

Federal Court



Cour fédérale

Date: 20150415

Docket: T-548-12

Citation: 2015 FC 460

Ottawa, Ontario, April 15, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

SHELDON BLANK

Applicant

and

THE MINISTER OF JUSTICE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Over the years, Mr Sheldon Blank has continually sought disclosure of documents held by the Government of Canada relating to a regulatory prosecution against his company in the 1990s. Ultimately, in 2004, the prosecution was stayed. Mr Blank has been seeking documentary evidence that would show prosecutorial misconduct in his case.

[2] In this application, Mr Blank requests disclosure of 17 pages of records held by the Department of Justice [DOJ]. DOJ argues that the documents are subject to solicitor-client privilege (under s 23 of the *Access to Information Act*, RSC 1985, c A-1 – see Annex for provisions cited). It has withheld some of the documents in their entirety, and severed off portions of others (under s 25).

[3] Mr Blank argues that he was wrongly denied access to these documents because solicitor-client privilege does not apply to them, and because the power to sever portions of documents was improperly invoked here. He asks me to order DOJ to disclose the records to him.

[4] In my view, DOJ was entitled to raise solicitor-client privilege and to sever off portions of some of the records Mr Blank sought. Therefore, I must dismiss this application for judicial review.

[5] There are three issues:

1. Does Mr Blank's record contain materials that fall outside the *Federal Courts Rules*?
2. Did DOJ improperly invoke solicitor-client privilege?
3. Were documents improperly severed?

[6] Mr Blank also argued that he was entitled to seek a remedy broader than disclosure of the records in issue, namely an order requiring DOJ to conduct a more thorough search and disclosure (under s 41). I need not deal with that argument given that Mr Blank is only pursuing the remedy of disclosure.

II. Background

[7] In 2011, Mr Blank requested all records relating to documents created by persons who participated in a 2001 teleconference meeting, at which five agenda items were discussed. Mr Blank received 338 pages of documents, some redacted, but was denied access to dozens of others. In 2012, in response to his complaint, the Information Commissioner conducted further investigations and disclosed additional records to him. Mr Blank now seeks further disclosure.

III. Issue One – Does Mr Blank’s record contain materials that fall outside the *Federal Courts Rules*?

[8] DOJ argues that Mr Blank has improperly included in his record two affidavits that were prepared for purposes of an interlocutory proceeding, not this application. Therefore, they should not be considered. Further, DOJ maintains that Mr Blank’s record contains numerous pages of unsworn materials that should not be before the Court.

[9] Having reviewed the impugned documents, I am satisfied that they are irrelevant to the issues before me. Therefore, I need not make a formal ruling on them.

IV. Issue Two – Did DOJ improperly invoke solicitor-client privilege?

[10] Mr Blank does not dispute that the information he seeks is privileged. Rather, he maintains that DOJ waived its solicitor-client privilege, in particular, in situations where information was redacted out of some records disclosed to him, but was not redacted from

others. He also contends that DOJ forfeited its privilege when it subjected him to an abuse of process.

[11] I disagree.

[12] It is clear that disclosure of some information that may be privileged does not amount to a waiver of privilege entirely. Waiver requires an express intention to relinquish the privilege. This is clear from previous cases involving Mr Blank: *Blank v Canada (Minister of Justice)*, 2005 FC 1551 at paras 46-48; *Blank v Canada (Minister of Justice)*, 2007 FCA 147 at para 13; *Blank v Canada (Minister of the Environment)*, 2006 FC 1253 at para 33(b).

[13] Further, where information has already been provided, the issue of disclosure effectively becomes moot: *Blank v Canada (Minister of the Environment)*, 2007 FCA 289 at para 3; *Blank v Canada (Minister of Justice)*, 2010 FCA 183 at para 24.

[14] Finally, abuse of process, even if it had been proved here, is not an exception to solicitor-client privilege: *Blank v Canada (Minister of Justice)*, 2010 FCA 183 at para 20. In fact, before me, there is no basis for concluding that there has been any wrongdoing that could justify lifting the privilege.

[15] Therefore, I cannot conclude that DOJ improperly invoked solicitor-client privilege here, or that the privilege should be lifted. DOJ correctly identified information that was privileged and reasonably exercised its discretion not to disclose it.

V. Issue Three – Were documents improperly severed?

[16] Mr Blank argues that some of the severed information should have been disclosed to him. For example, in some cases, Mr Blank received the first page of a memorandum, but the subject lines on them were redacted.

[17] Mr Blank also received copies of certain emails, but not the parts of them that addressed the decision to proceed against his company by indictment. He says this information should not be considered privileged because it deals with unlawful conduct (citing *R v Campbell*, [1999] 1 SCR 565).

[18] Finally, Mr Blank argues that he should have received at least portions of the draft agenda mentioned above.

[19] I disagree.

[20] A government institution has an obligation to disclose parts of records that do not contain privileged information (s 25). Here, DOJ did just that – it provided to Mr Blank the portions of requested documents that did not contain legal advice.

[21] Having reviewed the unredacted documents, I am satisfied that they contain legal advice and, therefore, are subject to solicitor-client privilege. DOJ did not improperly sever the documents disclosed to Mr Blank.

[22] Further, DOJ did not unreasonably fail to sever the draft agenda. Severance should be carried out only where there are parts of a document that can reasonably be severed from the rest (s 25). Since the items on the agenda relate to legal advice, the privileged information could not reasonably be severed from any remainder.

[23] Therefore, I cannot conclude that DOJ improperly severed the documents provided to Mr Blank.

VI. Conclusion and Disposition

[24] In my view, DOJ did not improperly invoke Solicitor-client privilege, and did not improperly sever the documents in issue. Therefore, I must dismiss this application for judicial review, with costs. Counsel for DOJ submitted a bill of costs in the range of \$10,000.00, plus \$500.00 in costs ordered against Mr Blank in an earlier interlocutory proceeding. I would fix costs at \$3,500.00.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, with costs.
2. Costs are fixed at \$3,500.00.

"James W. O'Reilly"

Judge

Annex

Access to Information Act, RSC 1985, c A-1

Solicitor-client privilege

23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege

Severability

25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

Review by Federal Court

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information 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 Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

Loi sur l'accès à l'information, LRC 1985, c A-1

Secret professionnel des avocats

23. Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel qui lie un avocat à son client.

Prélèvements

25. Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente loi pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

Révision par la Cour fédérale

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-548-12

STYLE OF CAUSE: SHELDON BLANK v THE MINISTER OF JUSTICE

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: OCTOBER 8, 2014

JUDGMENT AND REASONS: O'REILLY J.

DATED: APRIL 15, 2015

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