



OFFICE OF THE
INFORMATION & PRIVACY
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Order F11-26

MINISTRY OF ATTORNEY GENERAL

Michael McEvoy, A/Senior Adjudicator

August 31, 2011

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Summary: The applicant requested information about expenses government incurred during a lawsuit with a construction company. The responsive records related to the legal billings of Ministry lawyers and external legal counsel. The Ministry disclosed some information and withheld other information on the basis it was protected by solicitor-client privilege. The adjudicator found the withheld information was presumptively privileged and, in the circumstances of this case, the privilege had not been rebutted.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 14; *Attorney General Act*, s. 2(i).

Authorities Considered: B.C.: Order F10-19, [2010] B.C.I.P.C.D. No. 30.

Cases Considered: *B. v. Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.); *Maranda v. Richer* (2002), 216 D.L.R. (4th) 257 (S.C.C.); *Ontario (Attorney General) v. Ontario Information and Privacy Commissioner*, [2005] O.J. No. 941.

INTRODUCTION

[1] This case concerns an applicant's request for government expenses related to a lawsuit between the Ministry of Transportation and Highways¹ and a construction company. The Ministry of Attorney General ("Ministry") responded by disclosing a record with some parts withheld because the Ministry said those parts would harm third party business interests and were also subject to solicitor-client privilege. The applicant requested that this Office ("OIPC") review

¹ Now the Ministry of Transportation and Infrastructure.

the Ministry's decision. Prior to the commencement of this inquiry, the Ministry disclosed additional information in the record and the applicant dropped her claim to information the Ministry said would harm third party business interests. This information is therefore not in dispute.

[2] Following the close of the inquiry, I wrote the parties seeking clarification of the records in dispute.² The Ministry identified legal accounts rendered by external counsel as the responsive records. The applicant believed that additional responsive records existed but that the Ministry was not providing them because they interpreted her request too narrowly. Moreover, it was not clear from the applicant's submissions whether she even disputed the withheld parts of the records the Ministry produced.³ I referred the issues to mediation for clarification. In the result, the Ministry produced an additional record that it disclosed in part. It withheld other portions of this additional record, again based on solicitor-client privilege. Mediation also confirmed that the withheld parts of the external legal accounts and the additional record are at issue in this inquiry.

ISSUE

[3] The issue in this inquiry is whether the Ministry is authorized to refuse access to withheld information under s. 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") because it is subject to solicitor-client privilege.

[4] Under Section 57 of FIPPA, it is up to the Ministry to prove that the applicant has no right of access under s. 14.

DISCUSSION

[5] **The Records at Issue**—The first record ("record 1") is a four-page document entitled a "Retainer History". It is a detailed accounting of the amounts paid to a legal firm retained by the Province in a lawsuit with a construction company. The Ministry disclosed parts of this record, including the name of the law firm involved and the total amount of the legal bill (\$700,985.67). The Ministry also disclosed itemized headings in record 1, such as the date of invoice, as well as fees and disbursements associated with each invoice. The Ministry withheld all of the information falling under these headings.

[6] The second record ("record 2") is a three-page accounting of the legal hours and fees undertaken by lawyers employed by the Legal Services Branch ("LSB") of the Ministry in relation to the construction lawsuit. Record 2

² March 1, 2011.

³ This lack of clarity related to a concern by the applicant that her request for information was interpreted too narrowly by the Ministry.

encompasses the period from April 1, 2003 to May 2, 2011. The disclosed part of record 2 reveals several subject headings including:

- the name of the LSB lawyer doing work;
- the date of the work in addition to the lawyer's billing rate;
- the time spent and total fee for work done on that date; and
- a description of the work for the date.

[7] Finally, the record provides spaces for the total amount billed by each lawyer. Unlike record 1, however, there is no heading for a combined total for all of the work done by LSB lawyers. The Ministry disclosed to the applicant the names of the lawyers and the client Ministry involved but withheld all other information related to the subject headings I have just described.

[8] **Preliminary Issue**—The applicant complained in all her submissions that the Ministry interpreted her request for the construction lawsuit expenses too narrowly. Whether this complaint is meritorious or properly dealt with in this inquiry are issues that are now effectively moot because whatever the sufficiency of the Ministry's initial response to the applicant, the Ministry subsequently did do a further search following my letter to the parties of March 1, 2011. That search resulted in the production of a record that appears responsive to the broader nature of the applicant's request and is now the subject of this inquiry.

[9] **Solicitor-Client Privilege**—Section 14 of FIPPA states:

Legal advice

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

[10] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal advice privilege and litigation privilege. The Ministry argues that legal advice privilege applies to information at issue. This kind of privilege protects a confidential communication between a lawyer and a client that is related to the giving or receiving of legal advice, unless the client waives that privilege, either expressly or impliedly. As stated in *B. v. Canada*:⁴

As noted above, the 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.

⁴ [1995] 5 W.W.R. 374 (B.C.S.C.).

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.

It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

[11] Numerous orders and cases have also considered legal advice privilege as it applies to the disclosure of legal expenses. Former Acting Commissioner Paul Fraser, Q.C., exhaustively reviewed those cases in Order F10-19.⁵ I will not repeat that review but will refer to specific aspects of it in my reasons below. It will suffice here to summarize the principles that the former Acting Commissioner distilled from those cases that I adopt here:⁶

- Information relating to bills of accounts are presumptively privileged.
- The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege.
- The following questions relevant in determining whether the privilege is rebutted
 - (1) Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege?
 - (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

[12] **Analysis**—The disputed information here (essentially the Ministry's bookkeeping records related to hours and fees of in-house and external legal counsel) is similar in kind to that considered by the Supreme Court of Canada in *Maranda v. Richer*.⁷ The Court in *Maranda* stated that even though this type of information is not strictly a communication between lawyer and client, it arises out of a solicitor-client relationship and, therefore, must generally be regarded as

⁵ [2010] B.C.I.P.C.D. No. 30. This Order is presently the subject of judicial review.

⁶ Order F10-19, para. 40.

⁷ (2002), 216 D.L.R. (4th) 257 (S.C.C.).

part of it.⁸ While the Court would not apply a blanket privilege to such records, it did hold that a presumptive privilege applied and that such a presumption is rebuttable.

[13] The Ministry agrees that the presumptive privilege test outlined in *Maranda* and elaborated upon in Order F10-19, applies here.⁹

[14] Given the similarity of the disputed information here to that in *Maranda* and the fact the affidavit evidence in this case establishes the bookkeeping records arise out of the government's relationship with its legal counsel, I find that a presumptive privilege applies to records 1 and 2.

[15] The Ministry submits that the presumptive privilege applicable here has not been rebutted. It argues that the information in this case is similar to that Acting Commissioner Fraser considered in Order F10-19 and ultimately found to be privileged.¹⁰

[16] I agree that most of the disputed information in this case is similar to that in Order F10-19. The Acting Commissioner concluded in that case that the presumption of privilege applied to, and had not been rebutted with respect to, amounts and dates of payment of specific legal invoices. He stated that "[t]he specific dates, and the amount paid with respect to services rendered on those dates, make it more likely that an assiduous researcher could deduce information which is subject to the privilege."¹¹ This reasoning is directly applicable here to the specific invoices associated with both records 1 and 2. The reasoning in Order F10-19 also applies to the description of the lawyer's work connected with each invoiced item in record 2. The Acting Commissioner found that solicitor-client privilege clearly protected such information and I reach the same conclusion in this case.

[17] The remaining category of information concerns the total fees charged by each lawyer found in record 2. This particular category of information was not considered in Order F10-19. Each lawyer's fees derive from an hourly rate, assigned to that LSB lawyer, multiplied by time spent on the file. It is not an amount actually paid by the Province, but is a method by which the LSB allocates its overall costs to ministries receiving legal advice. Nonetheless, in my view these calculations relate to the time each lawyer spends on a file, and it is possible that an assiduous researcher could deduce from these specific billings,

⁸ *Maranda*, para. 32.

⁹ Ministry's initial submission, para. 4.14.

¹⁰ The only difference the Ministry says is that it contains information about dates and amounts related to various legal matters rather than the one legal matter here.

¹¹ At para. 54.

information that is subject to the privilege.¹² The solicitor-client privilege, therefore, is not rebutted with respect to this information.

[18] The applicant's main argument concerning the claim of privilege is that the real client in this solicitor-client relationship is the taxpayer who "has a right to know what they are being billed."¹³ The premise of this argument is not correct. The client in this case is in fact, Her Majesty the Queen in right of the Province of British Columbia ("Province"). In the eyes of the law, the Province is a distinct legal entity from individual taxpayers. The Province can sue and be sued. Further, under the terms of the *Attorney General Act*, the Attorney General "has the regulation and conduct of all litigation for or against the government or a ministry in respect of any subjects within the authority or jurisdiction of the legislature."¹⁴ Therefore, the Ministry has properly exercised the right of the Province, as client, to claim solicitor-client privilege in this case.

[19] I find there is no other evidence that demonstrates that the presumption of privilege has been rebutted in this case and therefore records 1 and 2 are subject to solicitor-client privilege.

CONCLUSION

[20] For all of the reasons stated above, under s. 58(2) I confirm that the Ministry is authorized to withhold the information in dispute under s. 14 of FIPPA.

August 31, 2011

ORIGINAL SIGNED BY

Michael McEvoy
A/Senior Adjudicator

OIPC File No.: F09-39516

¹² I note that in *Ontario (Attorney General) v. Ontario Information and Privacy Commissioner*, [2005] O.J. No. 941, at para. 1, the Ontario Court of Appeal upheld the Ontario Commissioner's order disclosing the total amount of fees charged by several lawyers. The Court was very careful to say that the disclosure order "revealed only the total amount paid by the Attorney General and *not* the amount paid to each lawyer." (para. 1, my emphasis).

¹³ Applicant's supplementary submission.

¹⁴ Section 2(i), *Attorney General Act*, R.S.B.C. 1996, c. 22.