



Decision on Application to Compel Production of Unredacted Government of Canada Records

1. Freedom 2022 Human Rights and Freedoms not-for-profit corporation (“Freedom Corp.”), brings an application seeking access to unredacted versions of nine documents that have been produced to the Commission by the Government of Canada (“Canada”). The redactions contained in these documents have been made by Canada on the basis of (a) solicitor-client privilege; (b) Cabinet confidence, including s. 39 of the *Canada Evidence Act* (“CEA”); (c) the fact that the redacted information is “irrelevant”; and (d) Parliamentary privilege.
2. This decision explains why I would dismiss Freedom Corp.’s application, except with respect to redactions for Parliamentary privilege.

Background to the Application and Applicable Rules and Statutes

3. Freedom Corp. served its Notice of Motion (“Notice”) on November 15, 2022. Accompanying Freedom Corp.’s Notice were copies of the documents at issue, as well as copies of the LinkedIn profiles of individuals whose records are the subject of Freedom Corp.’s application. As the documents at issue are not yet exhibits, I will refrain from discussing their content in detail.
4. The Commission’s Revised Rules of Practice and Procedure (“Rules”) provide:
 82. Where the Government asserts that information or documents (or portions thereof) constitute a confidence of the Queen’s Privy Council for Canada, the information or documents (or portions thereof) shall not be produced, or shall be produced with redactions. In the event that the Commission or Commission counsel disputes a redaction or a claim of Cabinet confidence, Commission Counsel shall advise the Government of the disputed claim. The Government shall then, within 10 days, reassess the document(s) or portion(s) of the document(s) listed and either issue a Certificate under section 39 of the Canada Evidence Act in respect of the



information or release the information. Following the issuance of a certificate, the process set out in section 39 of the Canada Evidence Act shall apply to the information so certified.

5. The Commission's Rules do not expressly permit parties to redact information on the basis that it is "irrelevant," other than irrelevant personal information (see Rule 21).
6. The Government's redactions for Cabinet confidence are marked "s. 39" overtop of redactions outlined in black. Section 39 of the *CEA* provides in relevant part:

Objection relating to a confidence of the Queen's Privy Council

39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

Definition

(2) For the purpose of subsection (1), a confidence of the Queen's Privy Council for Canada includes, without restricting the generality thereof, information contained in

- (a) a memorandum the purpose of which is to present proposals or recommendations to Council;
- (b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
- (c) an agendum of Council or a record recording deliberations or decisions of Council;
- (d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and



(f) draft legislation.

Definition of Council

(3) For the purposes of subsection (2), Council means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

7. In accordance with the Commission's Rules, Freedom Corp.'s application was circulated to the parties, who were given an opportunity to respond. The Commission received responses from:

- a. the Justice Centre for Constitutional Freedoms, who supported the relief sought;
- b. the Canadian Constitution Foundation, who also supported the relief sought and, referring to Rule 82, requested confirmation as to whether Commission Counsel had disputed the s. 39 redactions at issue;
- c. the Government of Saskatchewan, whose position was that "in the absence of any s. 39 certificates having been filed, Canada's agreement to provide the Commission "with all the inputs that were before Cabinet when it decided to declare the public order emergency" should be interpreted broadly"; and
- d. the Canadian Civil Liberties Association, who supported Freedom Corp.'s motion "to the extent it relates to redactions on the basis of Cabinet confidence / s. 39 and, in particular, its application to political staff." The CCLA agreed with the Government of Saskatchewan's submissions, and took the position that "[s]ection 39 should be limited to the deliberations of members of Cabinet and the Government of Canada should be consistent



in its application of this cabinet confidence.” The CCLA noted “that there are inconsistencies in the way in which s. 39 redactions have been made to documents” in the Party Database which, the CCLA submitted, “suggests that some documents may have been overzealously redacted.”

8. Canada provided responding submissions. Freedom Corp. provided reply submissions to Canada’s responses to the various parties.
9. Rule 20 sets out a process for resolving disputes over the existence or scope of privileges. This mechanism, where the dispute is referred to an independent adjudicator, is not mandatory. Commission Counsel asked Canada if it would consent to having the independent adjudicator address its claims of solicitor-client privilege. Canada declined.
10. I note that Freedom Corp. sought additional relief in its reply. It asked that it, the CCF, and the CCLA be given an extra hour, collectively, to cross-examine the Clerk of the Privy Council when she testified on November 18, in order to ask her a series of questions about Canada’s s. 39 claims. Given the timing, on November 17, Commission Counsel informed the parties that I had dismissed the request for additional time.

Analysis

11. Below, I set out the law relevant to Freedom Corp.’s application. I then turn to an analysis on a document-by-document basis.

Law and Analysis Relating to the Relief Sought

12. The redactions at issue in this application fall into four categories:
 - a. solicitor-client privilege;



- b. Parliamentary privilege;
- c. Cabinet confidence; and
- d. relevance.

Relevant Decision in Related Litigation

13. I note that the Federal Court released a decision in August in *Canadian Constitution Foundation v. Canada (Attorney General)* which addresses many of these issues.¹ In that case, the applicant, Canadian Constitution Foundation, brought a motion challenging redactions that Canada had applied to the records it produced in the context of the application. The Court held as follows in response to CCF's motion:

- a. the Court declined to question redactions made on the basis of relevance, as there were no allegations of bad faith or bias against the Clerk of the Privy Council;
- b. the Court agreed to review materials redacted on the basis of s. 37 of the CEA to determine the validity of those claims, possibly to be done in a closed hearing;
- c. the Court directed the Attorney General to file a s. 38 application and make representations as to the injury that would arise from disclosure of the redacted information; and
- d. the Court found that while there was no evidence that the claims of solicitor-client privilege were unfounded, it would be preferable to have the fact that solicitor-client privilege exists be confirmed in writing by a

¹ 2022 FC 1233 ("*CCF v. AGC*").



government lawyer, with the ethical responsibilities that entails, with personal knowledge of the circumstances in which the communication of legal advice took place.

14. Redactions for ss. 37 and 38 are addressed in the Commission's Rules, but the Court's comments on redactions for relevance and solicitor-client privilege are instructive.

Solicitor-client privilege

15. The Supreme Court has repeatedly affirmed that solicitor-client privilege must be "as close to absolute as possible."² Solicitor-client privilege can attach not only to direct communications between a lawyer and their client but applies to a continuum of communications between solicitor and client,³ and officials or employees acting on behalf of the client or solicitor are also covered by the privilege.⁴

16. A preliminary issue that was raised by Freedom Corp. was the process that I ought to follow for determining whether Canada had properly redacted records for solicitor-client privilege. Freedom Corp. urged me to order Canada to produce unredacted versions of the records 'for my eyes only' so that I could assess the claim in light of the full record before me.

17. Canada relies on *Blood Tribe* for the proposition that I do not have the authority to compel Canada to produce unredacted versions of the records to confirm if the privilege is properly claimed. Freedom Corp. argued that *Blood Tribe* is distinguishable

² *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 9 (and references therein) ("*Blood Tribe*").

³ *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 at paras. 25-33.

⁴ *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 875.



and not binding on me. He urged me to require the Government to produce unredacted versions of the documents to the Commission for my review.

18. In my view, paragraph 17 of the *Blood Tribe* decision is instructive:

[17] The only reason the Privacy Commissioner gave for compelling the production and inspection of the documents in this case is that the employer indicated that such documents existed. She does not claim any necessity arising from the circumstances of this particular inquiry. The Privacy Commissioner is therefore demanding routine access to such documents in any case she investigates where solicitor-client privilege is invoked. **Even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue.** In the Privacy Commissioner's view, however, piercing the privilege would become the norm rather than the exception in the course of her everyday work. (citations omitted, emphasis added)

19. In this case, based on the record and argument, I do not see any necessity to review the documents over which the Government claims solicitor-client privilege in order to decide the issues. A simple challenge as to the propriety of the redaction is insufficient in the context. I have no reason to question counsel's assertion that the privilege applies.

20. Finally, Canada's submissions in response to Freedom Corp.'s motion respond to the concerns raised in *CCF v. AGC*. Counsel for Canada re-reviewed all documents at issue and made submissions in writing and signed by a lawyer for Canada. Based on this, I am satisfied that the claim of solicitor-client privilege is made in good faith.

Parliamentary privilege

21. Parliamentary privilege is the "sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their



functions.”⁵ It “creates a sphere of decision-making immune from judicial oversight for compliance with the *Charter*.”⁶

22. The scope of Parliamentary privilege is delimited by the purposes it serves and extends only so far as is necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly’s work in holding the government to account for the conduct of the country’s business.⁷ The established categories of Parliamentary privilege are as follows:

- a. freedom of speech;
- b. control over debates and proceedings, i.e. “parliamentary proceedings” (includes control over “internal affairs”);
- c. power to exclude strangers from proceedings; and
- d. authority to discipline members and non-members.⁸

23. In order to fall within the scope of parliamentary privilege, the matter at issue must meet the test for necessity set out in *Canada (House of Commons) v. Vaid*: it must be “so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body...that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.”⁹

⁵ *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 at para. 19 (“*Chagnon*”).

⁶ *Chagnon*, at para. 25.

⁷ *Chagnon*, at para. 27.

⁸ *Chagnon*, at para. 31.

⁹ 2005 SCC 30, at para. 46 (“*Vaid*”); *Chagnon*, at para. 29.



24. The necessity test demands the sphere of activity over which Parliamentary privilege is claimed be more than merely connected to the legislative assembly's functions.¹⁰ In other words, the immunity that is sought must also be necessary to the assembly's constitutional role. The party seeking to rely on immunity from external review bears the burden of establishing its necessity, that is, to demonstrate that the scope of the protection it claims is necessary in light of the purposes of Parliamentary privilege.¹¹

25. Parliamentary privilege, once invoked, operates to shield the conduct that is the subject of the privilege from judicial review by the Courts. No party provided me with precedents in which Parliamentary privilege was invoked to prevent the disclosure of information or to redact documents produced in the context of proceedings. Canada's reliance upon the privilege as a basis upon which to do so therefore appears novel. Based on the case law above, and the historical scope and established categories of Parliamentary privilege, it is not an application that I am prepared to accept has the broad application suggested by Canada.

26. At Commission Counsel's request, counsel for Canada provided copies of the documents over which Parliamentary privilege is claimed with those redactions lifted. These were for 'my eyes only.' I have reviewed the unredacted versions of these documents and comment on them below. However, even if I were to accept that Parliamentary privilege could be invoked as a basis for redactions, I am not satisfied

¹⁰ *Chagnon*, at para. 30.

¹¹ *Vaid*, at para. 75; *Chagnon*, at para. 32.



that Canada has met the test for necessity as set out in *Vaid* in respect of the three documents at issue over which it claims Parliamentary privilege.

Cabinet confidence

27. At the outset, I note that Freedom Corp. correctly noted that no certificate under s. 39 of the *CEA* has been issued in respect of any of the challenged documents.

28. That, however, is not the end of the inquiry. Cabinet confidence exists at common law, independent from s. 39 of the *CEA*.¹² Cabinet confidentiality extends to documents that reflect on the content of Cabinet deliberations (but are not records arising out of a Cabinet meeting), and deliberations among Ministers, regardless of whether these occur in Cabinet.¹³

29. Where the Government asserts Cabinet confidentiality as the basis for redaction, whether under s. 39 of the *CEA* or at common law, a reviewing Court does not stand in the same position as it does in the case of solicitor-client privilege and cannot compel the production of an unredacted version of the document to confirm the existence or propriety of the privilege once the Clerk of the Privy Council issues a certificate.

30. While there is no certificate in this case, as a practical matter, Canada has re-reviewed the records and has confirmed that the remaining redactions are subject to Cabinet confidentiality. In other words, I am satisfied that the process in Rule 82 of the Rules has played out in substance, if not in form. Requiring the Government to produce a s. 39 certificate would serve no practical purpose in the circumstances.

¹² *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 (“*BC Judges*”), at para. 98.

¹³ *BC Judges* at paras. 67 and 97.



Relevance

31. Canada cites *Eli Lilly Canada Inc. v. Sandoz Canada Incorporated* for the proposition that portions of a relevant document may be redacted where the redacted portion is clearly irrelevant to the issues in dispute and would clearly not assist in properly understanding those parts of the document which are relevant.¹⁴

32. Freedom Corp. asked that the Government provide copies of the documents that had been redacted for relevance to Commission Counsel with those redactions lifted, so that I could review the information and satisfy myself as to the relevance or irrelevance of the information. The Government did so for two of three documents which contain redactions for irrelevance: SSM.CAN.00007719 and SSM.CAN.0000730. It did not do so for SSM.CAN.00007720 because, as explained by Canada, the redacted information is both irrelevant and also subject to Cabinet confidence.

Analysis of Relief Sought on a Document-By-Document Basis

33. Freedom Corp. seeks relief relating to nine documents produced by Canada. In response to Freedom Corp.'s motion, Canada re-reviewed all of the documents. Following to that review, Canada agreed to lift certain redactions (as summarized below), and reaffirmed the propriety of the balance of the redactions.

SSM.CAN.00007719: Sarah Jackson – Handwritten Notes

34. The Government redacted this document for solicitor-client privilege, Cabinet confidence, and relevance.

35. Freedom Corp. challenges all three bases for the redactions:

¹⁴ 2009 FC 345 at para. 14.



- a. **Solicitor-client privilege:** Freedom Corp. submits that the redactions on this basis, found on pages 3 and 7 of the record, are improper because there is no indication of (a) a lawyer being present, (b) who that lawyer was, or (c) if there was actual legal advice. Freedom Corp. submits that if the Government intends to maintain this assertion of solicitor-client privilege, it must provide evidence of all of the foregoing.
 - b. **Cabinet confidence:** Freedom Corp. submits that redactions to this document on the basis of s. 39 of the *CEA* are improper for three reasons. First, because the Government has not issued a certificate under s. 39 of the *CEA*. Second, the document must be a “cabinet record” to be afforded the protection of s. 39 of the *CEA*, and Freedom Corp. submits that since neither Sarah Jackson nor Katie Telford are in Cabinet, the notes are not cabinet records. Third, based on other documents produced by the Government, it does not appear that Sarah Jackson was present at the Incident Response Group meeting on February 10, and so her notes in relation to that meeting cannot be due to Cabinet confidence.
 - c. **Irrelevance:** Freedom Corp. submits that, based on circumstantial evidence, redactions to pages 1, 3, and 5 of the notes appear to relate to “highly relevant information.” Freedom Corp. submits that redaction on the basis of irrelevance in the entirety of these notes is unjustified.
36. Canada responded to each of these submissions:
- a. **Solicitor-client privilege:** Canada agreed to lift the second redaction for solicitor-client privilege (on page 7). On the first redaction for solicitor-



client privilege (on page 3), it submits that the information “falls within the continuum of communication between solicitor and client for the purposes of giving or receiving legal advice.” In any event, the Government further submits that the redacted information is “irrelevant being unrelated to the Convoy or the *Emergencies Act*.”

- b. **Cabinet confidence:** the Government agreed to lift certain redactions to page 6 of the notes, but maintained that other redactions on that same page and on page 5 are “properly withheld as a Confidence of the King’s Privy Council of Canada.”
- c. **Irrelevance:** the Government submitted that “[a]ll of the information redacted for irrelevance is appropriate as it is unrelated to the Convoy or the *Emergencies Act*.”

37. Freedom Corp. requested that Canada produce an unredacted version of this document to the Commission and, if Canada refused to do so, asked that I draw an adverse inference against them. The Government did not produce a fully unredacted version to Commission Counsel. However, it produced a version to Commission Counsel disclosing the “irrelevant” information. Having reviewed those redactions, and adopting the most generous interpretation of my mandate, I am satisfied that the redacted information is entirely irrelevant. I do not order those redactions to be lifted.

38. As set out above, I am not prepared to order the Government to produce a version of the document to Commission Counsel on which the redactions for Cabinet confidence or solicitor-client privilege are lifted. Based on the submissions of the



government related to solicitor-client privilege, I would accept their claim of privilege and, as noted earlier, I see no basis for ordering disclosure of the s. 39 redactions.

SSM.CAN.00007720 and SSM.CAN.00007721: Alex Jagric – Notes

39. The Government redacted this document for Cabinet confidence and “parliamentary privilege.”

40. Freedom Corp. submits that these notes do not “have any date or nexus to cabinet,” and that parliamentary privilege is not a legal basis upon which to object to produce evidence or to redact evidence.

41. Regarding SSM.CAN.00007720, Canada submits that the redactions on the basis of parliamentary privilege are proper. It further submits that the “information redacted for irrelevance is properly withheld as it does not relate to the circumstances that led to the declaration of the public order emergency or special temporary measures for dealing with the emergency.” In any event, Canada explains that the irrelevant information is also properly withheld as a Cabinet confidence.

42. Regarding SSM.CAN.00007721, Canada confirmed that the information redacted for Cabinet confidence is relevant but is properly redacted on that basis. It submits that the redactions for parliamentary privilege are also proper.

43. For the reasons previously expressed, I am not prepared to order the Government to produce an unredacted version of the document on which Cabinet confidence is asserted.

44. As set out above, I have reviewed the portions of these documents over which Canada claims Parliamentary privilege. Even if that were a basis upon which a party could redact a document, I am not persuaded by Canada’s argument or the documents



themselves that the redactions are necessary to protect the legislative's constitutional role, as required under *Vaid*. I therefore order Canada to produce unredacted versions of these two documents to counsel for the parties in a reasonably timely manner.

SSM.CAN.00000275: REDACTED

45. Canada redacted this document for Cabinet confidence.

46. Freedom Corp. submits that this is an email between political staffers and, as such, is not subject to Cabinet confidence and should be disclosed in full.

47. Canada lifted the claims of Cabinet confidence on page 1 and the top of page 2 and agreed to provide an updated version to the parties. Canada confirmed that the information redacted for Cabinet confidence on page 3 is relevant but is properly redacted on that basis.

48. I am not prepared to order Canada to produce an unredacted version of the document on which Cabinet confidence is asserted.

SSM.CAN.00000151: RE: Emergencies Act?

49. Canada redacted this document for solicitor-client privilege.

50. Freedom Corp. submits that this is an email between numerous Deputy Ministers, Assistant Deputy Ministers, and civil servants which has been redacted for solicitor-client privilege although “no recipients or senders are lawyers.”

51. Canada submits that the information redacted for solicitor-client privilege “refers to the giving or seeking of legal advice and, therefore, falls within the continuum of communication between solicitor and client for the purposes of giving or receiving legal advice.”



52. I am not prepared to order Canada to produce an unredacted version of the document on which solicitor-client privilege is asserted, as I accept their claim of privilege.

[SSM.NSC.CAN.00003164: Fwd: AB Letter](#)

53. Canada redacted this document for Cabinet confidence.

54. Freedom Corp. notes that this is an email dated February 17, 2022, between Minister Blair and his Chief of Staff, Zita Astavas, regarding using a February 5 letter from Alberta Minister Ric Mclvor as a justification for the *Emergencies Act*. It submits that an email between a Minister and their staffer is not a Cabinet confidence, and that the email should be disclosed in full.

55. The Government confirmed that the information redacted for Cabinet confidence is relevant but is properly redacted on that basis. However, it agreed to remove a redaction over the name “Dom,” and to produce an updated version to the parties.

56. I am not prepared to order the Government to produce an unredacted version of the document on which Cabinet confidence is asserted.

[SSM.CAN.00007129: RE: Emergencies Act – Parliamentary Update](#)

57. The Government redacted this document for “Parliamentary Privilege.”

58. Freedom Corp. submits that these emails dated February 14-15, 2022, cannot be redacted for “Parliamentary Privilege” as this privilege is not a basis upon which to refuse to produce or to redact documents.

59. In response to Freedom Corp.’s motion, Canada agreed to lift the claim of parliamentary privilege on page 1, within the email dated February 16, 2022, at 15:56, and to produce an updated version to the parties. Canada confirmed that the



information redacted for parliamentary privilege within the email of February 15 at 9:29 p.m. is relevant but is properly redacted on that basis.

60. Although Canada's claim of Parliamentary privilege over this email is stronger than its claim over the notes referred to above, Canada has provided little information in its submissions as to how this email meets the test for Parliamentary privilege I have discussed above. While the redacted material is of marginal relevance and would be of little assistance to the parties, I will nonetheless order its disclosure.

SSM.CAN.00007730: Text – Katie Telford-PM-Phil Proulx

61. Canada redacted this document to omit irrelevant information.

62. Freedom Corp. submits that the portion of the document immediately prior to and following the redacted portion has to do with the issue of blockades, and that the record should be disclosed in full as the redacted information is likely to be relevant.

63. Canada submits that the “redacted information does not relate to the circumstances that led to the declaration of the public order emergency or special temporary measures for dealing with the emergency,” and is therefore properly withheld as irrelevant.

64. I have been provided with an unredacted version of the document and am satisfied that the redacted information is irrelevant. As a result, I do not order that the redactions be lifted.

SSM.NSC.CAN.00003113: Text – Zita-Bill Blair

65. Canada redacted this document for Cabinet confidence.

66. Freedom Corp. submits that a text message between a Minister and their staffer is not a Cabinet confidence, and the text message should therefore be disclosed in full.



67. Canada confirmed that the information redacted for Cabinet confidence is relevant but is properly redacted on that basis.

68. I am not prepared to order the Government to produce an unredacted version of the document for which Cabinet confidence is asserted.

Disposition

69. I wish to comment on the timing of this decision in relation to Freedom Corp.'s application. As set out above, Freedom Corp. served its Notice at 10:20 p.m. on November 15. I gave parties an opportunity to make submissions in response to or supportive of Freedom Corp.'s application. Freedom Corp. then replied. Subsequent to that, and as sought by Freedom Corp. in its application, Commission Counsel asked for and received copies of the documents at issue with relevance and Parliamentary privilege redactions lifted. These were produced for my eyes only. The latter of these sets of unredacted documents was only produced in the afternoon on November 21.

70. The above, coupled with the fact that the assertion of Parliamentary privilege in this case appears to be a novel one, contributed to the timing of the issuance of this decision.

71. For the reasons set out above, I would therefore dismiss this application except insofar as it relates to the redactions applied on the basis of Parliamentary privilege.

Signed

The Honourable Paul S. Rouleau
Commissioner

November 22, 2022