located but had not been provided, or whether they had not been located. However, the law firm argued that these emails were not the Applicant's personal information and that he had no right of access to them.

The Commissioner found it more likely that one of these emails had not been found (rather than that it had been found and withheld), but that the likely cause for not locating it was that it was not present on the file. As the client file was the reasonable place to look for information related to the Applicant, the Commissioner found that the law firm's search had been adequate even if the email had not been located. He also held that, in any event, the emails sent by the law firm to the Applicant contained his personal information only by implication, and that there was no obligation under the Act to provide them even if they had been located.

Statutes Cited[1]: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5, ss. 1(k), 4(3)(k), 4(5), 24(1), 24(2), 24(2)(a), 24(3), 29, 29(1)(c)(ii), 29(1)(c)(iii), 38(1), 38(2), 38(3), 52; by reference from Decision P2011-D-003: 24, 24(2)(c), 38, 38.1, 38(5), 41(3), 41(3.1), 41(3.2), 50, 50(1), 52, 52(6), 54,1, 54.1(2).

Orders Cited: AB: F2004-026, F2007-008; F2007-029, F2008-016, P2009-005, P2010-010, P2011-001, P2011-D-003; by reference from Decision P2011-D-003: 96-015**,** 96-017, 97-009, 2001-025, P2006-002, P2006-004, P2006-005, P2007-002, F2007-014, F2007-029, F2009-015.

Court Cases Cited: *Canada v. Solosky* [1980] 1 S.C.R. 821 (S.C.C.); *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner),* 2011 NLCA 69 (C.A.); by reference from Decision P2011-D-003: *Canada (M.N.R.) v. Coopers and Lybrand Ltd.* (1978), 92 D.L.R. (3d) 1 (S.C.C.); *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.); *Canada (Information Commissioner) v. Canada (Minister of Environment),* [2000] F.C.J. No. 480 (C.A.); *Pritchard v. Ontario Human Rights Commission* [2004] S.C.J. No. 16 (S.C.C.); *Canada (Attorney General) v. Canada (Information Commissioner),* [2005] F.C.J. No. 926 (C.A.); *Blank v. Canada (Minister of Justice),* [2006] S.C.J. No. 39 (S.C.C.); *Canada (Privacy Commissioner*) *v. Blood Tribe Department of Health,* [2008] S.C.J. No. 45; *Law Society of Saskatchewan v. Merchant* [2008] S.J. No. 623 (C.A.); *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner),* [2010] N.J. No. 52 (T.D.); *R. v. Ahmad,* [2011] S.C.J. No. 6.

Authorities Cited: by reference from Decision P2011-D-003: R. Cross, *Cross on Evidence***,** 5th ed., 1979; EA. Driedger, *Construction of Statutes*, 2nd ed. (Butterworths: Toronto, 1983; Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals, Carswell,* Chapter 24.

[1] Amendments to the *Personal Information Protection Act* came into force in May, 2010, after some of the events transpired to which this order relates, and some of the provisions cited herein were changed or renumbered as part of those amendments. The pre-amended provisions are the ones that apply to the issue of the application by the law firm of exceptions to disclosure. Thus the references contained in the text of this order are to the provisions that were in force at the time of the access request, the law firm's responses, and the mediation phase of the review in this matter. The references cited above that are incorporated from Decision P2011-D-003 are to provisions in the current version of PIPA, since these provisions apply to the question of my power to hear this inquiry and to require the production of documents over which privilege is claimed, which are questions that have arisen since the amendments came into force.

I. BACKGROUND

[para 1] On February 6, 2009, an applicant made an access request under the *Personal Information Protection Act* (PIPA or the Act) to a law firm for disclosure of "all personal records as described in the Act pertaining to [himself], with regard to their collection, use and disclosure, under the control and maintenance of [the law firm]". The Applicant had been involved in an employment dispute with clients of the law firm.

[para 2] The law firm initially responded, on March 12, 2009, that any information relating to the Applicant that was in its possession had been obtained in connection with its legal representation of particular clients of the firm or was otherwise privileged, and that pursuant to sections 24(2) and (3) of the Act, it was declining the access request.

[para 3] Subsequently, the law firm disclosed some records to the Applicant, including emails and a release signed by the Applicant. The law firm stated in its submissions that this disclosure was made as a practical accommodation to the Applicant, and had not resulted from a change in its position as to the applicable exceptions to disclosure.

[para 4] The Applicant was not satisfied with this response, and on November 23, 2009 he asked that this office review the law firm's response. On February 11, 2010, I authorized a portfolio officer to investigate and to try to resolve the matter. During this process, a number of additional records were disclosed by the law firm. However, this did not resolve the Applicant's concerns, and the Applicant requested an inquiry on April 29, 2010. I agreed to hold an inquiry on August 10, 2010.

[para 5] Correspondence between this office and the law firm clarified that it would be appropriate for the law firm to follow this office's Solicitor-Client Privilege Adjudication Protocol in this inquiry, in view of the law firm's claim that the records at issue were subject to solicitor-client privilege. The law firm responded by providing a detailed, document-by-document affidavit, in accordance with the requirements of the Protocol.

[para 6] The Law Society was invited to participate as an intervenor in this matter, and it chose to do so, and provided a submission.

[para 7] The law firm and the Applicant both provided initial and rebuttal submissions. The law firm also provided answers to a number of questions I posed to it about its submission. The Applicant provided two unsolicited comments on these questions, dated August 16, 2011 and August 18, 2011. As well, the law firm responded to my questions about the adequacy of its search, and the Applicant provided a reply.

II. INFORMATION AT ISSUE

[para 8] The information at issue is any personal information of the Applicant in the possession of the law firm.

III. ISSUES

[para 9] The issues stated in the Notice of Inquiry were as follows:

> **Issue A: Was the information in the withheld records, or any of it, responsive to the Applicant's request for the Applicant's personal information having regard to the definition of personal information in section 1(k) of the Act?**
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> **Issue B: If yes, is the information or any of it excluded from the Act by the application of section 4(3)(k) of the Act (information in a court file)?**
>
> **Issue C: Is the Applicant's personal information in the Organization's custody or control?**
>
> **Issue D: If the Organization refused to provide access to the Applicant's personal information in its custody or control that is not excluded by section 4(3)(k), did it do so in accordance with section 24(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)? In particular,**
>
> a. **Did the Organization properly apply section 24(2)(a) of the Act (legal privilege) to the requested personal information or parts thereof?**
> b. **Does section 24(3)(a) (threat to life or security) apply to the requested personal information or parts thereof?**
> c. **Does section 24(3)(b) (information revealing personal information about another individual) apply to the requested personal information or parts thereof?**
> d. **Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to the requested personal information or parts thereof?**
> e. **If the withheld records contain the personal information of the Applicant and if section 24(3)(a), 24(3)(b), or section 24(3)(c) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant as required by section 24(4)?**

[para 10] The Intervenor, the Law Society, did not address most of these issues. Rather, it argued first that I ought to decline to make an order under PIPA because the inevitable consequence of making such an order is to affect legal privilege or information available by law to a legal proceeding, contrary to section 4(5) of the Act. Second, it asserted that if I do decide to proceed with the inquiry, I may not inspect documents over which a claim of privilege has been made, but the claim must be referred to the courts. The law firm said that it adopted these submissions. Thus I will address these questions as preliminary issues.

[para 11] As well, the law firm accepted that the answers to the questions posed in issues A to C are such that these issues need not be considered. It did not dispute that the

information in the records identified as responsive was the Applicant's personal information, that it was in the law firm's custody and control, and that there was no question of it being information in a court file. I will accept the law firm's position on the latter two points ('custody and control' and 'not in a court file'), but I will address the question of what parts of the information identified as responsive or potentially so is the Applicant's personal information.

[para 12] Finally, the law firm relied only on the exception contained in section 24(2)(a) – legal privilege – and not on any of the other exceptions set out in the Notice of Inquiry. Therefore, I will not deal with the applicability of the remaining exceptions.

IV. DISCUSSION OF ISSUES

Preliminary issues – the decision to hold this inquiry and the power to inspect the documents

[para 13] As noted, the Intervenor, the Law Society, submitted that I should not hold this inquiry, and that I may not review documents over which a claim of solicitor-client privilege has been made. The law firm adopted these submissions in its initial submission.

[para 14] I have already responded to similar arguments in Decision P2011-D-003. I held in that decision that I had the jurisdiction and the obligation under the Act to review the law firm's responses to the applicants in that case, including its responses relative to records over which it was claiming solicitor-client privilege. There are no other means by which this determination can be made. As well, I held that the wording of sections 38(1), (2), and (3) of the Act, which give me power to require production of records for my review "notwithstanding any … privilege of the law of evidence", permit me to require production of solicitor-client privileged records. However, I recognized that this is to be done, in accordance with the substantive rule of confidentiality of solicitor-client communications that had been laid down by the Supreme Court of Canada, only in circumstances in which it is absolutely essential in order for me to perform my statutory duty, and only to the extent absolutely necessary. I found that the Solicitor-Client Adjudication Protocol of this office meets the requirements of the substantive rule in this regard.

[para 15] I incorporate the reasons given in Decision P2011-D-003, as to my proper role relative to documents over which solicitor-client privilege has been claimed, into this order by reference.[2] Accordingly, I find that it is appropriate for me to hear this matter and to make a determination as to whether the information at issue may be withheld on the basis that it is subject to solicitor-client privilege. I am further supported in this conclusion by the recent decision of the Newfoundland and Labrador Court of Appeal, *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador*

[2] Decision P2011-D-003 is presently the subject of an application for judicial review by the law firm that is the respondent in the case.

(Information and Privacy Commissioner), 2011 NLCA 69, in which the court held that legislation in Newfoundland and Labrador which contains wording respecting the power to require documents, similar to that in PIPA which permits compelling production "notwithstanding any … privilege of the law of evidence", was unambiguous and explicitly permitted the Commissioner to abrogate a claim to solicitor-client privilege in order to verify the legitimacy of such a claim in the discharge of his statutory mandate.

[para 16] With respect to inspecting the documents, in this case, for the greatest part of the information, it is not necessary for me to do this, because, as explained further below, I accept the evidence of the law firm given by way of its page-by-page affidavit that the records that it withheld from the Applicant on the basis of solicitor-client privilege were subject to this privilege. The only exception to this conclusion relates to a single record which was referenced in error by the law firm in its list of records over which it was claiming privilege, and which is not at issue in the inquiry.

Issue A: Was the information in the withheld records, or any of it, responsive to the Applicant's request for the Applicant's personal information having regard to the definition of personal information in section 1(k) of the Act?

[para 17] As noted, the law firm did not dispute that the information in the records it had identified as responsive was the Applicant's personal information. Accordingly, its affidavit setting out the basis of its claim of privilege over the documents that contain the requested information did not make distinctions between information that is, and is not, properly regarded as the Applicant's personal information.

[para 18] Despite the law firm's concession, I have a different view on this question. Section 1(k) of the Act defines personal information as information about an identifiable individual.

[para 19] As I pointed out in in Decision P2011-D-003, information in the file of a law firm that is representing a client opposed in interest to the Applicant in a legal matter may not be personal information of the Applicant in the sense of being "about" him within the terms of PIPA, even though it relates to the Applicant in some way. As I said in that order:

> 29 … under PIPA, an access request can only be for a person's own personal information, and in this and similar cases, what is properly regarded as the requestor's personal information does not by any means extend to what are likely to be the greatest parts of the file. I addressed a similar point in an earlier order, P2006-004. In that case, an individual had requested his own personal information from the Law Society. Much of the information in the Law Society's files consisted of its dealings with complaints the applicant had made against Law Society members. I said:
>
> > 11 My jurisdiction over information requests under the Personal Information Protection Act is limited to access requests for personal information. Sections 24 and 46(1) of the Act combine to confer my jurisdiction. They provide:

> 24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:
>
> (a) the individual's personal information where that information is contained in a record that is in the custody or under the control of the organization; … .
>
> 46(1) An individual who makes a request to an organization respecting personal information about that individual may ask the Commissioner to review any decision, act or failure to act of the organization. [emphasis added]

> 12 The Act defines "personal information" as "information about an identifiable individual". In my view, "about" in the context of this phrase is a highly significant restrictive modifier. "About an applicant" is a much narrower idea than "related to an Applicant". Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant - and that is therefore connected to them in some way - is not necessarily "about" that person. In this case, only a part of the information that the A/C asked for was information "about" him. Had he relied on PIPA to obtain information, he would not have received much of the information that was made available to him under the Legal Profession Act and the Rules created thereunder, or pursuant to the requirements of fairness.
>
> …
>
> 18 I do not need to decide for the purpose of this inquiry precisely which parts of the information in the documents collected or created for the purpose of the complaint proceedings were "personal information" of the A/C, as that term is to be understood in PIPA. It is sufficient to say that there is a great deal of information in the documents that is not the A/C's personal information even though it was generated in consequence of his complaints. The latter includes information about the persons about whom he complained and their dealings with the A/C, information about other third parties and their dealings with the A/C, descriptions of various events and transactions, and correspondence and memos related to the handling of the complaints and other aspects of the complaint process. As well, the fact the A/C was the author of documents does not necessarily mean that the documents so authored were his personal information.

30 In my view, there is likely to be a close parallel between the type of information that is in the “client file” held by the law firm, and the type of information described in the paragraphs just quoted. The fact the file contains information related to one of the Applicants because he was the opposing party in the legal matters does not of itself make the information “about him”. What is “about him” is information such as what he has said or expressed as an opinion, the fact he has done certain things or taken certain steps, details of his personal history, and personal details about him such as his name and other associated information such as where he lives or his telephone number. This is not meant to be an exhaustive list, but is provided to illustrate the type of information that is personal information, in contrast to information other than this type of information, that was generated or gathered by the law firm or its client for the

> purpose of pursuing the litigation. The point is that much or most of the latter may well not be the first Applicant's personal information even though it relates to a legal matter that involved him. An obvious example would be legal opinions given to the law firm's client as to how to deal with the litigation with the Applicant or associated legal matters. The way in which the law firm was advising its client and dealing with the legal matters may have affected the Applicants, but it was not "about" them in the sense meant by the definition of personal information in the Act. (This information would also be privileged, but the point here is that much or most of it would likely not be the Applicant's personal information within the definition of the term contained in the Act.)

[para 20] Thus, it appears highly likely to me that much of the information in the file over which privilege is being claimed in this case is not the Applicant's personal information within the terms of PIPA, and the Applicant is not entitled to it on that basis, regardless of whether it is subject to privilege.

[para 21] However, if a claim of privilege is sustainable for any given document that contains information that both is and is not personal information of an applicant, there may not be any efficiency in first making a determination as to which information is the applicant's personal information, and then deciding whether that particular information is subject to privilege. (In another case, where only parts of the information in a given document are subject to privilege, it might be more efficient to first decide which information is the applicant's personal information, and then to decide if it is subject to solicitor-client privilege. The order in which the decisions could be made most efficiently would depend on the nature of the information in a given case.)

[para 22] In this case, as noted, the law firm has provided a detailed affidavit on a document-by-document basis explaining its claim of privilege for the entire set of documents over which it is making this claim. If the claim of privilege is satisfied for each of these documents, it is not necessary to decide which parts of them consist of the Applicant's personal information and which do not; he is not entitled to any of the information in any event.

[para 23] I therefore turn to the question of whether the claim of solicitor-client privilege was properly made for each of the documents in the law firm's list of withheld records relative to which it was made.

Issue D: Did the Organization properly apply section 24(2)(a) of the Act (legal privilege) to the requested personal information or parts thereof?[3]

[para 24] As described by the Supreme Court of Canada in *Canada v. Solosky* [1980] 1 S.C.R. 821, solicitor-client privilege covers a specific type of information. According to this decision, the evidence must establish, for each record, that:

- there is a communication between a lawyer and the lawyer's client; and
- the communication entails the giving or seeking of legal advice; and

[3] Issues B and C do not need to be considered, for the reasons given above at para 11.

- the communication was intended to be confidential.

[para 25] I have reviewed the affidavit of the law firm, which was provided by the member of the firm who acted as counsel to the client that was adverse in interest to the Applicant in certain legal matters. The affidavit attaches the Solicitor-Client Privilege Adjudication Protocol form for each of the documents withheld on the basis of the privilege. Based on the statements contained in this affidavit and forms, I am persuaded that the claim of solicitor-client privilege was properly made for most of the records in the list for which it was claimed. Some of the records are direct communications between the lawyer and the client involving the seeking or giving of legal advice. Others are notes to file but it is attested that these notes involve the seeking or giving of legal advice between the client and the lawyer. Finally, some are communications amongst members of the law firm, or amongst the clients of the law firm, but again, it is attested that these involve the seeking or giving of legal advice between the client and the lawyer. (This includes record 63, which was, apparently, mistakenly, listed as a communication between a lawyer and a client but was in fact a communication between lawyers. I note that in regard to this record, the Applicant speculates that this communication merely described an exchange between himself and one of the lawyers, and as such was not legal advice. However, such a communication between lawyers, where it concerns or describes what was done or is to be done by a legal advisor relative to a legal matter, qualifies as legal advice.)

[para 26] In addition, the law firm's answers to my supplemental questions explain that all of the communications among lawyers are strings of email correspondence regarding the legal advice provided or to be provided to the clients or regarding the conduct or administration of the related litigation.

[para 27] I find that all of the communications and notes described above were, by their very nature, intended to be confidential. Further, the lawyer who was counsel to the client regarding the Applicant's matter has attested to their confidentiality in his affidavit dated April 29, 2011.

[para 28] I accept that all of the documents just described are subject to solicitor-client privilege. (I note in saying this that some of the attachments to the listed records appear to be records that would have come into the possession of the law firm after having been filed in court, and that, by reference to section 4(3)(k) of the Act, I do not have jurisdiction over records that are derived from court files. For any such records among the records here in question, I have no power to make any determinations about them, or to order their disclosure even if they were not subject to legal privilege.)

[para 29] The only exceptions to my conclusion that the records on the list are subject to solicitor-client privilege are records 5 and 23, relative to which there is no attestation that the communications involved the seeking or giving of legal advice. The former of these does not record the personal information of the Applicant, and he is not entitled to this document on this account. The latter is a communication from the Applicant to the lawyer's client which, according to the answers supplied by the law firm to my

supplemental questions, was mistakenly included by the law firm in its list of records, has previously been disclosed to the Applicant, and is therefore not at issue in the inquiry.

[para 30] I have noted that in his request for inquiry the Applicant questioned whether solicitor-client privilege had been applied to particular documents relating to his performance which he understood had been given by his former employer to the law firm (and if so, whether it had been properly applied), or whether these and possibly other documents had not been included in the law firm's list of documents it had withheld on the basis of solicitor-client privilege. He also specifically mentioned his request for a copy of an original document.

[para 31] In this regard, I note that the affidavit of the legal counsel that the law firm provided in its initial submission did not specifically attest that it had not located any records relating to the Applicant other than those which it had included in its list of documents over which it was claiming privilege. However, in its affidavit given in response to my questions about the nature of its search, the legal counsel swore that the "client file" was a complete file of the law firm's activities in the matter relating to the Applicant. While, as discussed further below, the Applicant provided evidence of a "missing" email, I accept the law firm's sworn evidence as evidence there were no other repositories for records relating to the Applicant other than this "client file", and that when the law firm initially claimed privilege over all records relating to the Applicant in response to his request, the claim was with respect to records in this file. When the law firm eventually created a list of records over which it was claiming privilege (in accordance the Protocol), it did not include records which it had already provided to the Applicant in the list, since, in its view, they were not subject to privilege because it had so provided them. Given that the law firm swore that the "client file" contained any records responsive to the request (which I take as evidence that this file contained all records relating to the Applicant that the law firm was able to locate), any records not on the Protocol list that it was able to locate are only those it had already provided.[4]

[para 32] In other words, I conclude that the law firm's list is a complete list of undisclosed records that it located that relate to the Applicant. This would include any records the Applicant has not already been given that relate to his performance, as well as any copies of 'original' records still in the law firm's possession. Further, to the extent that these were records which the Applicant's former employer had provided to the law firm so that it could prepare a defence to the Applicant's claim, they reveal the matters about which advice was being sought, and form part of the continuum of communications relating to that advice. (See Orders F2007-008 at para 11, F2008-016 at para 136, which hold that information supplied to legal counsel in order to give a factual background is part of the "continuum of communications" that is caught under the umbrella of seeking legal advice.) As such, any such records that were withheld were, consistent with my conclusions above, properly withheld on the basis of solicitor-client privilege.

[4] As discussed below, there is a remote possibility that the "missing" email was located, but not provided because the law firm did not regard it as the Applicant's personal information. However, as will be seen, I find it more likely that this email was not located, either because it was misplaced, or because it had never been printed and placed on the "client file".

Additional Concerns raised by the Applicant

The law firm's claim of privilege over records it subsequently provided

[para 33] As indicated in the statement of issues in a foregoing section of this order, this inquiry focused initially on the validity of the law firm's claim of legal privilege over the records it was continuing to withhold.

[para 34] The Applicant's request for review of November 23, 2009 raised a number of concerns (some of which are outside of the scope of the Act), but concluded as follows:

> In summary I requested access to all personal information in the control of BLG on February 6, 2009, they refused access to my information on March 12, 2009, it is only due to my persistence to obtain that to which I am entitled in law, that they have provided partial access.
>
> I therefore believe that BLG have failed in their obligation under PIPA and would confirm my request that your organization carry out an investigation in accordance with the Act.

Because the law firm's response to the request involved a denial of access to records that it regarded as privileged, the Applicant's request to have that response reviewed, and his assertion that the law firm had failed in its obligation under PIPA when it responded to his access request, were naturally understood as including an objection to the law firm's claim of solicitor-client privilege for the records it had located but was refusing to disclose. It was for this reason that the issue of whether privilege over the withheld records was properly claimed was included as an issue for this inquiry, and has accordingly been reviewed in the foregoing part of this order.

[para 35] However, in both his request for review and request for inquiry, and in his inquiry submissions, the Applicant stated that he had additional concerns about the law firm's response to his request, and in his submissions he stated that his concerns were not properly addressed in the Notice of Inquiry.

[para 36] The manner in which the Applicant worded his concerns has made it difficult to identify exactly what he wished to have addressed that was not addressed. For example, in his initial submission he made the following statement:

> 12. Clearly the respondent has denied access to my personal information under section 24(2) & (3), I have requested an inquiry regarding my access request, I would anticipate, for a fair inquiry that the original issues are addressed. I would have expected this inquiry to focus on the respondent's response to my access request and not their entitlement to withhold records unless they are pertinent to the respondent's denial of access.

Since in its response to his access request, the law firm stated that it was withholding all records relating to the Applicant in its possession on the basis of privilege, the part of the final sentence that precedes "and not" is difficult to reconcile with the part that follows.

[para 37] As well, the final part of the last sentence suggests that the law firm's claims of privilege should be examined where they are pertinent to the law firm's denial of access. It is therefore difficult to reconcile with the following statement in the Applicant's rebuttal:

> 1. … the Applicant did not seek to have the commissioner review the decision of the respondent to withhold from disclosure records that are protected by solicitor-client privilege. The Applicant sought an inquiry into BLG's [the law firm's] response to his access request.

Again, since the law firm's response involved a denial of access on the basis of privilege, initially with respect to all the records it regarded as responsive and ultimately with respect to most of them, and since it continued to maintain its claim of privilege for most of the records it eventually provided, the Applicant's meaning is hard to grasp.

[para 38] As well he stated:

> 8. … The Applicant sent a letter to the Commissioner requesting a review of the Respondents response to his access request. Specifically that certain documents that did not meet the criteria for legal privilege and had NOT been provided access.

[para 39] Still other parts of the Applicants submissions explicitly question whether privilege was properly applied to the records in the list provided by the law firm in accordance with the requirements of the Solicitor-Client Adjudication Protocol. For example, he stated:

> 31. The index [the law firm's list of withheld records] would suggest that some of the documents are referencing issues regarding the Applicant that are potentially NOT concerning the provision of legal advice.

[para 40] Possibly, with the exception of the point immediately preceding, these points can be understood to mean that the Applicant is mainly concerned not with the validity of the claim of privilege over the records the law firm is still withholding, but rather with the fact that the law firm initially claimed privilege for all records or information in its possession that it regarded as responsive to his request, but later provided some of these records to him (these are the records to which he refers as "the Documents" in his rebuttal submission). The Applicant takes from the fact that records were subsequently provided to him that the original "umbrella" claim of privilege was invalid, and he appears to argue in some parts of his submission that it is this aspect of the law firm's response that should be addressed in this inquiry.

[para 41] As well, his statement quoted at para 38 above may be referring to the fact that an email that the law firm sent to him (which therefore was not confidential and not subject to privilege) was not provided to him. (This email is referred to in the discussion in the section below, which relates to the adequacy of the law firm's search, as "Item 2". I will deal with it under that heading.)

[para 42] It is not usually the practice of this office to address the initial withholding of records where they are provided before or during the mediation phase of this office's processes. Doing so is not consonant with the scheme of the Act, which provides for a process for achieving a mediated outcome so as to avoid the need for inquiries, and is not, generally, a justifiable use of this office's resources. No meaningful remedy can be given in an inquiry with respect to records that have already been provided. Nonetheless, as the Applicant's objection is this regard is partly misconceived, I will comment briefly on the records that were initially withheld but later provided.

[para 43] One such objection is with respect to seven records that were initially withheld but were subsequently provided during the mediation process (on March 23, 2010). The Applicant maintains that initially withholding these documents was improper because they were not subject to solicitor-client privilege. However, the description of these documents in the letter in which they were conveyed to the portfolio officer (which was provided to me in the law firm's submission) reveals that most of them involve communications between the Applicant and employees of the organization or organizations with which he was having a legal dispute. I note that in providing these documents to the Applicant, the law firm did not make any concession that they were not subject to privilege. If, as seems likely, these documents were conveyed to the law firm by the employer organization or organizations as part of the material relative to which legal advice was being sought, they reveal the matters about which advice was being sought, and form part of the continuum of communications relating to the advice. (See Order F2007-008 at para 11; F2008-016 at para 136.) On that account, they would be subject to solicitor-client privilege in that context, even though in a different context and standing alone, they might not be. Thus even if I were minded to somehow deal with an initial withholding of documents that were subsequently disclosed prior to the inquiry, I would find this part of the Applicant's objection to be unfounded.

[para 44] The Applicant's objection in relation to the law firm's initial stance also relates to the email of September 21, 2008 that was authored by him, and the release that he signed, both of which were his personal information. The former document had been written by the Applicant, and the latter was presumably part of a settlement negotiated between the parties, so that neither consisted of 'legal advice', nor were they confidential. Thus I agree that the law firm's initial "blanket" claim of solicitor-client privilege, insofar as it was applied to these particular documents, was not supported by the Act. The same would be true of email communications sent by the law firm to the Applicant (though as to these, as I will explain below, since they were not primarily his personal information, the law firm was not obliged to provide them in any event).

[para 45] However, the law firm did provide the email of September 21 and the release, and did so prior to the Applicant's formal request for review. It is now fully compliant with the Act. Thus although the original claim of privilege over some responsive records may not have been merited, as these records have now been provided, there is no order which I can make against the law firm in respect of them.

Adequacy of the law firm's search for information

[para 46] The Applicant's concerns included that the Notice of Inquiry had not raised as an issue that particular emails which he knew to have been in the law firm's possession at one time had not been provided to him. In this regard, I noted that the Applicant's request for inquiry had involved the contention that the law firm ought to have located particular emails – which appeared on two pages to which the parties referred as Items 1 and 2.

[para 47] These emails were communications between the Applicant and a member of the law firm. Email correspondence between the law firm and the Applicant was the subject of a number of written exchanges between them subsequent to the request, and it appears that the law firm regarded the question of providing access to emails as having been resolved prior to the beginning of the mediation of this matter, on the basis that it had provided such records to the Applicant. However, the Applicant was not satisfied on this issue, and continued to maintain that certain emails had not been provided to him. For this reason, given the absence of any explanation as to why emails (which presumably existed at one point on the law firm's computer system) had apparently not been located, the adequacy of the search for the Applicant's personal information ought to have been identified as an issue for the inquiry.

[para 48] Accordingly, I asked the law firm to describe its search and to indicate whether it searched its computer systems, and if it had done so, why emails which had formerly existed on its email systems were not found.

[para 49] Prior orders of this office have held that, in general, evidence as to the adequacy of a search should cover the following points:

- the specific steps taken by the organization to identify and locate records responsive to the Applicant's access request;
- the scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.;
- the steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.;
- who did the search; and
- why the organization believes no more responsive records exist than what has been found or produced (see Orders F2007-029, P2009-005, P2010-010).

[para 50] The law firm began its response to my questions by pointing out that two of the three communications in the email string constituting Item 1 had in fact been provided (whereas one of the communications appears to have been removed from the page), and it provided evidence of correspondence in which this had been done. (There appears to be an error in the law firm's submission on this point: it indicates that it withheld the communication of September 17, 2008, which it did in fact provide, and that

it provided the communication dated September 22, 2008, which it actually withheld; however, it seems clear that the law firm had located the email chain that constitutes Item 1.)

[para 51] The law firm did not explain whether or (if not) why it had failed to locate the second missing email (which constitutes Item 2), nor why part of Item 1 is missing from the document it provided to the Applicant.

[para 52] In its response to my questions about its search, the law firm also stated its view that these emails did not constitute the Applicant's personal information on the basis that although they related to the Applicant – in the sense that they were communications to him – they were not the Applicant's "personal information" as this term has been defined in earlier orders of this office. The law firm described 'Item 2' as a statement by the lawyer of his view on a particular matter.

[para 53] As well, the law firm explained that it did not include Item 1 in its list created in accordance with the Solicitor-Client Privilege Adjudication Protocol because that list included only documents over which it was claiming privilege, whereas the email, as a document that had already been provided to the Applicant, was neither privileged nor was it, in the law firm's view, the Applicant's personal information.

[para 54] With respect to the nature of its search, the law firm provided an affidavit sworn by the lawyer who had acted for the client to whom the Applicant was opposed in interest in the legal matter.

[para 55] In this affidavit, by way of background, the lawyer stated that the law firm's initial response to the Applicant's request of February 6, 2009 (which had been given by the firm's privacy officer) had been based on the determination that the Applicant was connected to the law firm through its client. On this basis, the law firm had claimed solicitor-client privilege over the requested records.

[para 56] The lawyer also described a similar response – that any information relating to the Applicant was "obtained in connection with BLG's legal representation of [its] clients, or is otherwise protected by privilege" – that was given to a second request by the Applicant of June 23, 2009. However, he indicated that when the law firm responded to this effect in its letter to the Applicant of July 31, 2009, it invited the Applicant to provide greater precision as to the particular information he was seeking, to see if any accommodation could be reached. The lawyer described the second letter as requesting "specifics of requested documents so that it could be determined whether non-privileged items existed that could be disclosed".

[para 57] With respect to the law firm's mode of organizing and holding records, the lawyer explained that its client files completely document all activities on behalf of a client, and that all documents created or received in respect of a particular client file, including all paper correspondence and printed copies of emails, are kept in a paper format. The lawyer stated that at the time of his dealings with the related legal matter, he

did not maintain separate electronic folders of emails relating to his client. He also stated that (presumably at the time of the Applicant's request) the active client file was being stored on-site in the Calgary office.

[para 58] The lawyer further stated that in July of 2009, he instructed his assistant to obtain and provide to him the file relating to his client's dealings with the Applicant. He gave this file to the firm's privacy officer for review. He said that an electronic search was not conducted because "that was not consistent with the manner in which the Client's file was maintained at the time".

[para 59] The lawyer further attested that in August, 2009, the Applicant provided further details as to the documents he was requesting (emails dated approximately September 2008 sent to him or by him, and a copy of a release signed by him), and that on November 12, 2009 the law firm provided, from the client's file, an email from September 2008 sent by the Applicant to the law firm (this is presumably the attachment to the November 12 letter, constituting parts of Item 1), as well as the release. The lawyer added that to the best of his knowledge, no further documents had been added to the file prior to the beginning of the review by this office.

[para 60] As already noted, the law firm did not explain whether it had located the email (dated September 30, 2008) that constitutes Item 2 and had decided not to provide it to the Applicant, or whether it did not locate this email. It would have been helpful had it clarified which of these was the case. It also provided no clarity as to why a portion of Item 1 in the copy of this document that it gave to the Applicant was missing (though it stated its view that this portion was not the personal information of the Applicant). I agree with the Applicant that an affidavit of the law firm's privacy officer as to whether he located the September 30, 2008 email when he reviewed the client file, and as to whether the law firm had redacted a portion of Item 1, would have been preferable.

[para 61] Despite this, however, I am able to determine that the search was adequate, for the following reasons.

[para 62] One possibility is that the law firm did not locate Item 2. This possibility is suggested by the content of the email, which is a communication from the lawyer to the Applicant asking him a question. As the law firm would have been aware that this record had already been sent to the Applicant, it might be supposed that it would have seen no reason for withholding it, and it is to be inferred from this that it did not locate it. Similarly, there is seemingly no reason why it would not now bring the document forward for discussion.

[para 63] However, if this is the right inference, I presume this is attributable to the fact that the email was never copied from its electronic format and placed on the paper file, or that this had been done but it was removed or misplaced prior to the search. Given that the number of documents is not voluminous (less than 70), it does not seem likely that the paper copy of the email existed on the file but that it was not located by the privacy officer when he reviewed the file, and has not been located since (although this does exist

as a remote possibility). I conclude, on a balance of probabilities, that if Item 2 was not found, this is not because the law firm did not conduct an adequate search for it, but because it did not exist on the paper file, so that no amount of searching in that location would have retrieved it.

[para 64] The other possibility is that Item 2 was located but has been withheld. I note that the part of Item 1 which the law firm presumably did locate, but which seems to have been redacted from the page (the part of the email chain consisting of a communication to the Applicant from the lawyer on September 22, 2008) is, similarly, a question that the lawyer is asking the Applicant. This possibly suggests that, as it seems likely happened with the communication of September 22 that constitutes part of Item 1, Item 2 was located but not provided. However, even if this is the correct inference, this would indicate that the search cannot be faulted, since the record was found.

[[para 65] I note that the Applicant has mentioned that a search of electronic records should have been done. However, I accept the sworn evidence of the lawyer that the practice at the relevant time was to make paper copies of emails and to place them on the file, rather than to retain electronic copies. (In this regard, I assume that what appears to be a redaction of the September 22, 2008 communication in Item 1 was done manually from the existing paper record). Given this, an electronic search would have been fruitless.

[para 66] Similarly, I accept that any references to the Applicant would normally have been found only in the file relating to the law firm's client, and that this was the reasonable place to look for it. Possibly Item 2 had gone astray somehow, but I do not believe it would have been reasonable for the law firm to undertake a broader search, given its system of keeping all related documents in a single location (a client file). As the law firm points out by reference to earlier decisions of this office, a search does not have to be perfect; it has only to be reasonable. (See Order P2011-001 at para 25.) It would not have been reasonable, in my view, to search other client files or other locations in the law firm's offices. On this basis, I find the law firm's search was adequate even if it is the case that it failed to locate Item 2.

[para 67] Moreover, I agree with the argument of the law firm that the information in the missing emails, which are questions that were put to the Applicant, is not, for the most part, the personal information of the Applicant. The emails are about the strategy of the sender with regard to the matter at hand; they are not primarily 'about' the Applicant. This conclusion is in accord with my conclusions in P2011-D-003, at paras 29 to 30, which have already been quoted above.

[para 68] I acknowledge in saying this that the emails sent by the law firm to the Applicant implicitly reveal that he was involved in the matter, and implicitly contain some information as to the nature of his involvement. The fact he was so involved is the Applicant's personal information, and if the emails were disclosed to some third party, that would incidentally disclose the fact and nature of his involvement.

[para 69] However, the Applicant is fully aware of the nature of his involvement in the matter that is the subject of the emails. In the context of the Applicant's access request under PIPA for his own personal information, what is revealed by implication in the emails about his involvement in the matter would not reveal anything to him that does not already know, and thus would provide nothing meaningful to him. In view of this, it would not be reasonable to require the law firm to provide it. Section 24(1) of PIPA, both in its recently-amended and earlier versions, permits an organization to take into consideration what is reasonable in responding to an access request.

[para 70] The point that information in the emails is mainly not personal information of the Applicant does not speak directly to the adequacy of the search, since the appropriate first step in the search would be for all records associated with the Applicant, followed only thereafter by determination of which parts of such records consisted of his personal information. However, even had I found the search to be inadequate because it failed to locate the emails, the fact the Applicant was not entitled to them because they were not primarily his personal information would mitigate the seriousness of the failure.

[para 71] Conversely, if the correct explanation is that such emails were found but not provided, I uphold the law firm's decision to withhold on the basis that any personal information that can be derived from them by implication is not meaningful in the present context, and it would not be reasonable to require the law firm to provide it. As I have said, the substantive parts of the emails, even if meaningful to the Applicant, are not his personal information.

[para 72] I note that previous orders of this office have held that when a public body or organization conducts a search and fails to locate records that it appears ought to have been located, part of its duty to the applicant is to explain why such records were not located. (See Order F2007-029 at para 66, Order P2009-005 at para 60.) While at the time the adequacy of the search issue was raised, the matter had already come to inquiry and it was too late to give the explanation directly to the Applicant, the law firm could have given this explanation (if it had in fact not located the document) in its response to my questions about its search. Having said this, however, I also take the law firm's point that it does not make sense to make adverse findings against it in respect of its fulfillment of its duties to give explanations to the Applicant where it had no duty to provide any such 'missing' documents to the Applicant.

[para 73] Before leaving the topic of the search, I will address some other points raised by the Applicant when he made his submissions on this question.

Email address as personal information

[para 74] The Applicant appears to think that the law firm is arguing that emails are not his personal information because they were sent to an email address that did not contain the Applicant's own name. This is not what the law firm argued – rather, it was arguing that the content of the emails was not "about" him in the sense required for information to be personal under the Act. (With respect to the email address itself, while this may be his

personal information (even though not using his name), I do not believe the Applicant was asking for his email address. Even if he were, I do not believe the law firm is obliged to provide it to him, as in this context, it would be a meaningless or insignificant snippet of information. Earlier orders of this office have held that there is no obligation to provide information of this type. (See Order F2004-026, Decision P2011-D-003).)

Retention of records by the law firm

[para 75] I turn to the Applicant's contention that if the explanation for the failure to provide certain records was that the law firm had not retained them, this was in violation of the Act and "evidentiary regulations" and "Canadian civil rights law". I have no jurisdiction under PIPA to direct an organization as to what records it is required to retain. PIPA's records retention provisions address only the duty to destroy or de-identify personal information that is no longer required, not a duty to retain it. The Applicant has not mentioned any other law that I might apply in this regard.

Duty of the law firm to advise the Applicant of his rights

[para 76] In both his initial and rebuttal submissions, the Applicant raised the point that the law firm is obliged by the Act to advise him of his rights in the event it denies access, and that it failed to do so. The Act contains such a requirement in section 29, which provides in part:

> *29(1) In a response to a request made under section 24(1)(a), the organization must inform the applicant*
>
> *…*
>
> *(c) if access to all or part of the applicant's personal information is refused,*
>
> *(i) of the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) of the name of the person who can answer on behalf of the organization the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may ask for a review under section 46.*[5]

[para 77] The initial letter from the law firm to the Applicant of March 12, 2009 explains why it is withholding records, but contains no information meeting the requirements of section 29(1)(c)(ii) and (iii). I acknowledge that in the subsequent exchanges between the Applicant and law firm, the law firm was indicating either a willingness to try to accommodate the Applicant, or its belief that it had satisfied the Applicant's requests and that he was no longer seeking the records it had chosen to withhold. In the subsequent correspondence, therefore, such information would not have been appropriate. However, this point does not apply to the initial letter.

[5] The amendments to the Act that came into force in May, 2010 changed this provision slightly from its former version, by adding "(1)(a)" after "section 24".

[para 78] However, this matter was not raised in the Applicant's request for review of November 23, 2009, nor in his request for inquiry of April 29, 2010, and it was not included in the Notice of Inquiry. I note the Applicant did raise it in his initial submission, but I did not add it as an issue to the inquiry given the late stage of the proceedings. Given that the law firm was not asked to respond to this concern of the Applicant, I will not make a finding against it in this case. However, I do note that on its face the law firm's initial response letter does not meet the Act's requirements, and remind organizations of their obligations to comply with the all of the terms of section 29.

Earlier decisions involving the Applicant

[para 79] The Applicant's submissions also involve points relating to his view that earlier inquiries involving him were not properly decided. I have no jurisdiction to consider these points or to revisit the decisions in these matters in the present inquiry.

Concerns regarding impartiality

[para 80] As well, the Applicant raises a concern regarding "communication between OIPC and BLG", commenting that "the correspondence would appear to show that [he] is not being made aware of certain communications between OIPC and BLG", which in his view "would show a certain disposition between OIPC and BLG, that raises questions with regard to impartiality". He also adverts to his previous advice of a "potential conflict of interest between OIPC and BLG". As the Applicant gives no further specifics or descriptions of the correspondence to which he is referring, I can make no comment about this concern.

Addition of section 4(3)(k) as an issue

[para 81] I turn finally to the Applicant's objection to the fact that section 4(3)(k) was added as an issue in the inquiry though it had not been relied on by the law firm. I have no jurisdiction over records which are covered by the terms of this provision. Therefore, it is mandatory that I consider the possible application of this section in situations in which there are records to which it might apply.

V. ORDER

[para 82] I make this Order under section 52 of the Act.

[para 83] I confirm the decision of the law firm to withhold the personal information of the Applicant that it has continued to withhold on the basis of solicitor-client privilege.

[para 84] I find that the law firm conducted an adequate search for documents containing the Applicant's personal information.

[para 85] In the event the law firm located but withheld emails it sent to the Applicant asking him questions, I confirm the decision of the law firm to withhold these emails.

Frank Work, Q.C.
Information and Privacy Commissioner