

Federal Court



Cour fédérale

Date: 20161019

Docket: T-924-14

Citation: 2016 FC 1167

Ottawa, Ontario, October 19, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ANTON OLEYNIK

Applicant

and

**THE OFFICE OF THE PRIVACY
COMMISSIONER OF CANADA**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Dr. Anton Oleynik, is an Associate Professor of Sociology at Memorial University in St. John's, Newfoundland and Labrador. He has brought an application under section 41 of the *Privacy Act*, RSC 1985, c P-21 [the *Act*] for review of the response by the Office of the Privacy Commissioner of Canada [OPC] to the Applicant's request dated January 30, 2013, for the following personal information:

“All the documents in the custody and control of the OPC that contain my name {(OLEINIK or OLEYNYK)}. Their [*sic*] list

includes, but not limited to, e-mail exchanges and attached documents. Hence, I request that a search on the OPC back up email server is conducted.”

I. Background

[2] The genesis of this application stems from the Applicant being denied a research grant from the Social Sciences and Humanities Research Council [SSHRC]. Since that denial, some nine years ago now, the Applicant has made numerous requests for access to information and has also initiated court proceedings not only in this Court but in other courts in Quebec, Alberta, and Newfoundland and Labrador.

[3] In September 2008, the Applicant submitted a complaint to the OPC about an access to information request he had made to the SSHRC. After the OPC determined that his complaint was not well-founded, the Applicant commenced an application in this Court under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of the OPC’s decision; that application, however, was dismissed on November 7, 2011, and the Federal Court of Appeal dismissed the Applicant’s appeal on September 4, 2012 (see: *Oleinik v Canada (Privacy Commissioner)*, 2011 FC 1266 [*Oleinik 2011*]; aff’d 2012 FCA 229).

[4] In June 2011, the OPC received a second complaint from the Applicant about the SSHRC, alleging that the SSHRC had not provided him with all personal information to which he was entitled. Prior to completion of the OPC’s investigation into this second complaint, the Applicant submitted a request for personal information to the OPC dated December 2, 2011 [the First Request], asking for “all documents in the custody and control of the OPC” containing his

name, including “e-mail exchanges and attached documents” as well as information stored on the OPC’s back-up e-mail server. After the OPC had issued its report dated December 16, 2011, concerning the second complaint against the SSHRC, the Applicant made a second request to the OPC dated January 5, 2012 [the Second Request]; this time he asked for all documents the OPC had created in the course of investigating the second SSHRC complaint. The OPC responded to this Second Request on January 6, 2012, informing the Applicant that the requested information could not be disclosed under section 22.1 of the *Act* since the time period had not expired for making an application to the Federal Court under section 41 of the *Act* to review the OPC’s response to the second complaint against the SSHRC.

[5] The OPC responded to the Applicant’s First Request in a letter dated January 26, 2012, disclosing certain information to the Applicant but withholding other information under sections 22.1, 26 and 27 of the *Act* and also under subsection 12(1) since it did not constitute personal information of the Applicant. The OPC further informed the Applicant in this letter that no search of its back-up e-mail servers had been conducted since it did not consider this information as being reasonably retrievable.

[6] The response letters from the OPC to the Applicant’s first two requests for information each noted that he was entitled to file a complaint concerning the processing of his requests with the “Privacy Commissioner of Canada, Ad Hoc” [the PCAH]. However, the Applicant chose instead to question the OPC’s processing of his requests in this Court by commencing an application for judicial review on February 2, 2012, challenging the OPC’s report concerning his second complaint about the SSHRC and also asking for an order directing the OPC to give him

access to his personal information in the OPC's custody and control. In response to this application, the OPC initiated a motion to strike out the Applicant's application for judicial review. Prothonotary Aalto struck out the application for judicial review without leave to amend on January 17, 2013, finding that the application was an abuse of process insofar as it related to the OPC's report concerning the SSHRC and also that the Applicant had not exhausted the administrative remedies available to him to make a complaint to the PCAH concerning the OPC's refusal to disclose all of the information requested by him (see: *Oleinik v Canada (Privacy Commissioner)*, 2013 FC 44, 425 FTR 228 [*Oleinik 2013*]).

[7] After the Applicant's application for judicial review was struck out, he sent a third request to the OPC dated January 30, 2013 [the Third Request], again asking for "all documents in the custody and control of the OPC that contain my name {(OLEINIK or OLEYNYK})", including "e-mail exchanges and attached documents", and again requesting that a search of the OPC's back-up e-mail server be conducted. In responding to this Third Request, the OPC notified the Applicant on February 27, 2013, that an additional thirty days would be required to comply with the request. The Applicant complained about this delay in a letter dated March 6, 2013. John Sims, the PCAH, replied to this letter with a letter dated March 12, 2013, advising the Applicant that he would begin an investigation.

[8] In a letter dated April 2, 2013 [the Decision], the OPC disclosed certain information to the Applicant but also withheld other information, stating in part that:

We have now completed the processing of your request. Paragraph 12(1)(b) of the *Privacy Act* (the "Act") states that the individual that has made the request for access to personal information "provide sufficiently specific information on the

location of the information as to render it reasonably retrievable by the government institution”. With respect to your request that our Office conduct a search of back-up servers, it is the position of this Office that the information on back-up tapes/servers is not considered “reasonably retrievable” and that the purpose of the back-up system is only for disaster recovery. For that reason no such search was conducted. [Emphasis in original]

Please find enclosed a copy of the records responsive to your above-noted request. You will note that certain information has been withheld from disclosure. This information has been withheld pursuant to sections 26 (information about another individual), 27 (solicitor-client privilege) and 22.1 (information obtained by the Privacy Commissioner) of the Act. In instances where we have cited subsection 12(1) of the Act, the information does not constitute your personal information under the Act. As the Director of Access to Information and Privacy, and as an authorized delegate for decisions rendered under sections 26 and 27 of the Act, I decided the applicability of the above-noted exemptions and exercised my discretion where required.

Subection [sic] 12(1) of the Act allows you the right to request access to your personal information. In *Mislan v. Canada (Minister of Revenue)*, 1998 FC 704, the Federal Court held that this right is not absolute and the “paramount power is the discretionary power granted to the head of the government institution”.

The information withheld under section 26 meets the definition of personal information about another identifiable individual as defined in section 3 of the Act. In balancing any competing interests involved in applying this exemption, I am of the view that protecting the personal information of other individuals in no way obstructed your rights to access your personal information. In all cases, the information appeared on the same page or within the same document as your personal information.

The information withheld under section 27 met the requirements of solicitor-client privilege as set out in the jurisprudence of the Supreme Court of Canada, including *Solosky v. the Queen* (1979), [1980] 1 S.C.R. 821 and *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319. The exchanges that included legal advice provided by lawyers from our Office or any legal agents were intended to be confidential. ...

You are entitled to file a complaint concerning the processing of your request. Should you decide to avail yourself of this right, please address your complaint to:

Privacy Commissioner of Canada, Ad Hoc
Suite 229-99 Fifth Avenue
Ottawa, ON K1S 5P5

[9] The affidavit dated July 11, 2014 of Andréa Rousseau Saunders, the OPC's Chief Privacy Officer, states that the Applicant's Third Request generated 17,842 pages of information that were responsive to the request. This documentation included information provided by the OPC to the Applicant in response to his First Request as well as additional information subsequent to the date of the First Request up to the date of the Third Request. Of the 17,842 pages which contained responsive information, 15,131 pages were released to the Applicant without redaction, 456 pages were released with certain portions redacted, and 1,923 pages were withheld entirely from the Applicant; the remaining pages were deemed to be duplicates or not relevant.

[10] Shortly after the Applicant's receipt of the OPC's response to his Third Request, he wrote to the PCAH complaining about the OPC ignoring statutory deadlines, its unwillingness to search back-up tapes despite his willingness to pay for the costs of the search, and the OPC's application of statutory exemptions to withhold certain information from him. Ultimately, the PCAH found the Applicant's complaints about the OPC and its processing of his Third Request for information to be not well-founded in his reports of findings dated July 10, 2013, October 22, 2013, and February 15, 2014.

[11] Following receipt of the PCAH's report dated February 15, 2014, the Applicant initiated the present application under section 41 of the *Act* on April 16, 2014. He also filed a statement of claim in this Court on June 6, 2014, seeking damages as against the Attorney General of Canada based, in part, upon alleged breaches of the *Act* and the *Access to Information Act*, R.S.C. 1985, c. A-1, in relation to his application for a grant from the SSHRC. The Attorney General's motion to strike out this statement of claim succeeded on August 13, 2014, with the Court finding that the claim failed to disclose a reasonable cause of action (see: *Oleynik v. Canada (Attorney General)*, 2014 FC 896, 464 FTR 114).

II. Issues

[12] Although the parties have raised and stated various issues to be considered on this application, in my view the pertinent issues to be addressed boil down to the following four questions:

1. Can the reports of the PCAH be reviewed on this application under section 41 of the *Act*?
2. What is the appropriate standard of review?
3. Was the OPC's determination that information on its back-up tapes or servers was not "reasonably retrievable" reasonable?
4. Did the OPC err in refusing access to certain information by virtue of subsection 12(1) or sections 22.1, 26, or 27 of the *Act*?

III. Analysis

A. *Can the reports of the PCAH be reviewed on this application under section 41 of the Act?*

[13] By virtue of Rule 302 of the *Federal Courts Rules*, SOR/98-106, unless the Court orders otherwise, an application for judicial review normally may be made in respect of only one decision (see: *Canada (Prime Minister) v. Khadr*, [2010] 1 FCR 73 at para 36, 2009 FCA 246). In this case, however, the Applicant raises various questions and concerns about not only the OPC's Decision, but also the PCAH and his findings and reports. Furthermore, the relief sought by the Applicant is a mixture of requests regarding the OPC and the PCAH. The Applicant's central complaint though appears to be with respect to the OPC's Decision and not the PCAH and his findings and reports. Although he requests the certification of a question concerning the operation and independence of the PCAH, the Applicant's primary request for relief concerns the OPC's refusal to provide certain information as well as its refusal to check its back-up tapes; those matters relate to the OPC's Decision and not to the PCAH and his findings and reports.

[14] Accordingly, in my view it is only the OPC's Decision, rather than the PCAH's reports and findings, which is the decision to be reviewed on this application under section 41 of the *Act*. Indeed, the Applicant himself acknowledges as much in the first paragraph of his Notice of Application where he states that he applies for judicial review in respect of the OPC's response to his access request on April 2, 2013 (though he later refers to the "decision" that was communicated to him as being the report of findings of the PCAH which was communicated to him on March 3, 2014).

[15] Furthermore, and more to the point, it is my view that this Court does not have jurisdiction under section 41 of the *Act* to review the findings and reports of the PCAH; this section states that:

**Review by Federal Court
where access refused**

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.

**Révision par la Cour
fédérale dans les cas de refus
de communication**

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.

[16] In the circumstances of this case, the OPC itself was the government institution which refused to disclose certain information; the PCAH and his reports performed the role that would have otherwise and usually been performed by the OPC had it been a government institution other than the OPC which had refused to disclose certain information. Case law has clearly established that the findings and report of the OPC, or in this case the PCAH, concerning an institution's refusal to disclose certain information are not binding upon a government institution (see: *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227 at para 75, 438 NR 280 [*Leahy*]), although they are an important consideration in a review by this Court under section 41

of the *Act* (see: *Canadian Association of Elizabeth Fry Societies v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 470 at para 44, [2011] 3 FCR 309). Moreover, the OPC's findings and report concerning a government institution's refusal to disclose certain information are not open to review under section 41 of the *Act* since it is the government institution, not the OPC, which is required to justify a refusal to disclose certain information. In this regard, it is appropriate to recall the Court's words in *Oleinik 2011*, where Justice Rennie (as he then was) stated:

[7] As Justice Tremblay-Lamer stated in *Keita v Canada (Minister of Citizenship and Immigration)*, 2004 FC 626 at para 20: "The validity of the [Privacy] Commissioner's recommendations is not subject to the Court's powers of review. The precedents on this point are clear and ample." In reaching this conclusion Justice Tremblay-Lamer relied on the decision of the Federal Court of Appeal, in *Canada (Attorney General) v Bellemare*, [2000] FCJ No 2077 (FCA) at paras 11-13, which involved allegations lodged against the Information Commissioner similar to those lodged by the applicant herein against the Privacy Commissioner. Noël J.A. held:

Section 41 does not provide for a recourse against the Information Commissioner (*Wells v. Canada (Minister of Transport)*, T-1729-92, April 19, 1993 [(1993), 48 C.P.R. (3d) 312 (Fed.T.D.)]).

[...]

In short, the Court has no jurisdiction, pursuant to section 41, to conduct a judicial review of the Information Commissioner's findings and recommendations. It was therefore not open to the motions Judge to allow the application for judicial review to continue.

[17] The PCAH's findings and reports in this case, therefore, cannot be reviewed under section 41 of the *Act*; in my view, they are analogous to those which the OPC could or might have made had a government institution other than the OPC refused to disclose certain

information. It should be noted, however, that this conclusion does not oust or remove the Court's jurisdiction to review findings and reports of the PCAH or any breach of procedural fairness in an investigation by the PCAH. The PCAH has been delegated many of the Privacy Commissioner's powers, duties and functions in order to carry out the OPC's review function when the OPC is the government institution which has refused to disclose certain information. How the PCAH has exercised such delegated authority could be open to judicial review by way of a separate application under section 18.1 of the *Federal Courts Act*.

[18] In this case, the Applicant did not directly challenge the findings and reports of the PCAH by way of a separate application for judicial review under section 18.1 of the *Federal Courts Act*, and he cannot indirectly do so now in the context of this application under section 41 of the *Act*. It may well be, as the Court noted in *Oleinik 2013* (at para 24), that the PCAH may not be completely independent inasmuch as the PCAH is appointed by the Privacy Commissioner and not by Parliament; but that is not the issue now before the Court and, in any event, that is a matter which would need to be addressed by a branch of government other than this Court.

B. *What is the appropriate standard of review?*

[19] In addressing this issue, I begin by noting that in its seminal decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court of Canada collapsed the variants of reasonableness review into a single form of "reasonableness" review, with the result that judicial review now comprises two standards of review: correctness and reasonableness.

[20] As to the reasonableness standard of review, the Supreme Court stated in *Dunsmuir* that:

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[21] The Supreme Court further stated in *Dunsmuir* with respect to the correctness standard of review that:

[50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[22] In this case, the appropriate standard of review in respect of the OPC's Decision is dependent on the two substantive aspects of the Decision, the first being the OPC's refusal to search its back-up servers and the second being its application of various statutory exemptions to refuse disclosure of certain information to the Applicant. Each of these aspects engages a different standard of review.

[23] As to the OPC's refusal to search its back-up servers, this involves a question of statutory interpretation concerning the meaning of "reasonably retrievable" under paragraph 12(1)(b) of the *Act*. There is some case law which suggests that correctness is the appropriate standard for review of a refusal to disclose information under section 12. For example, in *Murchison v Export Development Canada*, 2009 FC 77, 354 FTR 18 [*Murchison*], Justice Zinn concluded as follows:

[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.

[24] The correctness standard of review was applied in *Murchison* because the government institution in that case had refused to disclose certain information on the basis of its interpretation of what constituted "personal information" under section 12 of the *Act*. The same standard was also applied in *Canada (Information Commissioner) v RCMP Commissioner*, [2003] 1 SCR 66, 2003 SCC 8 [*RCMP Commissioner*], a case where the RCMP Commissioner had refused to disclose certain records based on his interpretation of what constituted "personal information" as defined by section 3 of the *Act*.

[25] The circumstances of this case, however, are distinguishable from those in *Murchison* and *RCMP Commissioner* because the government institution that denied disclosure of certain information in this case is the OPC. In my view, the OPC's interpretation of the words

“reasonably retrievable” under section 12 of its home statute should be adjudged and assessed against a reasonableness standard of review. A standard of reasonableness presumptively applies because the OPC was interpreting its home statute: *Alberta (Information & Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61 at para 30, [2011] 3 SCR 654 [*Alberta Teachers*]. The OPC has expertise in the matter and, accordingly, is entitled to due deference (see: *Dunsmuir*, at paras 54, 68 and 124; *Alberta Teachers* at para 39; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 13, [2011] 3 SCR 708; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para 24, [2011] 3 SCR 471; and *John Doe v Ontario (Finance)*, 2014 SCC 36 at para 17, [2014] 2 SCR 3). The OPC’s interpretation of “reasonably retrievable” does not involve a question of law central to the legal system, and there is no compelling reason to displace the presumption that a standard of reasonableness applies to this aspect of the Decision.

[26] Accordingly, I conclude that the OPC’s interpretation of “reasonably retrievable” and its decision not to search its back-up servers should be reviewed on a standard of deferential reasonableness. This conclusion accords with that of the Federal Court of Appeal in *Leahy* where the decision by the government institution in that case to restrict the scope of its search for information to one location was assessed and reviewed on a standard of reasonableness (see *Leahy*, at paras 100 and 109).

[27] As to the OPC’s application of various statutory exemptions to refuse disclosure of certain information to the Applicant, the jurisprudence shows that there is a two-step process of

review. This process was summarized by the Court in *Braunschweig v Canada (Public Safety)*, 2014 FC 218, 449 FTR 252, where Justice Noël stated:

[29] When a Court is called upon to review a government institution's decision not to disclose personal information, it must undertake a two-step process. It must first determine if the information sought falls within the description of the exempt information under the applicable provision of the Act, and this first portion is reviewable under the standard of correctness. If found to be correct then the Court must determine whether the government institution has appropriately exercised its discretion not to disclose the information in question. This second portion of the process must be reviewed following the standard of reasonableness (*Barta v Canada (Attorney General)*, 2006 FC 1152 at paras 14-15, [2006] FCJ No 1450; see also *Leahy v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227 at paras 96-100, [2012] FCJ No 1158)....

[28] Accordingly, the OPC's assessment in this case of whether certain information constituted exempt information under an applicable provision of the *Act* attracts review on the standard of correctness; but whether the OPC appropriately exercised its discretion not to disclose certain information attracts review on the standard of reasonableness.

C. *Was the OPC's determination that information on its back-up tapes or servers was not "reasonably retrievable" reasonable?*

[29] The Applicant argues that copies of e-mails and information on back-up systems are discoverable in legal proceedings, and that information retrieval from back-up tapes is readily available. According to the Applicant, the question is whether the difficulties in retrieving information from back-up systems can be dealt with at a reasonable cost. The Applicant proposes various solutions to deal with the cost of such retrieval and points to decisions by provincial privacy commissioners which show that back-up records should and can be searched.

[30] For its part, the OPC argues it was reasonable in light of the Applicant’s broad request for information that it refused to search its back-up systems because the cost and effort would be excessive. According to the OPC, the phrase “reasonably retrievable” in paragraph 12(1)(b) and subsection 13(1) of the *Act*, and particularly the French version “puisse les retrouver sans problèmes sérieux,” suggests that “reasonably retrievable” relates not simply to whether a document can be located but, rather, requires consideration of whether the document is retrievable with reasonable, not excessive, effort. In the circumstances of this case, the OPC says it was reasonable to refuse to search its back-up systems since there was no evidence to show that there was additional information on the back-up.

[31] Subsection 12(1) of the *Act* provides as follows:

Right of access

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

(a) any personal information about the individual contained in a personal information bank; and

(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

Droit d'accès

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) les renseignements personnels le concernant et versés dans un fichier de renseignements personnels;

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

specific information on the location of the information as to render it reasonably retrievable by the government institution.

suffisamment précises pour que l'institution fédérale puisse les retrouver sans problèmes sérieux.

[32] Was it reasonable for the OPC in this case to determine that information on its back-up systems was not “reasonably retrievable” or, according to a literal translation of the French version, “retrievable without serious difficulties”?

[33] On the whole, and based on the evidence in the record, I find that it was reasonable in the circumstances of this case for the OPC to determine that information on its back-up systems was not reasonably retrievable. The evidence shows that acceding to the Applicant’s broad request that the OPC’s back-up e-mail server be searched would have required reimaging or restoring all of the OPC’s servers and not just e-mails in in-boxes on its back-up tapes; the OPC’s back-up tapes are used for disaster recovery purposes. Moreover, there is no evidence that there was any additional or deleted information on the OPC’s back-up systems; and, it also warrants note, that the PCAH found in his report dated February 15, 2014, that the Applicant’s complaint about the OPC’s failure to search its back-up tapes was not well-founded.

[34] The burden was upon the Applicant to provide sufficient information about his requested information in order to make it “reasonably retrievable” by the OPC. The Applicant did not specify the dates or recipients of the e-mails he sought in his request to the OPC to search its back-up e-mail server. The Applicant may have supplied a sufficiently specific location for the requested information, but that does not necessarily or automatically make any such information “reasonably retrievable.” A personal diary which slips from its owner’s hands into the ocean

from the deck of a cruise ship en route across the Atlantic Ocean would not be reasonably retrievable despite the fact that all who witnessed the mishap know the location or place where the diary was lost.

[35] Before leaving this issue, it is necessary to add a few comments as to the thoroughness of the OPC's searches for information in response to the Applicant's Third Request for information. The Applicant contends that the OPC's search for documents was not thorough or complete, and he points to several documents the OPC apparently missed since they were not included among those released to him. The OPC argues that unless there is evidence of deficiency in the search or that a search was unreasonable, the Court should not intervene; according to the OPC, the standard by which the adequacy of its search for documents should be assessed is, in view of *McBreairty v College of the North Atlantic Board of Governors*, 2010 NLTD 28 at para 43, 293 Nfld & PEIR 321, not one of perfection but "all reasonable effort." In my view, however, it is not necessary to determine the standard to which the OPC should be held in respect of its searches in response to a request for information because the evidence offered by the Applicant in this regard is insufficient to show that the searches for information in this case were significantly deficient or unreasonable.

D. *Did the OPC err in refusing access to certain information by virtue of subsection 12(1) or sections 22.1, 26, or 27 of the Act?*

[36] Whether the information exempted by the OPC in response to the Applicant's Third Request for information falls within one of the statutory exemptions is a *de novo* review and the standard of review, as noted earlier, is that of correctness. The OPC's exercise of discretion

whether to exempt certain information from disclosure is subject to review on a standard of reasonableness. Furthermore, the OPC bears the burden of justifying non-disclosure of certain information in this case (see: *Layoun v Canada (Attorney General)*, 2014 FC 1041 at para 22).

[37] The Applicant identifies more than 100 questionable exemptions invoked by the OPC. The OPC states that the exemptions were properly applied. The OPC withheld certain information from the Applicant by virtue of subsection 12(1) and sections 22.1, 26, and 27 of the *Act*. In this case, the OPC determined that some 1,923 pages should be withheld entirely from the Applicant and another 456 pages should be partially released to him.

[38] The Court has reviewed in detail all of the information withheld from the Applicant to determine whether it was correctly and reasonably not disclosed to him by the OPC. Although there is some discrepancy between the name and numbering of the .pdf files on the CD attached as Exhibit “F” to the public affidavit of Andréa Rousseau Sanders (which CD contains all of the information released to the Applicant), and those .pdf files on the CD attached to her confidential affidavit dated August 13, 2014 (which CD contains all of the information released to and also withheld from the Applicant), this discrepancy has not prevented the Court from identifying and reviewing the exempted information (albeit requiring more time than should have been the case). Attempts to resolve this discrepancy subsequent to the hearing of this matter were unproductive, not the least because of several errors identified by the Applicant in the cross-referencing chart and an additional CD of Exhibit “F” provided by OPC’s counsel. Accordingly, the Court has ignored that chart and the additional CD of Exhibit “F” which contains the disclosed information in one continuous .pdf file (rather than numerous .pdf files as on the initial CD). The Court has

thus restricted its review to the documentation as contained on the CD filed as Exhibit “F” and that on the confidential CD.

[39] The OPC’s reliance upon the four provisions of the *Act* noted above to withhold information from the Applicant will be sequentially addressed below. Before doing so, however, one page of the documentation released to the Applicant should be mentioned. On page 606 of Exhibit “F” certain information has been redacted without a corresponding reference to a section of the *Act* justifying such redaction. The same information has also been redacted from the confidential copy of this page, so it is impossible to determine whether this information should or should not have been withheld. Nevertheless, since the redacted information is contained in an e-mail from the Applicant to Ms. Rousseau Saunders dated January 16, 2012, the Applicant is presumably aware of what information is contained in the redacted portion of this e-mail released to him.

(1) Subsection 12(1)

[40] The Applicant asserts that the OPC improperly utilized subsection 12(1) of the *Act* to safeguard litigation-privileged documents. For its part, the OPC argues that a person’s name in and of itself is not personal information; it only becomes such when linked to other information relating to the individual, or if disclosure of the name itself would reveal information about the individual. According to the OPC, the Applicant does not have a right to access all records that contain his name, but only those records that have information about him in addition to his name. Subsection 12(1), the OPC says, is not so much an exemption from disclosure as it is, instead, a

parameter for access to information; thus, information withheld by virtue of this provision is information that was not the Applicant's personal information.

[41] The Applicant points to an e-mail dated March 15, 2011, at page 10839 of the disclosed information, suggesting that the redacted portions likely include views or opinions of another person about him, and that this constitutes his personal information. I disagree for two reasons.

[42] First, the redacted portions of this particular e-mail do not constitute personal information of or about the Applicant because his name appears in this document only as a reference to a case involving him (*Oleynik v Newfoundland and Labrador (Information and Privacy Commissioner)*, 2011 NLTD(G) 34) which the OPC relied upon in a court proceeding unrelated to the Applicant; the attachments to this e-mail do not constitute personal information of the Applicant because they comprise correspondence between counsel and copies of case law filed in that other proceeding.

[43] Second, just because a document may contain the Applicant's name does not necessarily or automatically mean that it constitutes "personal information" within the broad definition of personal information contained in section 3 of the *Act*; there must be something beyond a person's mere name that makes the information individualized or personal to that person "where it appears with other personal information relating to the individual [such as his or her age or address] or where the disclosure of the name itself would reveal information about the individual".

[44] It is true, as the Applicant points out, that many documents were withheld in whole or in part on the basis of subsection 12(1) in conjunction with section 27 (solicitor-client privilege). However, after carefully reviewing all of the instances where subsection 12(1) was used alone or in conjunction with another provision of the *Act* to refuse disclosure of information, I cannot find or conclude that the OPC improperly utilized subsection 12(1) of the *Act* to safeguard privileged documents. I also cannot find or conclude that the OPC incorrectly or unreasonably relied upon this subsection to withhold personal information of the Applicant. In most instances, the personal information of the Applicant was co-mingled with that of others in internal OPC reports concerning other litigation in which the OPC was involved and, thus, it was correctly and reasonably exempted from disclosure since it concerned the personal information of others and not that of the Applicant. In other instances, the redacted portions of documents contained information pertaining to personal information of those involved with the Applicant's requests for information concerning such matters as personal vacation dates and who would deal with the Applicant's requests while someone was on vacation. In short, I find that in this case the OPC correctly and reasonably refused to disclose certain information to the Applicant by virtue of subsection 12(1) of the *Act*.

(2) Section 22.1

[45] In addition to subsection 12(1) of the *Act*, the OPC also relied upon section 22.1 to exempt certain information from disclosure to the Applicant. Section 22.1 of the *Act* provides as follows:

**Information obtained by
Privacy Commissioner**

22.1 (1) The Privacy Commissioner shall refuse to disclose any personal information requested under this Act that was obtained or created by the Commissioner or on the Commissioner's behalf in the course of an investigation conducted by, or under the authority of, the Commissioner.

Exception

(2) However, the Commissioner shall not refuse under subsection (1) to disclose any personal information that was created by the Commissioner or on the Commissioner's behalf in the course of an investigation conducted by, or under the authority of, the Commissioner once the investigation and all related proceedings, if any, are finally concluded.

**Renseignements obtenus par
le Commissaire à la
protection de la vie privée**

22.1 (1) Le Commissaire à la protection de la vie privée est tenu de refuser de communiquer les renseignements personnels demandés en vertu de la présente loi qui ont été créés ou obtenus par lui ou pour son compte dans le cadre de toute enquête faite par lui ou sous son autorité.

Exception

(2) Toutefois, il ne peut s'autoriser du paragraphe (1) pour refuser de communiquer les renseignements personnels créés par lui ou pour son compte dans le cadre de toute enquête faite par lui ou sous son autorité une fois que l'enquête et toute instance afférente sont terminées.

[46] In my view, subsections 22.1(1) and 22.1(2) manifest a legislative intent that personal information *obtained or created* by the OPC during an investigation must be excluded from disclosure, but only up to a certain point in time. After an investigation and all related proceedings, if any, are finally concluded, the personal information *created* by the OPC, rather than that obtained by it during an investigation, may be disclosed. Information properly falling within subsection 22.1(1) must be information that was obtained *or* created by the OPC in the course of an investigation. However, once all proceedings related to an investigation have been

completed, this subsection cannot be invoked to refuse disclosure of personal information *created* by the OPC during an investigation; that information can be accessed by virtue of subsection 22.1(2).

[47] The Applicant contends that several exemptions under section 22.1 of the *Act* were inappropriate. In particular, he points to pages 004444 and 004638 of Exhibit “F” where information was redacted by the OPC in reliance upon subsection 22.1(1). He also notes other pages of Exhibit “F”, notably 004728, 004762, 004763 and 005023, as being instances where the OPC improperly utilized this subsection to withhold information. I have reviewed these pages identified by the Applicant as well as those on the confidential CD where the OPC relied upon subsection 22.1(1) to deny disclosure of some information to the Applicant. By and large, the information withheld on the basis of this subsection pertains to information *obtained* by the OPC from the SSHRC during the course of its investigations of the Applicant’s complaints about the SSHRC; it was not personal information about the Applicant *created* by the OPC. For example, pages 005024 to 005095 of Exhibit “F” were correctly and reasonably withheld from the Applicant because these pages contained a letter with various enclosures from the SSHRC to the Applicant dated April 19, 2011, in which he was informed that his application for an award was not approved. Similarly, pages 004798 to 004858 and pages 004869 to 004928 of Exhibit “F” were also correctly and reasonably withheld because they were documents obtained by the OPC during its investigation of the Applicant’s complaints about the SSHRC; these documents included copies of internal SSHRC e-mails, correspondence between the Applicant and Industry Canada which was copied to the SSHRC, as well as copies of letters and e-mails to and from the

SSHRC and the Applicant. Likewise, page 005486 was correctly and reasonably withheld under this subsection because it was a letter from the SSHRC to the Applicant dated May 12, 2012.

[48] However, certain information was incorrectly and unreasonably withheld from the Applicant by the OPC on the basis of subsection 22.1(2). The redacted information at pages 004418 and 004419 of Exhibit “F” as well as that on page 004444 should not have been withheld because it was created by the OPC (although it did refer to a document being prepared by the SSHRC). Likewise, the redacted information at pages 004467 to 004471 should not have been withheld merely because it referred to a document created by the SSHRC. The redacted information at pages 004458 to 004460 and at pages 004728, 004730, 004735, 004737, 004739, 004748, 004762, 004763, 004790, and 004791 of Exhibit “F” was incorrectly withheld because it was the OPC’s commentary on information released by the SSHRC to the Applicant and, thus, something created by the OPC. The e-mail from Michael Billinger at pages 005564 and 005565 and pages 005566 to 005570 should not have been withheld under subsection 22.1(1) because these were documents created by the OPC during its investigation in response to the Applicant’s second complaint about the SSHRC and that investigation and the proceedings relating to it, resulting in this Court’s decision in *Oleinik 2013*, had been completed by the time of the Applicant’s Third Request for information.

(3) Section 26

[49] In addition to subsection 12(1) and section 22.1 of the *Act*, the OPC also relied upon section 26 to withhold certain information from the Applicant. Section 26 of the *Act* states:

Information about another individual

26 The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) about an individual other than the individual who made the request, and shall refuse to disclose such information where the disclosure is prohibited under section 8.

Renseignements concernant un autre individu

26 Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) qui portent sur un autre individu que celui qui fait la demande et il est tenu de refuser cette communication dans les cas où elle est interdite en vertu de l'article 8.

[50] As noted by the Court in *Mislan v. Canada (Minister of Revenue)* (1998), 148 FTR 107,

[1998] FCJ No 704 (QL):

[13] Under section 26 the right of the person making the request under subsection 12(1) to access his or her own personal information is subject to the requirement on, or the exercise of discretion by, the head of the government institution not to disclose information about another person. Specifically, when the information in question is about both the person making the request and another person the discretion to refuse disclosure by the head of the government institution is paramount to the right of the person making the request for his own personal information.

[51] The Applicant argues that in some instances where the OPC invoked an exemption under section 26 it exempted information that is not personal. He points to the fact that the e-mail address for a paralegal on contract with the OPC (Caroline Etter) was redacted (for example, at pages 000060 to 000062), while the e-mail address for a lawyer retained by the OPC (Dougald Brown) was not redacted (for example, at pages 010482 or 016565).

[52] The Applicant is correct that the OPC treated the e-mail addresses of these two persons engaged by it differently. In this regard, both e-mail addresses appear to be a business or office e-mail address. The Federal Court of Appeal has noted that, although a home e-mail address is clearly protected personal information, the status of an office e-mail address is uncertain (see: *Bernard v Canada (Attorney General)*, 2010 FCA 40 at para 38, 398 NR 325 [*Bernard*]). In my view, an office or business e-mail address is akin to the office phone number of the government employee in *Bernard*; an office phone number is something which is explicitly excluded from the definition of personal information in section 3 of the *Act*. On a correctness standard, therefore, I find that the OPC improperly redacted the e-mail address at pages 000060 to 000062 of Exhibit “F”.

[53] I also find that the OPC improperly and unreasonably redacted the paralegal’s office phone number and e-mail address at pages 000179 and 000345, and her office e-mail address at pages 000074, 000289, 000312, 001588, 001637, 001653, 001869, 010477 to 010480, 012035, 012119, 012124, 012128, 012210, 012641, 012642, 012646, 012647, 012916, 012942, 014131, 015037, 015079, and 015082. Even if I am incorrect in making these findings, the fact remains that the OPC afforded differential treatment to these two office e-mail addresses, and that is unreasonable because it constituted a contradictory application of the exemption under section 26 of the *Act*.

[54] As to the other information redacted from page 000062, the Applicant contends that this does not constitute personal information about another individual. I disagree because the redacted remark made by the paralegal is not about the Applicant or her view or opinion of him;

hence, it does not constitute personal information about the Applicant as defined in section 3 of the *Act* and it was correctly and reasonably withheld from the Applicant under section 26 of the *Act*.

[55] With respect to other instances where the OPC relied only upon section 26 of the *Act* to withhold information from the Applicant, after a detailed review in this regard I cannot find or conclude that the OPC incorrectly or unreasonably refused to disclose certain personal information about persons other than the Applicant. Thus, for example, the OPC correctly and reasonably redacted the home e-mail address and home phone number of someone other than the Applicant at page 011442 and the home e-mail address for an OPC employee at page 011365. In other instances, section 26 was correctly and reasonably applied by the OPC to exempt the personal information of individuals other than the Applicant pertaining to their personal contact information such as a home e-mail address or cell phone or their whereabouts while on vacation. In short, save for those instances noted above where section 26 of the *Act* was incorrectly or unreasonably applied, the OPC's refusal to disclose some information to the Applicant on the basis of section 26 is otherwise justifiable and falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. The affidavit of Ms. Rousseau Saunders shows that, in exercising her discretion to withhold information about an individual other than the Applicant, she weighed the competing interests between providing the Applicant with the information and protecting the privacy interests of others and also considered whether withholding such information would obstruct the Applicant's right to access his personal information.

(4) Section 27

[56] The fourth provision of the *Act* upon which the OPC relied to withhold certain information from the Applicant was section 27; this section states:

Solicitor-client privilege

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.

Secret professionnel des avocats

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.

[57] Before reviewing the OPC's reliance upon section 27 in this case, it is helpful to look at what is encompassed by the phrase "solicitor-client privilege." In *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 SCR 809, the Supreme Court defined solicitor-client privilege as follows:

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.

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.

[58] The Supreme Court further noted in *Blood Tribe Department of Health v Canada (Privacy Commissioner)*, 2008 SCC 44, [2008] 2 SCR 574, that it matters not whether litigation may or may not have been in contemplation when a client seeks legal advice, and that while solicitor-client privilege may have originated as a rule of evidence: “it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity” (at para 10).

[59] Furthermore, it must be noted that all communications between a solicitor and a client directly related to the seeking, formulating or giving of legal advice are privileged, along with “communications within the continuum in which the solicitor tenders advice” (see: *Canada (Information Commissioner) v Canada (Public Safety and Emergency Preparedness)*, 2013 FCA 104 at para 26, 360 DLR (4th) 176). As stated by the Federal Court of Appeal in *Samson Indian Nation and Band v. Canada*, [1995] 2 FC 762, 125 DLR (4th) 294:

8 Today, it is generally recognized that there are two distinct branches of solicitor and client privilege: the litigation privilege and the legal advice privilege. The litigation privilege protects

from disclosure all communications between a solicitor and client, or third parties, which are made in the course of preparation for any existing or contemplated litigation. The legal advice privilege protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.

[60] Moreover, it warrants note that information can be privileged even if the communications are made to employees of a lawyer and even if they deal with matters of an administrative nature related to the privileged communications. As noted by the Supreme Court in *Descôteaux v Mierzwinski*, [1982] 1 SCR 860 at 892-893, 141 DLR (3d) 590):

In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches 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.

[61] The Applicant asserts that litigation privilege should be differentiated from solicitor-client privilege, and that the OPC improperly refused to disclose records containing legal advice no longer subject to litigation privilege since the litigation resulting in *Oleinik 2011* and *Oleinik 2013* had been concluded by the time of the OPC's response to his Third Request. In this regard,

he refers to the Supreme Court's decision in *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319 [*Blank*], where a portion of the headnote for the majority's decision states:

The purpose of the litigation privilege is to create a zone of privacy in relation to pending or apprehended litigation. The common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege. Unlike the solicitor-client privilege, it is neither absolute in scope nor permanent in duration. The privilege may retain its purpose and its effect where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. This enlarged definition of litigation includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action or juridical source.

[62] The Applicant's arguments in this regard are misguided for several reasons. First, some documents may fall under both litigation privilege and solicitor-client privilege; for example, a draft factum and communications pertaining to it among lawyers for a client are subject to both privileges until such time as the factum is publically filed with the court, whereupon the solicitor-client privilege attaching to the factum as filed is lost yet the draft factum and all communications about it remain subject to solicitor-client privilege. Second, section 27 of the *Act* contemplates and explicitly refers to the withholding of documents that are subject to *solicitor-client* privilege and not merely litigation privilege, the purpose of which differs substantially from that of solicitor-client privilege since litigation privilege is concerned with ensuring the efficacy of the adversarial process and not promoting the solicitor-client relationship. Third, solicitor-client privilege extends to any legal advice, regardless of whether it relates to litigation or not, and also to any legal advice in respect of litigation even after the litigation has ended. Lastly, solicitor-client privilege is generally absolute in scope and permanent in duration unless waived by a client; whereas litigation privilege is neither absolute

in scope nor permanent in duration and does not necessarily terminate where, as is the case in this case, the “litigants or related parties remain locked in what is essentially the same legal combat” and “related litigation remains pending or may reasonably be apprehended” (see: *Blank*, at paras 34 and 38).

[63] I have reviewed in detail the OPC’s use of section 27 of the *Act* to withhold certain information from the Applicant in response to his Third Request for information. At the hearing of this matter, counsel for the OPC provided the Court with a list of individuals or groups relevant to the OPC’s claims of solicitor-client privilege. I am satisfied that none of these individuals or groups constituted third parties who were privy to information in respect of which it might be suggested that the OPC waived its privilege over documents or communications it withheld from disclosure on the basis of solicitor-client privilege. I have also reviewed Ms. Rousseau Saunders’ affidavit in which she not only provides her understanding of the notions of solicitor-client privilege under section 27 of the *Act* and litigation privilege, but also confirms that in exercising her discretion under this section she did so based on this understanding as well as recommendations provided by internal legal counsel for the OPC.

[64] The following chart summarizes the instances where the OPC relied upon section 27 of the *Act*, in whole or in part, to exempt certain information from the Applicant and the Court’s comments with respect to whether such documentation was correctly within the ambit of solicitor-client privilege:

Page	PDF #	Comments
000020 and 000022-000031	A0009075	The redacted portions of the litigation report withheld from the Applicant pertain to the OPC's legal strategy concerning the Applicant and to litigation between the OPC and persons other than the Applicant; correctly within the ambit of solicitor-client privilege.
000042-000043	A0009081	E-mail conversation between paralegal and internal OPC counsel; correctly within the ambit of solicitor-client privilege.
000046-47 and 000050-51	A0009085	E-mail conversation and notes between external and internal OPC counsel; correctly within the ambit of solicitor-client privilege.
000074	A0009091	E-mail conversation between paralegal and internal OPC counsel; correctly within the ambit of solicitor-client privilege.
000322-000325	A0009117	E-mail conversation among Louisa Garib, Michael De Santis, Regan Morris and Andrea Lockwood who are OPC legal counsel and Caroline Etter, an external paralegal then on contract with the OPC; correctly within the ambit of solicitor-client privilege.
000582-000583	A0009126	Draft document between OPC legal counsel containing strategic considerations about the Applicant's litigation; correctly within the ambit of solicitor-client privilege.
000587-000591	A0009128	This is legal advice from Louisa Garib on a draft affidavit from Michael Billinger, a senior privacy investigator with the OPC; correctly within the ambit of solicitor-client privilege.
000593-000594	A0009129	Although these two pages were ostensibly withheld from disclosure under section 27, they were in fact released to the Applicant as pages 000618-000619 in the same .pdf file.
000662	A0009131	Legal opinions provided by Louisa Garib; correctly within the ambit of solicitor-client privilege.
000733	A0009132	Legal opinions provided by Louisa Garib; correctly within the ambit of solicitor-client privilege.
000742-000747 and 000774-000775	A0009134	This is legal advice from Michael De Santis on a draft affidavit, copied to Daniel Caron, legal counsel with the OPC; correctly within the ambit of solicitor-client privilege.

Page	PDF #	Comments
000836-000859	A0009143	Draft record prepared by OPC legal counsel and sent between OPC counsel with changes; correctly within the ambit of solicitor-client privilege.
000861-000884	A0009144	Draft record prepared by OPC legal counsel and sent between OPC counsel with changes; correctly within the ambit of solicitor-client privilege.
000888-000889	A0009150	Draft affidavit; correctly within the ambit of solicitor-client privilege.
000911	A0009152	Legal advice from OPC counsel; correctly within the ambit of solicitor-client privilege.
000940-000941 and 00943-000944	A0009155	Legal advice from OPC counsel; correctly within the ambit of solicitor-client privilege.
001218-001223	A0009158	Draft affidavit provided by OPC legal counsel to other OPC legal counsel; correctly within the ambit of solicitor-client privilege.
001243 and 001245-001247	A0009161	E-mail conversation between internal and external OPC counsel; correctly within the ambit of solicitor-client privilege.
001300	A0009167	E-mail conversation between internal and external OPC counsel, including external counsel's assistant; correctly within the ambit of solicitor-client privilege.
001301	A0009168	Legal advice from OPC Counsel; correctly within the ambit of solicitor-client privilege.
001308-001309	A0009169	E-mail conversation between internal and external OPC counsel, including external counsel's assistant; correctly within the ambit of solicitor-client privilege.
001310-001345	A0009170	Draft respondent's memo prepared by OPC legal counsel; correctly within the ambit of solicitor-client privilege.
001348-001376	A0009175	Draft respondent's memo prepared by OPC legal counsel; correctly within the ambit of solicitor-client privilege.
001383-001398	A0009180	Draft respondent's response prepared by and circulated to OPC legal counsel; correctly within the ambit of solicitor-client privilege.
001399-001431	A0009182	Draft respondent's memo prepared by and circulated to OPC legal counsel; correctly within the ambit of solicitor-client privilege.
001432	A0009183	E-mail conversation between internal OPC counsel on draft document; correctly within the ambit of solicitor-client privilege.

Page	PDF #	Comments
001437-001452	A0009185	E-mail conversation between internal OPC counsel on draft document attached to the e-mail; correctly within the ambit of solicitor-client privilege.
001501	A0009189	E-mail conversation between internal OPC counsel; correctly within the ambit of solicitor-client privilege.
001509-1510	A0009191	Draft affidavit; correctly within the ambit of solicitor-client privilege.
001511	A0009192	E-mail conversation between internal OPC counsel; correctly within the ambit of solicitor-client privilege.
001516	A0009194	Legal advice from OPC counsel; correctly within the ambit of solicitor-client privilege.
001539	A0009196	Litigation report prepared by OPC legal counsel containing strategic considerations about the Applicant's litigation; correctly within the ambit of solicitor-client privilege.
001541-001543	A0009197	Internal notes and comments on Applicant's appeal prepared by OPC internal counsel; correctly within the ambit of solicitor-client privilege.
001566-001571	A0009204	Draft respondent's representations prepared by OPC legal counsel; correctly within the ambit of solicitor-client privilege.
001573-001581	A0009205	E-mail conversation between internal OPC counsel on draft document attached to the e-mail; correctly within the ambit of solicitor-client privilege.
001585	A0009207	E-mail conversation between internal OPC counsel; correctly within the ambit of solicitor-client privilege.
001603 and 001605-001614	A0009209	Litigation report prepared by OPC legal counsel containing strategic considerations about the Applicant's litigation as well as other litigation involving persons other than the Applicant; correctly within the ambit of solicitor-client privilege.
001620 and 001622	A0009211	E-mail conversation between internal OPC counsel; correctly within the ambit of solicitor-client privilege.
001729	A0009228	E-mail conversation between internal OPC counsel; correctly within the ambit of solicitor-client privilege.

Page	PDF #	Comments
001730-001735	A0009229	Draft affidavit; correctly within the ambit of solicitor-client privilege.
001736-001741	A0009230	Draft affidavit; correctly within the ambit of solicitor-client privilege.
001824-001829	A0009238	Draft affidavit; correctly within the ambit of solicitor-client privilege.
002287	A0009275	Redacted portion is legal advice from OPC legal counsel; correctly within the ambit of solicitor-client privilege.
002349-002350	A0009292	Draft outline for memo of law; correctly within the ambit of solicitor-client privilege.
003558	A0009320	Redacted portion of legal bill pertains to specific legal services and advice provided by OPC external counsel to OPC internal counsel; correctly within the ambit of solicitor-client privilege; see: <i>Stevens v Canada (Prime Minister)</i> , [1998] 4 FC 89 at para 34, [1998] FCJ No 794.
003563-003593	A0009321	Draft motion record; correctly within the ambit of solicitor-client privilege.
004301, 004304 and 004307	A0009327	Redacted comments are legal advice from one internal OPC legal counsel to another; correctly within the ambit of solicitor-client privilege.
004322	A0009329	Redacted portion of legal bill pertains to specific legal services and advice provided by OPC external counsel to OPC internal counsel; correctly within the ambit of solicitor-client privilege.
004361	A0009338	Redacted portion of memo pertains to legal advice provided by OPC internal counsel to the Privacy Commissioner, the Assistant Privacy Commissioner, and other OPC internal counsel; correctly within the ambit of solicitor-client privilege.
004364-004374 and 004376-004399	A0009346	Redacted portions of the litigation update pertaining to the Applicant is legal advice provided by OPC internal counsel; correctly within the ambit of solicitor-client privilege; other portions of this document withheld from the Applicant pertain to litigation between the OPC and persons other than the Applicant.

Page	PDF #	Comments
004524-004527 and 004529-004533	A0009367	Redacted portions of the litigation report pertaining to the Applicant is legal advice provided by OPC internal counsel; correctly within the ambit of solicitor-client privilege; other portions of this document withheld from the Applicant pertain to litigation between the OPC and persons other than the Applicant.
004538	A0009369	Redacted portion of this e-mail constitutes legal advice provided by OPC internal counsel; correctly within the ambit of solicitor-client privilege.
004543 and 004547	A0009371	Redacted portions of this e-mail constitutes legal advice provided by OPC internal counsel; correctly within the ambit of solicitor-client privilege.
004946-004951 and 004953	A0009419	This legal review by OPC internal counsel and the underlying request for such is correctly within the ambit of solicitor-client privilege.
010464-10465, 010473-10474, 010482, and 010485	A0009511	This e-mail conversation between internal OPC counsel, the handwritten comments on the Applicant's notice of appeal, and the e-mail exchange between OPC's external counsel and Louisa Garib, an internal counsel with the OPC, are correctly within the ambit of solicitor-client privilege.
010493-010500	A0009512	Litigation report prepared by OPC legal counsel about other litigation involving persons other than the Applicant; correctly within the ambit of solicitor-client privilege.
010523-010557 and 010560-010561	A0009514	E-mail communication and advice from internal OPC counsel about a motion; correctly within the ambit of solicitor-client privilege.
010858 and 010870	A0009518	E-mail communication and advice from internal OPC counsel to external legal counsel and also to internal OPC counsel; correctly within the ambit of solicitor-client privilege.
010894-010895 and 010898- 010899	A0009519	Redacted portion of memo from internal OPC legal counsel to Privacy Commissioner providing legal advice; correctly within the ambit of solicitor-client privilege.

Page	PDF #	Comments
010906-010912	A0009521	Redacted portion of the litigation report pertaining to the Applicant is legal advice provided by OPC internal counsel; correctly within the ambit of solicitor-client privilege; other portions of this document withheld from the Applicant pertain to litigation between the OPC and persons other than the Applicant.
010957-010962	A0009525	Legal review and comments about OPC's investigation report; correctly within the ambit of solicitor-client privilege.
010982-010992, 010994-011000, 011003-011010 and 011012-001118	A0009527	Legal advice from OPC external counsel to OPC internal counsel as well as a legal review and comments by internal OPC counsel about OPC's investigation report; correctly within the ambit of solicitor-client privilege.
001044	A0009530	Reference to legal advice received from external counsel; correctly within the ambit of solicitor-client privilege.
011099 and 011011	A0009532	The first redacted block on these two pages is correctly within the ambit of solicitor-client privilege as it relates to the OPC's litigation strategy; the second redacted block on these pages (as well as the other information in this .pdf file withheld from the Applicant) relates to litigation involving the OPC and persons other than the Applicant; correctly within the ambit of solicitor-client privilege.
011132-011140, 011152 and 011173	A0009535	Litigation report prepared by OPC legal counsel about other litigation involving persons other than the Applicant; correctly within the ambit of solicitor-client privilege; the first redacted block on page 011152 and the redacted block on page 011173 are correctly within the ambit of solicitor-client privilege as the redacted information relates to the OPC's litigation strategy.
011280-011282	A0009537	E-mail communication and legal advice between internal and external OPC legal counsel; correctly within the ambit of solicitor-client privilege.
011365	A0009537	The second redacted block on this page is correctly within the ambit of solicitor-client privilege since it is legal advice from internal OPC counsel on a draft bill of costs.

Page	PDF #	Comments
011439-011440, 011442, 011444- 011453 and 011455-011464	A0009538	These pages are correctly within the ambit of solicitor-client privilege since it is legal advice from internal OPC counsel on a draft bill of costs as well as advice from external to internal OPC legal counsel.
011520, 011526, 011528, 011546, 011549, 011572 and 011574	A0009539	Legal advice from internal OPC counsel in respect of the Applicant's complaint about the SSHRC; reference in an e-mail to a matter discussed with external OPC legal counsel; a legal opinion and e-mail legal advice from internal OPC counsel on next steps in litigation involving the Applicant; and a request from internal to external OPC legal counsel for legal advice; all correctly within the ambit of solicitor-client privilege.
011580 and 011588	A0009540	Reference to a person other than the Applicant with whom the OPC was involved in litigation and legal advice between external and internal OPC counsel; correctly within the ambit of solicitor-client privilege.
011867 and 011869	A0009542	Request by internal OPC counsel for legal advice from external legal counsel and e-mail advice from OPC internal legal counsel; correctly within the ambit of solicitor-client privilege.
011951-011952	A0009543	Legal opinion of internal OPC counsel concerning litigation with the Applicant and request for advice from external legal counsel; correctly within the ambit of solicitor-client privilege.
012033-012034 and 012064	A0009544	Legal opinions of internal OPC counsel concerning litigation with the Applicant; correctly within the ambit of solicitor-client privilege.
012087-012088, 012093, 012098, 012109-012111, 012112-012113 and 012114- 012118	A0009545	References to a person other than the Applicant with whom the OPC was involved in litigation and legal opinions of internal OPC counsel on strategy and litigation involving the Applicant; correctly within the ambit of solicitor-client privilege. Although the redacted block on page 012112 is correctly exempted because it relates to the OPC's legal strategy, the redacted information on page 012113 was incorrectly exempted from disclosure under section 27 of the <i>Act</i> because it pertains to background information about the Applicant and his complaint. The information contained on page 012113 should have been released to the Applicant.

Page	PDF #	Comments
012493-012500, 012559-012565 and 012568-012572	A0009549	The e-mail discussion among internal and external OPC legal counsel at pages 012493-012494 and at 012559-012560 about a certain legal case and the strategy to follow in view of such case correctly falls within the ambit of solicitor-client privilege. The publicly reported case at pages 012495-012500 and also at pages 012561-012565 does not fall within the ambit of solicitor-client privilege, and the copy of this case should have been released to the Applicant. The e-mail discussion among internal OPC legal counsel about a draft bill of costs at pages 012568-012572 correctly falls within the ambit of solicitor-client privilege.
012597, 012607- 012608, 012655- 012661 and 012666	A0009550	The redacted portions and withheld pages of this .pdf file correctly fall within the ambit of solicitor-client privilege since they refer to a person other than the Applicant with whom the OPC was involved in litigation and contain legal opinions of internal OPC counsel on strategy and litigation involving the Applicant.
012735 and 012737	A0009551	The redacted portions of these pages correctly fall within the ambit of solicitor-client privilege since they relate to legal advice provided by OPC's internal and external counsel.
013174 and 013175-013178	A0009555	The redacted portion of this e-mail contains a request from internal to external OPC legal counsel for advice on a draft court document; this request and draft document correctly fall within the ambit of solicitor-client privilege.
013179-013198, 013204-013227, 013230-013236, 013238-013243 and 013245- 013270	A0009556	The information withheld from the Applicant in this .pdf file relates to a draft factum and comments and advice among internal and external OPC counsel; correctly falls within the ambit of solicitor-client privilege.
013421-013445	A0009558	The redacted portion of this e-mail contains a request from internal to external OPC legal counsel for advice on a draft court document; this request and draft document correctly fall within the ambit of solicitor-client privilege.

Page	PDF #	Comments
013487, 013489 and 013533-013534	A0009559	The e-mails at pages 013487 and 013489 between internal and external OPC counsel and the e-mail dated May 3, 2011, at page 013533, correctly fall within the ambit of solicitor-client privilege. However, the e-mail from the Federal Court dated April 29, 2011, at pages 013533-013534 is not within the ambit of solicitor-client privilege and should have been released to the Applicant.
013593-013598	A0009560	Litigation report prepared by OPC legal counsel about other litigation involving persons other than the Applicant; correctly within the ambit of solicitor-client privilege; the redacted block on page 013595 is correctly within the ambit of solicitor-client privilege as it relates to the OPC's litigation strategy.
013861-013862	A0009562	E-mail exchange between internal and external OPC counsel about a draft document; correctly within the ambit of solicitor-client privilege.
014157	A0009565	The redacted portion of this e-mail from internal OPC counsel concerns legal strategy; correctly within the ambit of solicitor-client privilege.
014276	A0009566	The redacted portion of this e-mail from internal OPC counsel concerns legal strategy; correctly within the ambit of solicitor-client privilege.
014932-014948	A0009573	Draft factum prepared by internal OPC counsel; correctly within the ambit of solicitor-client privilege.
015038-015040, 015042-015044, 015051-015054, 015060-015061 and 015076-015078	A0009574	The redacted portions of the e-mails on these pages between internal and external counsel concern draft affidavits and the pages withheld from the Applicant contain the drafts; correctly within the ambit of solicitor-client privilege.
015080-015081, 015083, 015085-015091, 015095-015097, 015104-015106, 015108-015110, 015112-015114, 015136 and 015177-01578	A0009575	The redacted portions of the e-mails on these pages between internal and external counsel concern draft affidavits and the pages withheld from the Applicant contain the drafts; the redacted and withheld information at pages 015177-01578 concerns other litigation involving persons other than the Applicant; correctly within the ambit of solicitor-client privilege.

Page	PDF #	Comments
015187, 015196, 015216-015228, 015244 015249-015255, and 015263-015278	A0009576	The redacted portion of the report at page 015187 from internal OPC counsel concerns legal strategy; the redacted portions of pages 015196 and 015244 are a request for legal advice from internal to external OPC counsel; pages 015216-015228 are draft court documents; pages 015249-015255 and 015263-015278 are e-mail communications between internal and external OPC counsel concerning a draft factum reproduced with comments at pages 015267-015278; correctly within the ambit of solicitor-client privilege.
015279-015373	A0009577	These pages are e-mail communications between internal and external OPC counsel concerning a draft factum attached to the e-mail; correctly within the ambit of solicitor-client privilege.
015523 and 015525-015589	A0009579	These pages are e-mail communications between internal and external OPC counsel concerning a draft factum attached to the e-mail; correctly within the ambit of solicitor-client privilege.
015591-015621, 015623, 015638-015671	A0009580	The redacted portions of the e-mails on these pages between internal and external OPC counsel concern a draft factum and the pages withheld from the Applicant contain drafts of the factum; correctly within the ambit of solicitor-client privilege.
015686-015687, 015698 and 015720	A0009581	The redacted portions of the e-mails on these pages between internal and external OPC counsel concern a draft factum; correctly within the ambit of solicitor-client privilege.
015966-015978	A0009583	The pages withheld from the Applicant are from a draft court document; correctly within the ambit of solicitor-client privilege.
015979-015984	A0009584	The pages withheld from the Applicant are from the draft court document in .pdf file A0009583; correctly within the ambit of solicitor-client privilege.
016568	A0009589	The redacted portion of the e-mail on this page from internal OPC counsel to other such counsel and external counsel pertains to the OPC's legal strategy; correctly within the ambit of solicitor-client privilege.

Page	PDF #	Comments
016592-016593 and 016595	A0009590	The redacted portions of the e-mails on these pages are between internal OPC counsel and relate to an appropriate legal response to a motion by the Applicant; correctly within the ambit of solicitor-client privilege.
017050-017051, 017056-017060, 017062, 017071 and 017073- 017078	A0009594	The redacted portions of the e-mails and pages withheld from the Applicant in this .pdf file refer to other persons involved in litigation with the OPC; relate to advice from and to internal OPC counsel about a legal procedure; and include notes made by an internal OPC counsel concerning litigation with the Applicant; all correctly within the ambit of solicitor-client privilege.
017079-017081, 017086, 017088- 017091	A0009595	The redacted portions of these pages and those pages withheld from the Applicant in this .pdf file include notes made by an internal OPC counsel concerning litigation with the Applicant and the OPC's legal strategy concerning such litigation; correctly within the ambit of solicitor-client privilege.
017553-017578	A0009599	The redacted portions of the documents and pages withheld from the Applicant in this .pdf file refer to other persons involved in litigation with the OPC as well as the nature of legal services and advice provided by internal OPC counsel concerning such litigation; correctly within the ambit of solicitor-client privilege.
017579-017634, 017637-017650, 017653-017665, 017668-017678	A0009600	The redacted portions of the documents and pages withheld from the Applicant in this .pdf file refer to other persons involved in litigation with the OPC as well as the OPC's legal strategy concerning its litigation with the Applicant; correctly within the ambit of solicitor-client privilege.
017679-017681, 017684-017699, 017701-017704, 017707-017710, 017712-017715, 017717, 017720- 017726	A0009601	The redacted portions of the documents and pages withheld from the Applicant in this .pdf file refer to other persons involved in litigation with the OPC as well as the OPC's legal strategy concerning its litigation with the Applicant; correctly within the ambit of solicitor-client privilege.

[65] In summary, although the OPC correctly withheld many documents from the Applicant on the basis of solicitor-client privilege, it erred in three instances:

1. The redacted information on page 012113 was incorrectly exempted from disclosure under section 27 of the *Act* because it pertains to background information about the Applicant and is not legal advice or strategy provided by counsel for the OPC.
2. The publicly reported case at pages 012495-012500 and also at pages 012561-012565 does not fall within the ambit of the OPC's solicitor-client privilege, although the discussion among its counsel and legal advice concerning such case does.
3. The e-mail from the Federal Court dated April 29, 2011, at pages 013533-013534, is not within the ambit of solicitor-client privilege because it does not constitute legal advice or strategy within a solicitor-client relationship.

[66] In these three instances the information and documents were incorrectly and, therefore, unreasonably withheld from the Applicant by the OPC on the basis of solicitor-client privilege. In all of the other instances where the OPC relied upon section 27 of the *Act*, as summarized in the chart above, it did so correctly.

[67] The OPC's determination to withhold certain information and documentation from the Applicant on the basis of section 27 of the *Act* was also reasonable. In my view, given the permissive and discretionary nature of the word "may" in section 27, deference should be afforded to the OPC's reliance upon this section in those instances where it correctly identified

documents as being subject to solicitor-client privilege. In this context, the scope of reasonable outcomes is relatively broad because it is the OPC who should decide whether to waive its solicitor-client privilege and release otherwise privileged documentation to the Applicant.

IV. Conclusion

[68] In conclusion, the OPC reasonably and correctly withheld certain information and documentation from the Applicant on the basis of subsection 12(1) of the *Act*. However, as noted above, certain documentation was incorrectly and unreasonably withheld from the Applicant by the OPC on the basis of subsection 22.1(2) because it was created by the OPC during its investigation in response to the Applicant's second complaint about the SSHRC and that investigation and all proceedings relating to it had been completed by the time of the Applicant's Third Request for information.

[69] In addition, the OPC incorrectly and unreasonably withheld from the Applicant on the basis of section 26 of the *Act* information about the office phone number and office e-mail address of a paralegal working for the OPC in response to the Applicant's requests for information. It also withheld certain information from the Applicant that was not properly within the ambit of solicitor-client privilege as contemplated by section 27 of the *Act*.

[70] Although the Applicant has been somewhat successful in this application, such success is divided inasmuch as the documentation and information incorrectly and unreasonably withheld from disclosure was not voluminous and, for the most part, the OPC correctly and reasonably applied subsection 12(1) and sections 22.1, 26 and 27 of the *Act*. At the hearing of this matter,

counsel for the OPC indicated that, despite its request for costs in its memorandum of fact and law, the OPC was not seeking costs in view of the complexity of the issues raised by the application. Having regard to the circumstances of this matter, I decline to make any award as to costs pursuant to Rule 400 of the *Federal Courts Rules*, SOR/98-106, as am.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. the Applicant’s application under section 41 of the *Privacy Act*, RSC 1985, c P 21, is allowed, in part;
2. the Respondent, Office of the Privacy Commissioner of Canada, shall disclose and provide to the Applicant within twenty (20) days of the date of this judgment the following pages of Exhibit “F” to the affidavit of Andrea Rousseau Saunders dated July 11, 2014:
 - a. non-redacted copies of pages 004418, 004419, 004444, 004458 to 004460, 004467 to 004471, 004728, 004730, 004735, 004737, 004739, 004748, 004762, 004763, 004790, 004791, the e-mail from Michael Billinger at pages 005564 and 005565, and pages 005566 to 005570;
 - b. non-redacted copies of pages 000179 and 000345 containing Caroline Etter’s office phone number and e-mail address, as well as non-redacted copies of her office e-mail address at pages 000074, 000289, 000312, 001588, 001637, 001653, 001869, 010477 to 010480, 012035, 012119, 012124, 012128, 012210, 012641, 012642, 012646, 012647, 012916, 012942, 014131, 015037, 015079, and 015082; and
 - c. a non-redacted copy of page 012113, a copy of the e-mail from the Federal Court dated April 29, 2011, at pages 013533-013534, and copies of pages 012495-012500 and pages 012561-012565; and

3. there shall be no award of costs.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-924-14

STYLE OF CAUSE: ANTON OLEYNIK v THE OFFICE OF THE PRIVACY
COMMISSIONER OF CANADA

PLACE OF HEARING: ST. JOHN'S, NEWFOUNDLAND AND LABRADOR

DATE OF HEARING: APRIL 14, 2016

JUDGMENT AND REASONS: BOSWELL J.

DATED: OCTOBER 19, 2016

APPEARANCES:

Anton Oleynik

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Kate Wilson
Jennifer Seligny

FOR THE RESPONDENT

SOLICITORS OF RECORD:

The Office of the Privacy
Commissioner of Canada
Gatineau, Quebec

FOR THE RESPONDENT