OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Decision F11-01

LAW SOCIETY OF BRITISH COLUMBIA

Michael McEvoy, Adjudicator

March 15, 2011

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Summary: The applicant requested the Law Society provide him certain correspondence between Davis LLP and third parties, that were copied to the Law Society and that related to him. The Law Society disclosed some records but withheld others claiming they were subject to solicitor-client privilege. The Law Society submitted that it was plain and obvious that s. 14 of FIPPA applied and requested that discretion be exercised to not hold an inquiry in this matter. The adjudicator exercised his discretion to grant the Law Society's request, finding that it was plain and obvious that solicitor-client privilege applied and the applicant had not made any cogent argument to the contrary.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss.14 and 56.

Authorities Considered: B.C.: Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Decision F08-08, [2008] B.C.I.P.C.D. No. 26; Decision F08-11, [2008] B.C.I.P.C.D. No. 36; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-28, [2002] B.C.I.P.C.D. No. 8.

Cases Considered: *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC); *Blank v. Canada (Minister of Justice),* [2006] S.C.J. No. 39.

1.0 INTRODUCTION

[1] The Law Society of British Columbia ("Law Society") asked under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") that an inquiry not be held regarding the applicant's request to review the Law Society's decision to withhold certain information. For reasons that follow, I have exercised my discretion to grant the Law Society's request.

2.0 DISCUSSION

The access requests

[2] The applicant made two separate requests to the Law Society in the latter part of 2009 for correspondence between the law firm Davis LLP and third parties, copied to the Law Society and that related to him. The Law Society responded to each request by disclosing some records and withholding others on the ground they were subject to solicitor-client privilege in accordance with s. 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The applicant wrote the Office of the Information and Privacy Commissioner ("OIPC") seeking a review of the Law Society's responses to both of his requests.

[3] The OIPC unsuccessfully attempted to mediate both requests for review and on August 16, 2010 scheduled an inquiry for the two matters. The Law Society wrote the OIPC on November 8, 2010 to request, under s. 56 of FIPPA, that the two reviews not proceed to an inquiry.

Issue

[4] Section 56(1) of the Act reads as follows:

> **Inquiry by Commissioner**
>
> 56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[5] A number of previous decisions have laid out the principles for the exercise of discretion under s. 56(1). Senior Adjudicator Francis summarized those in Decision F08-11:[1]

- the public body must show why an inquiry should not be held
- the respondent (the applicant for records) does not have a burden of showing why the inquiry should proceed; however, where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide "some cogent basis for arguing the contrary"
- the reasons for exercising discretion under s. 56 in favour of not holding an inquiry are open-ended and include mootness, situations where it is plain and obvious that the records fall under a particular exception or outside the scope

[1] Senior Adjudicator Francis referred to a number of decisions in compiling this summary including: Decision F07-04, [2007] B.C.I.P.C.D. No. 20, Decision F08-08, [2008] B.C.I.P.C.D. No. 26, and Decision F08-11, [2008] B.C.I.P.C.D. No. 36.

of FIPPA, and the principles of abuse of process, *res judicata* and issue estoppel

- it must in each case be clear that there is no arguable case that merits an inquiry.

[6] I apply the same approach here.

Background

[7] The applicant is a non-practising member of the Law Society. In 2004, he filed a complaint with the British Columbia Human Rights Tribunal against the Law Society alleging that it had discriminated against him. The Law Society retained the law firms Davis LLP, Nathanson, Schachter & Thompson LLP and Lawson Lundell LLP to represent it with respect to various aspects of the complaint and associated proceedings. In addition, the law firm Heenan Blaikie LLP acted as counsel for a third party in a matter related to the applicant's Human Rights complaint.[2] The Human Rights Tribunal matter remains ongoing.[3]

The records in issue

[8] Originally, there were 27 records at issue within the applicant's first request and 31 in the second. However, the applicant states in his initial submission that he does not seek production of the portion of record 3 of his first request marked "Privileged and Confidential" or records 5–6 and 9–31 of his second access request. I take the applicant to abandon his request for these records and I will therefore only deal with the remaining 26 records in dispute.

[9] The Law Society submits it is plain and obvious that s. 14 of FIPPA applies to these 26 records.

Section 14

[10] Section 14 of FIPPA reads as follows:

> The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[11] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal professional privilege (sometimes referred to as legal advice or solicitor-client privilege) and litigation privilege.[4] The Law Society argues that litigation privilege applies to all of the records, while legal professional privilege also applies to records 3 and 22 from the respondent's first request.

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[2] Law Society initial submission, paras. 6 and 7.
[3] As at the time Law Society's, reply submission, January 21, 2011.
[4] See for example Order 01-53, [2001] B.C.I.P.C.D. No. 56.

[12] The decisions of this office have consistently applied the test for legal professional privilege at common law. Thackray J. (as he then was) put the test this way:[5]

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.

[13] Litigation privilege protects communications, including those between a lawyer and third party, where the dominant purpose for the communication was the preparation or conduct of litigation or the litigation was in reasonable prospect at the time of the communications.[6] It is also settled law that litigation privilege ends when the litigation, giving rise to it, ends. The proviso, which the Supreme Court of Canada articulated in *Blank v. Canada (Minister of Justice)*, is that the privilege "may retain its purpose – and, therefore, its effect - where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended."[7]

The Law Society's arguments

[14] The Law Society submits that records 3 and 22 are communications between it and their external counsel seeking and receiving legal advice. The Law Society says these records plainly and obviously fall within the scope of the legal professional privilege under s. 14 of FIPPA.[8]

[15] The Law Society further argues that all of the disputed records, including those just noted, are communications sent or received when litigation was in reasonable prospect or in progress and for which the dominant purpose for the communication was litigation.

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[5] *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).
[6] Numerous previous orders have affirmed this test. See for example Order 02-28, [2002] B.C.I.P.C.D. No. 8.
[7] [2006] S.C.J. No. 39 at para. 38.
[8] Law Society initial submission, para. 26.

[16] The Law Society provided affidavit evidence detailing each communication to support its claims with respect to both aspects of privilege. Many of the records at issue are letters from Davis LLP to potential witnesses respecting the ongoing litigation between the Law Society and the applicant.

The applicant's arguments

[17] The applicant says at least some of the disputed records are "for the purpose of assisting other parties in litigation against the Applicant"[9] rather than litigation between him and the Law Society. In support of this argument, the applicant provided two documents he obtained through a 2008 small claims court action that he commenced against a law firm ("Law Firm").[10] The documents are the cover pages of two Human Rights Tribunal decisions involving the applicant. Those documents contained "fax headers" indicating Davis LLP had faxed them to the Law Firm.

[18] The applicant also submits the Law Society's reference to "third party witnesses" is vague and there is no indication how these witnesses relate to the applicant's litigation with the Law Society.[11] Finally, the applicant says a sworn affidavit by a Davis LLP lawyer in another proceeding casts doubt on the Law Society's submissions that the dominant purpose for creating certain records was litigation.

Findings

[19] The Law Society describes the 26 disputed records in considerable detail, identifying each as a letter or email, the date on which it was written, the parties to the correspondence, the litigation to which it relates and the general nature of the content of each. The litigation to which the correspondence relates has been ongoing between these parties for approximately seven years.

[20] The applicant in this case says the dominant purpose for the creation of some records was not litigation but rather the assistance of "other parties" (which I take to be the Law Firm). In my view, the two faxed documents the applicant refers to do not raise any arguable issue concerning the records in dispute. There is no evidence linking these faxes and the disputed records. Based on their date, it is apparent the two faxes are not records in dispute. There is not even any evidence they came from the Law Society. Even if they did come from the Law Society this proves nothing with regard to the disputed records themselves. The Law Society's sworn evidence is clear that the withheld records were created for the dominant purpose of litigation relating to the Law Society and the applicant. The Law Society's sworn evidence is that none of the withheld records is to or from the Law Firm, and that none relates to the legal

[9] Applicant's reply, para. 6.
[10] The Law Firm is not any of those otherwise identified in this Decision.
[11] Applicant's reply, paras. 11 and 12.

proceedings between the applicant and the Law Firm.[12] Therefore, I find that the applicant's argument is conjecture lacking any cogent basis whatsoever.

[21] Further, the Law Society conclusively addresses the applicant's questions about whether the withheld communications between the Law Society's counsel and third parties relate to his litigation with the Law Society. The sworn affidavit evidence the Law Society filed states the communications with third parties in this case relate to the applicant's human rights complaint and court proceedings arising from it.[13] As noted above, solicitor-client privilege applies to a lawyer's communications with the third parties undertaken with respect to contemplated or actual litigation.

[22] Finally, nothing in the affidavit filed by a lawyer with Davis LLP in another proceeding casts doubt on the Law Society's claim of solicitor-client privilege in this case. The Law Society attached this affidavit, originally filed in connection with the applicant's Human Rights Tribunal complaint, to its reply in this matter. In my view, this affidavit confirms, rather than calls into doubt, the Law Society's submission that the withheld communications here involve its lawyer, Davis LLP and were created for the dominant purpose of litigation. The affidavit in question refers to three records that were the exception to a claim of privilege in the Human Rights complaint. The Law Society's reply makes clear none of those records is at issue here.[14]

[23] To summarize, the Law Society has demonstrated that it is plain and obvious that solicitor-client privilege applies to the 26 disputed records in this case. The applicant makes no cogent case to the contrary. This being so, there is no arguable case that merits an inquiry.

3.0 CONCLUSION

[24] For reasons given, no inquiry will take place on this review. This office's file is therefore closed.

March 15, 2011

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC Files: F09-40728 and F10-41576

[12] Law Society's reply, para. 11.
[13] Para. 13, Law Society's reply.
[14] Law Society's reply, paras. 11 and 12.