

## Legal update

# The Information and Privacy Commissioner of Alberta has no authority to order production of solicitor-client privilege materials

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**November 2016**

### **Privacy and access to information**

In its recent decision in *Alberta (Information and Privacy Commissioner) v University of Calgary*<sup>1</sup> the Supreme Court of Canada held that the Information and Privacy Commissioner of Alberta (IPC) does not have authority to order production of solicitor-client privilege materials under section 56(3) of the *Alberta Freedom of Information and Protection of Privacy Act (FOIPP)*.<sup>2</sup>

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### **Background**

In the context of a constructive dismissal claim, a former employee made a request for information under s. 7 of *FOIPP*. The university claimed solicitor-client privilege over certain records and in accordance with Alberta's civil practice provided a list of documents identified by page numbers, along with a sworn affidavit indicating solicitor-client privilege had been asserted. Because the university did not follow the "Solicitor-Client Privilege Adjudication Protocol" established by the IPC, the IPC delegate issued a Notice to Produce Records under s. 56(3) of *FOIPP*. This section requires a public body to produce records "despite ...any privilege of the law of evidence."

The engagement of solicitor-client privilege, a cornerstone of our legal system protecting a client's ability to obtain candid legal information, attracted 17 interveners including information and privacy commissioners from across the country and representatives from law society organizations.

### **Decision of the Supreme Court**

The majority decision of the Supreme Court assessed the standard of review as "correctness" and dismissed the case on the basis that solicitor-client privilege is greater than the law of evidence and is a substantive right fundamental to the proper functioning of our legal system. To set aside a fundamental policy such as solicitor-client privilege requires clear and unambiguous legislative language.

The majority held that the language of s. 56(3) did not clearly and unambiguously override solicitor-client privilege. The decision was supported by three main reasons. First, *FOIPP* establishes that public bodies such as the university may refuse to disclose "information that is subject to any type of legal privilege, including solicitor client privilege."<sup>3</sup> Second, the language of "privilege of the law of evidence," which are the words used in *FOIPP* section 56(3), represents a narrower category than "legal privilege." Third, if the legislature had intended to set aside solicitor-client privilege it would have also provided safeguards to protect the documents from disclosure, such as addressing whether the disclosure constitutes a waiver of privilege with respect to any other person. Finally, in the alternative, the majority stated that even if *FOIPP* did intend to set aside solicitor-client privilege, it was not appropriate for the IPC delegate to order the production of the records merely because the university did not follow the protocol established by the IPC.

Anthony Morris

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## Footnotes

- <sup>1</sup> 2016 SCC 53, online: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16251/index.do>
- <sup>2</sup> *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25. (**FOIPP**)
- <sup>3</sup> *FOIPP* s. 27(1)(a).

For further information, please contact one of the following lawyers:

> <b>Christine A. Carron</b>	Montréal	+1 514.847.4404	<a href="mailto:christine.carron@nortonrosefulbright.com">christine.carron@nortonrosefulbright.com</a>
> <b>Karen Jensen</b>	Ottawa	+1 613.780.8673	<a href="mailto:karen.jensen@nortonrosefulbright.com">karen.jensen@nortonrosefulbright.com</a>
> <b>Kateri-Anne Grenier</b>	Québec	+1 418.640.5932	<a href="mailto:kateri-anne.grenier@nortonrosefulbright.com">kateri-anne.grenier@nortonrosefulbright.com</a>
> <b>Anthony Morris</b>	Calgary	+1 403.267.8187	<a href="mailto:tony.morris@nortonrosefulbright.com">tony.morris@nortonrosefulbright.com</a>

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