



OFFICE OF THE
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Order F13-03

COLLEGE OF PSYCHOLOGISTS OF BRITISH COLUMBIA

Elizabeth Barker, Adjudicator

January 28, 2013

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Summary: The applicant requested information about what the College's legal counsel charged for certain services. The responsive records were monthly legal accounts. The adjudicator found that the presumption that the requested information is protected by solicitor-client privilege had not been rebutted.

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

Cases Considered: *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278; *Maranda v. Richer*, 2003 SCC 67; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39; *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427.

INTRODUCTION

[1] This case involves a request by a former employee of the College of Psychologists of British Columbia ("College") for "any records of the dollar amounts charged by legal counsel for services related to any applications filed with the Health Professions Review Board (HPRB) involving the College." The College responded by denying access to the records on the basis of solicitor-client privilege under s. 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the College's decision. The matter did not resolve during the investigation and mediation process, so the applicant requested that the matter proceed to inquiry under Part 5 of FIPPA.

ISSUE

[2] The issue before me is whether the College is authorized by s. 14 of FIPPA to refuse access to the requested records.

DISCUSSION

[3] **Background**—The College is the self-governing body that regulates the practice of psychology in the province. Its responsibilities include setting the standards for registration and competent, ethical practice, monitoring the practice of psychology practitioners and taking action when standards are not met. The College is governed by a nine person board and it employs six staff including a registrar who is the College's chief executive officer. The applicant is a former College employee.

[4] The College's decisions regarding the registration of members and the timeliness and disposition of complaints made against registrants are subject to review by the Health Professions Review Board ("HPRB"), an independent administrative tribunal established under the *Health Professions Act*. The parties to a review are the applicant for registration or a person who has made a complaint to a college about a health professional, the health professional who is the subject of the complaint, and the professional college that made the decision under review.

[5] **The Records**—The College states that the only records responsive to the request are monthly legal accounts for 2009, 2010 and 2011. Although the actual legal accounts are not before me, the College describes them in sufficient detail in its affidavit evidence to allow me to make a determination about whether they are privileged.

[6] **Would Disclosure Reveal Information Subject to Solicitor-Client Privilege?**—Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. As noted above, the assertion of privilege in this case relates to legal accounts.

[7] The Supreme Court of Canada set out the legal test with respect to lawyers' billing information in *Maranda v. Richer*.¹ The Court stated there is a rebuttable presumption that solicitor-client privilege applies to billing information contained in a lawyer's statement of account. The BC Supreme Court recently encapsulated that test in *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*.²

¹ 2003 SCC 67, para. 33.

² 2012 BCSC 427, paras.104-106.

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? And
2. Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

[8] I have applied the above principles to the facts of this case.

[9] **Analysis**—The College submits that the monthly statements of account are confidential, privileged communications that relate to legal and litigation advice sought and received. The records are described in the registrar’s affidavit as monthly legal accounts invoicing the College for professional legal services, only some of which pertain to applications before the HPRB. She explains that the College retained the services of several different lawyers, and their accounts include a detailed description of the services rendered, the number of hours spent providing each service, the date the service was provided, the total hours of service for the invoice period, and the amount of fees, disbursements and taxes charged. The registrar elaborates:

The professional services description includes the specific nature of the matters that were considered and discussed, including the specific nature of the legal advice sought and received; the identity of the individuals with whom the matters were discussed or otherwise addressed; the actions taken in respect of these matters, including the preparation of legal documents and steps taken in preparation for litigation; information about the status of ongoing litigation; strategies discussed in ongoing litigation; and the names of the applicants, registrants and/or complainants to whom the matters and advice relate and/or who have made applications to the HPRB.³

[10] Although the statements of account are not before me, I accept the College’s evidence as to their content and format. I find that the information they contain, including the amount billed, is confidential, written communication related to the seeking, formulating, and giving of legal advice, and that the presumption of solicitor-client privilege applies.

[11] Without conceding that the presumption of solicitor-client privilege applies to the information he seeks, the applicant provides submissions identifying circumstances he believes rebut the presumption and weigh in favour of disclosure.⁴ In short, he believes that the following circumstances make the possibility of his being able to deduce or acquire privileged information merely fanciful or theoretical: he is not involved in litigation with the College; the HPRB cases referenced in the accounts are most likely concluded by now; he could not

³ Registrar’s affidavit, para. 40.

⁴ Applicant’s reply submissions, paras. 3-6.

know about the College's current or ongoing HPRB matters because HPRB cases are not made part of the public record until concluded; presumably there is more than one HPRB case reflected in the accounts; no inferences can be made about the privileged communications because the College used several different lawyers with different fee structures and the records likely reflect final fees rather than interim fees.

[12] The applicant also argues in favour of severing the records. He reiterates that he only wants the dollar amounts charged for legal services related to the HPRB. He writes, "The College has not demonstrated that it is impossible to reasonably sever the 'Responsive Records' to release the requested information (e.g., dollar amounts) while still protecting privileged communications."⁵

[13] The College submits that the presumption of solicitor-client privilege applies to the records and that, contrary to the applicant's suggestion, the records are privileged in their entirety and are not severable into discrete parts. Regarding the issue of whether the presumption is rebutted, the College asserts that the applicant is an assiduous and particularly well-informed inquirer who would be able to use the information in the records to deduce or otherwise acquire privileged communications. He was employed by the College from September 2009 to February 2011, and his responsibilities included tracking the College's HPRB matters, liaising with the HPRB and participating in mediation of HPRB cases. In addition, he has legal training and has operated a website where he describes himself as follows:

...a twice Yale educated, former Deputy Registrar and Director of Investigations of one of the health colleges, who is intimately familiar with the medical registration (licensure) processes in three countries. While at the college he served as the originating co-chair of the Health Regulatory Organizations of British Columbia's (HROBC) working group devoted specifically to issues related to the new Health Professions Review Board (HPRB). In this role he attended bi-monthly meetings with the Chair, Executive Director, and staff of the HPRB, making him intimately familiar with the HPRB's process.⁶

[14] The College points out that the applicant's website offers, among other things, "Insight and inside information on the Health College Compliant Process" and HPRB decision summaries.⁷ The College believes that the billing information contained in the records would permit the applicant to reach some reasonably educated conclusions about the details of the retainer, instructions to counsel or the strategies being employed or contemplated, including:

⁵ Applicant's reply submission, para. 7.

⁶ Registrar's affidavit, paras. 26-30.

⁷ Registrar's affidavit, exhibit D.

- the state of preparation of the College in a HPRB application at a given point;
- whether or not the expense of expert opinion evidence had been incurred;
- whether the amount of the fees indicated only minimal expenditure, thus showing an expectation of compromise or capitulation;
- whether preparation in an application was done with or without substantial time involvement and assistance of senior counsel;
- whether legal accounts were being paid on an interim basis and whether payments were relatively current ; and
- what future costs to the College in a particular application might reasonably be predicted prior to its conclusion.⁸

[15] Regarding the applicant's argument that the legal accounts can be severed, I find that the presumption of privilege applies to the accounts as a whole. The applicant provided no legal authority to support his contention that the presumption of privilege applies only to the non-dollar parts of a legal account, and I note that *Central Coast* did not make that distinction. Nor does he provide authority to support his argument that a document that is subject to solicitor-client privilege may be severed. The accounts in this case are not divided into separate parts as was the situation in *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*⁹ where the court found only part of the record was subject to solicitor-client privilege and that the distinct, non-privileged section could be reasonably severed. Here, based on the facts as I find them, the dollar amounts are not contained in a separate section of each account. My conclusion in this regard is also guided by *Maranda* where the Supreme Court of Canada acknowledged the inherent risk in attempting to sever a bill of account:

... Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which this Court forcefully stated even more recently in *McClure*...¹⁰

⁸ College's initial submission, para. 105.

⁹ *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, at paras. 67-68.

¹⁰ *Maranda v. Richer*, 2003 SCC 67, at para. 33.

[16] However, even if the dollar amounts were disclosed in isolation, there is a reasonable possibility that this information would reveal communication protected by solicitor-client privilege. The applicant is, to use the language of the BC Court of Appeal in *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, an “assiduous, vigorous seeker of information”¹¹ when it comes to the College and HPRB cases involving the College. He did not refute the College’s evidence regarding his website or his background and experience with the College and HPRB matters. He worked for the College and handled its HPRB matters for the period captured by the records, and he operated a website that dealt with HPRB issues. There is a very real possibility that he could, with his background and in-depth knowledge of the College’s HPRB matters, use billing amounts to accurately deduce information about privileged communication. In my view, the amount billed reflects the College’s communication with its lawyers about how to proceed with HPRB matters. The size of fees and disbursements covering a particular time period, or discernible patterns in billings, would allow inferences to be made about the privileged communication. In addition, on its website the HPRB publishes oral hearing schedules as well as decisions. It would not be difficult for a knowledgeable individual such as the applicant to combine those details with information about fees and disbursement to draw conclusions about, for example, legal advice regarding litigation strategy or the significance of particular issues to the College.

[17] In conclusion, I find that the presumption that the requested information is protected by solicitor-client privilege has not, in the circumstances of this case, been rebutted.

CONCLUSION

[18] For the reasons stated above, pursuant to s. 58 of FIPPA, I find that the College is authorized to withhold the information in dispute under s. 14 of FIPPA.

January 28, 2013

ORIGINAL SIGNED BY

Elizabeth Barker
Adjudicator

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¹¹ *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278, at para. 37.