Office of the Information & Privacy Commissioner for British Columbia

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Order F14-03

MINISTRY OF JUSTICE

Elizabeth Barker, Adjudicator

January 23, 2014

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Summary: The applicant requested information related to the Province's decision to fund the legal expenses of two ministerial assistants who were charged with criminal offences. The Ministry withheld some of the responsive records claiming they were protected by solicitor-client privilege (s. 14) and others because it believed disclosure would be an unreasonable invasion of third-party personal privacy (s. 22). The ministerial assistants argued that all of the information in dispute should be withheld under ss. 14 and 22.

The adjudicator finds that the Ministry is authorized to refuse access to all of the information in dispute under s. 14 because it is protected by solicitor-client privilege. In light of the conclusion that s. 14 applies to all of the disputed information, there is no need to consider s. 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 8 and 14.

Authorities Considered: B.C. Orders: Order 00-07 2000 CanLII 7711 (BC IPC); Order 00-16, 2000 CanLII 7714 (BC IPC); Order 00-18 2000 CanLII 7416 (BC IPC); Order 01-20, 2001 CanLII 21574 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order 03-28, 2003 CanLII 49207 (BC IPC); Order 04-09, 2004 CanLII 34263 (BC IPC); Order 04-12, [2004 CanLII 34268 (BC IPC); Order F06-16, 2006 CanLII 25576 (BC IPC); Order F07-05, 2007 CanLII 9596 (BC IPC); Order F09-04, 2009 CanLII 14731 (BC IPC); Order F11-33, 2011 BCIPC 41 (CanLII); Investigation Report F13-05, 2013 BCIPC No. 33 (CanLII).

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665; *R. v. B.,* 1995 Can LII 2007 (BCSC); *Canada v. Solosky*, [1980], 1 S.C.R. 82; *Legal Services Society v. The Information and Privacy Commissioner of the Province of B.C.*,1996 Can LII 1780 (BC SC); *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 203; *British Columbia (Auditor General) v. Butler*, 2011 BCSC 1064; *British Columbia (Auditor General) v. British Columbia (Attorney General)*, 2013 BCSC 98.

Authors Cited: Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, 1993.

INTRODUCTION

[1] This inquiry concerns a request for records related to two indemnity agreements, by which the Ministry of Justice ("Ministry"), on behalf of the Province of British Columbia ("Province"), agreed to pay the legal defence costs of two former ministerial assistants ("Third Parties"). The Ministry is withholding all of the responsive records, some because it asserts they are protected by solicitor-client privilege (s. 14) and others because disclosure would be an unreasonable invasion of the Third Parties' personal privacy (s. 22). The Third Parties argue that all of the records should be withheld under both s. 14 and s. 22.

[2] The responsive records in this case are a smaller subset of those at issue in Order F14-02, which is being released at the same time as this order. The Ministry's and the Third Parties' submissions in both cases are almost identical.[1]

[3] A review of the Ministry's decision to withhold the responsive records in this case was conducted by the Office of the Information and Privacy Commissioner ("OIPC"), but the issues in dispute were not resolved. The applicant requested that this matter proceed to an inquiry under Part 5 of FIPPA.

ISSUES

[4] The issues to be addressed are as follows:

1. Is the Ministry authorized by s. 14 of FIPPA to refuse access to the requested information?

2. Is the Ministry required by s. 22(1) of FIPPA to refuse access to the requested information?

[1] Only one of the two Third Parties provided a submission. The other indicated that he adopted the first's submissions as his own.

[5] The Ministry has the burden of proof, under s. 57(1) of FIPPA, to establish that s. 14 authorizes it to withhold the requested information. However, s. 57(2) of FIPPA places the burden on the applicant to establish that disclosure of personal information would not be an unreasonable invasion of third-party personal privacy under s. 22 of FIPPA.

DISCUSSION

[6] **Background**—The Third Parties were formerly employed by the Province as ministerial assistants to the Minister of Finance and the Minister of Transportation. While still employed by the Province, they were charged with criminal offences alleging breach of trust and improper disclosure of confidential information concerning the sale of provincial assets.

[7] Since the 1980's, the Province has provided its employees with indemnity coverage to fund the costs of their legal expenses when the employee's involvement in the legal proceedings arises from conduct that occurred in the performance of employment. The terms and conditions for such coverage are contained in collective agreements for unionized employees and in policy for excluded employees. In addition, the Province may enter into indemnity agreements, under s. 72 of the *Financial Administration Act*, for employees who are not covered by indemnity protection in either a collective agreement or the Province's policy for excluded employees.

[8] In 2005, the Province, as represented by the Ministry (then the Attorney General), entered into an indemnity agreement with each of the Third Parties ("Indemnity Agreements") to pay their lawyers' accounts for their defence to the criminal charges. These Indemnity Agreements were granted under the authority of s. 72 of the *Financial Administration Act*.

[9] On October 18, 2010, the Third Parties each pleaded guilty to several counts.

[10] In an October 20, 2010 public statement, the Deputy Attorney General revealed the existence and the contents of some of the records in dispute here.[2] He explained that the Indemnity Agreements specified that the Third Parties would be obliged to repay their legal costs unless acquitted on all counts, but that the Province had decided to release them from their liability to repay. He also disclosed that a letter would be sent later that same day to the Third Parties and their lawyers releasing them from an October 14, 2010 condition that they not discuss the release from liability and they refer all inquiries to the Ministry.

[2] Ministry's initial submission, Appendix C.

[11] The applicant received a letter dated April 19, 2011, from the Assistant Deputy Attorney General informing him (and once again revealing some of the contents of the records in dispute) that the Indemnity Agreements had been amended by removing the condition that the Third Parties must, if convicted, repay the Province for the cost of their legal defence.[3] The letter also explained that a mortgage against the property of one of the Third Parties had been released at the same time because it was no longer needed to secure repayment.

[12] In September of 2012, the applicant requested a copy of the records referenced in the Assistant Deputy Attorney General's April 19, 2011 letter, namely:

1. The amended indemnity agreements, and
2. The document releasing the mortgage.

[13] The applicant also requested a copy of any correspondence between the Minister of Finance and the Deputy Minister of Finance, between October 5-20, 2010, concerning the above documents and/or the Third Parties' trial. However, during the course of the OIPC investigation, it was learned that the Ministry of Finance had no records responsive to this third aspect of his request, so it is not part of the inquiry.

[14] **Records at Issue**—The Ministry identified 63 pages of records responsive to the first two elements of the applicant's request. They are as follows:

Category 1:

An Indemnity Agreement for each Third Party, accompanied by its respective Schedules A and B.[4] The Ministry withheld the main body of the Indemnity Agreements under s. 22 and their Schedules A and B under s. 14. [Pages 1-47 of the records].

Category 2:

Records pertaining to the removal of the Third Parties' obligation, if convicted, to repay the Province for the cost of their legal defence, as well as records concerning the release of a mortgage secured against the

[3] Applicant's initial submission, attachment A.

[4] In his reply submission, the applicant states that he is not seeking access to Schedules A and B because he surmises they deal only with fees and billing information. However, as they are an integral part of the Indemnity Agreements and were part of the disputed records during the OIPC review which resulted in this inquiry, I have considered them in making this order.

property of one of the Third Parties. The Ministry withheld all of the information in these records under s. 22. [Pages 48-63 of the records].

Solicitor-client privilege

[15] The Ministry applies s. 14 to withhold only Schedules A and B of the Indemnity Agreements. The Third Parties, however, claim s. 14 applies to all of the responsive records. In light of that, the Ministry submits that it does not have the discretion to disclose information properly subject to s. 14 where a third party privilege is at stake and the third party has not waived that privilege. Therefore, I will consider all of the records in light of s. 14.

[16] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. This provision encompasses both legal advice privilege and litigation privilege.[5] The Ministry submits that legal advice privilege applies, but the Third Parties do not narrow their argument in this regard.

[17] For legal advice privilege to apply, the following conditions must be satisfied:

1. there must be a communication, whether oral or written;
2. the communication must be confidential;
3. the communication must be between a client (or agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[18] If these four conditions are satisfied, then the communication and the papers relating to it are privileged.[6]

Description of the records

[19] Given that a portion of the Ministry and Third Party submissions were submitted *in camera*, I am restricted in what I may reveal here when describing the nature of the records. The category 1 records (the Indemnity Agreements and their respective Schedules A and B) contain specifics of how the Third Parties' lawyers are to be retained, instructed and paid. The category 2 records

[5] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, para. 26.
[6] For a statement of these principles see also *R. v. B., 1995 Can LII 2007* (BCSC), para. 22 and *Canada v. Solosky*, [1980], 1 S.C.R 82, p. 13.

pertain to the decision, referenced by the Assistant Deputy Attorney General in his April 19, 2011 letter, to end the Third Parties' obligation to repay the Province for the cost of their legal defence.

Case law

[20] In considering whether the records in dispute are protected by legal advice privilege, I was guided by the following three similar cases.

[21] *Descoteaux v. Mierzwinski*[7] ("*Descoteaux*") involved an attempt by the police to gain access to communications between an applicant and the Legal Aid Society employee who interviewed him regarding his eligibility for legal aid. Although it was ultimately held that the privilege was defeated by fraud,[8] the court determined that information concerning an individual's financial means, the basis of his claim and any other information he must provide the Legal Aid Society in order to obtain the services of a lawyer is privileged. Lamer, J. wrote:

> The items of information that a lawyer requires from a person in order to decide if he will agree to advise or represent him are just as much communications made in order to obtain legal advice as any information communicated to him subsequently...
>
> Moreover, the same applies not only to information given before the retainer is perfected concerning the legal problem itself, but also to information concerning the client's ability to pay the lawyer and any other information which a lawyer is reasonably entitled to require before accepting the retainer. First, this information of an administrative nature is just as related to the establishment of the professional relationship as any other information; this is especially clear when, as in the case at bar, the legal aid applicant "must set forth [his] financial means... and the basis of his claim". In addition, information of this nature that a person gives his lawyer for that purpose may also be highly confidential and would have been kept secret by that person were it not for that person's need of the assistance of a legal adviser.
>
> ...
>
> I therefore do not think that a distinction should be made between information that must be given in order to establish the probable existence of a valid claim and that given to establish eligibility from the point of view of financial means, since, on the one hand, information concerning the person's financial situation may be just as highly confidential as any other information and since, on the other hand, the fact of being unable to meet

[7] [1982] 1 S.C.R. 860.

[8] The SCC explained that there are exceptions to the principle of the confidentiality of solicitor-client communications. Thus communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged.

> the eligibility requirements respecting financial means is no less fatal to the ability to obtain the services sought. [9]

[22] In *Legal Services Society v. The Information and Privacy Commissioner of the Province of B.C.*,[10] ("*Legal Services*"), Lowry, J. found that information disclosed by an applicant to the Legal Aid Society for the purpose of obtaining legal advice and representation is privileged and should be kept confidential in the same manner and to the same extent as if it had been disclosed directly to the applicant's solicitor. He wrote:

> The nature and the terms of a legal aid retainer appear to me to be unquestionably a communication between lawyer, client, and the Society as agent that occurs for the purpose of obtaining legal advice where, generally, there exists an expectation of confidence. Either directly or through the Society, the client instructs the lawyer to undertake the defence on the basis that he will be paid for his services in accordance with the legal aid tariff and the lawyer, in turn, accepts the arrangement. It is a communication that occurs within the framework of the solicitor-client relationship and is accordingly privileged.

[23] A similar finding was made in BC Order 03-28,[11] which dealt with a request for the accounts of lawyers who, at public expense, defended an individual accused of the 1985 Air India bombing. The disputed records included a funding agreement between the Ministry and the accused's defence counsel and an agreement with an external lawyer to review the defence counsel's fees and disbursements. In that case, the functions of the Ministry of the Attorney General respecting the funding of the accused's defence were determined to be central to the solicitor-client relationship between the accused and his lawyer as were the functions performed by the lawyer retained by the Ministry to review the legal accounts submitted for payment. It was found that the communications contained in the records were privileged because they were both confidential and related to the seeking or giving of legal advice.

[24] I understand the above three cases as confirming that a client has the right to keep communications with his or her lawyer confidential even when those communications flow through others, or commence by way of communications with others regarding how the client will compensate the lawyer. In other words, when communications of this nature are made in this manner for the purpose of obtaining or giving of legal advice, they need not be made by an applicant to their lawyer directly in order for privilege to apply.

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[9] Pages 877-78.

[10] 1996 CanLII 1780 (BC SC), at para. 16. Similarly, several years later in L*egal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 203, Scarf J. agreed that the nature and terms of a lawyer's legal aid retainer agreement with a client is privileged information.

[11] 2003 CanLII 49207 (BC IPC).

[25] I have also considered the recent British Columbia Supreme Court decisions in *British Columbia (Auditor General) v. Butler*[12] ("*Butler*") and *British Columbia (Auditor General) v. British Columbia (Attorney General)*[13] ("*Attorney General*"), as well as the Auditor General's December 2013 report entitled *An Audit of Special Indemnities*, all of which dealt with many of the same records that are before me in this inquiry. Although there was no specific finding that solicitor-client privilege applies to the records, the implication in all three is that it does.

[26] In *Butler,* Greyell, J. dealt with the Auditor General's application for access to the Third Parties' Indemnity Agreements and related records, which were in the possession of the Ministry. He found that the Third Parties had waived any solicitor-client privilege they may have over the records, but only for the express purpose of, and for no other purpose, than the Auditor General's audit. However, he concluded his reasons by stating, "I wish to make it clear I am making no finding that solicitor/client privilege applies to any of the documents requested by the Auditor General."[14]

[27] Two years later, in *Attorney General*, Bauman, J. addressed the issue of whether the *Auditor General Act* permitted BC's Auditor General to access indemnity agreement records, notwithstanding that such records may be subject to a claim of solicitor-client privilege. The records the Auditor General sought were those in the possession of the individuals reviewing the Third Parties' lawyers' legal accounts. Bauman, J. found that solicitor-client privilege may only be abrogated by clear and unambiguous legislative language, which the *Auditor General Act* did not contain. As was the case in *Butler*, the Court did not examine whether the requested records were properly protected by solicitor-client privilege, however, the analysis proceeded as if this were a given.

[28] More recently, in the BC Auditor General's report, it is evident that an obstacle in his investigation was the privilege asserted over the indemnity agreements he sought to examine. It appears that most of the individuals who were asked to provide him with access to their indemnity agreements claimed solicitor-client privilege, and only a portion of those agreed to waive privilege for the purposes of the audit.

Communication between client and lawyer directly related to seeking or giving legal advice

[29] The Third Parties submit that they relied on the disputed records to assess their legal situation, provide instructions and obtain legal advice from their lawyers. They add that the records contain information dealing with their criminal

[12] 2011 BCSC 1064.
[13] 2013 BCSC 98.
[14] At para. 69.

charges and their lawyers' professional obligations, as well as legal fees and costs. I find that the communication contained in the Indemnity Agreements and their Schedules A and B (*i.e.*, the category 1 records) and the communication contained in the records which modify them (*i.e.*, the category 2 records) clearly and directly relate to the seeking or providing legal advice and representation.

[30] The applicant argues that the records cannot be privileged because they do not contain communication between solicitor and client. He is correct in understanding that the records are not exclusively between the Third Parties and their lawyers. The parties to these records also include the Ministry and a lawyer whose task was to review and certify defence counsel's accounts prior to payment.[15] However, such third party communications may be protected by legal advice privilege where the third party is performing a function, on the client's behalf, that is integral to the relationship between the solicitor and the client.[16] I find that this is the case with respect to the records here. In a manner similar to the situation in *Descoteaux*, *Legal Services* and BC Order 03-28, the Ministry and the reviewer in this case were agents or intermediaries of the Third Parties for the purpose of facilitating the attainment and provision of legal advice and representation. In other words, I find that the Ministry and the reviewer are performing a function integral to the relationship between the Third Parties and their lawyers.

Confidential communication

[31] I have also considered whether the communication captured in the responsive records was confidential. The Ministry's Legal Services Branch lawyer responsible for negotiating, implementing and administering the indemnity arrangements provided evidence that he and the Third Parties' lawyers had an unwritten agreement that information exchanged regarding the indemnity arrangements would remain confidential between themselves, their respective clients, and where applicable, the lawyer reviewing the legal accounts.[17] The Third Parties submit that all of the records in dispute are confidential communications related to their retainer agreements with their lawyers so are protected by solicitor-client privilege. I am satisfied that the responsive records reflect confidential communications and decisions made for the purpose of retaining counsel and obtaining or providing legal advice.

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[15] As per details provided in *Attorney General, footnote 12 above.*

[16] *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, para 31; Order F06-16, 2006 CanLII 25576 (BC IPC); Order F11-33, 2011 BCIPC 41 (CanLII).

[17] The Province also asserted this confidentiality in *Butler*.

Waiver of privilege

[32] Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege knows of the existence of the privilege and voluntarily shows an intention to waive that privilege.[18] The law is well established that the privilege belongs to, and may only be waived by, the client. The clients in this case are the Third Parties.

[33] The facts of this case raise the issue of whether privilege in the responsive records was waived when the Ministry revealed particulars about the Indemnity Agreements and their amendments. For example, on October 20, 2010, the Deputy Attorney General stated that the Indemnity Agreements contained a repayment condition and that the Third Parties had been released from that condition. At the same time, he also revealed details contained in the category 2 records about conditions imposed on October 14, 2010, as well as the nature and contents of the October 20, 2010 letter being sent to the Third Parties and their lawyers, lifting those conditions.

[34] The Ministry explains that it obtained the consent of the Third Parties' lawyers before issuing the Deputy Attorney General's October 20, 2010 statement. However, there is nothing in the materials that demonstrates that their clients - the Third Parties - agreed to this disclosure or had any intention of waiving privilege. In fact, *Butler* and *Attorney General*, as well as their submissions in this inquiry, indicate that the Third Parties have (with the sole exception of the Auditor General's audit) refused to relinquish their claim of privilege over the records related to their indemnification arrangement with the Ministry.

[35] I find that the Third Parties have not waived privilege over these records.

CONCLUSION

[36] I find that both the category 1 and the category 2 records contain confidential communications directly related to the seeking, formulating, or giving of legal advice; and though the communication is not exclusively between the Third Parties and their solicitors, it is integral to the establishment and operation of the professional relationship between them. Further, there has been no waiver of privilege by the Third Parties. In conclusion, I find that all of the disputed records are protected by solicitor-client privilege.

[18] Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, 1993, p. 187-191; Order 00-07 2000 CanLII 7711 (BC IPC); Order F07-05, 2007 CanLII 9596 (BC IPC).

[37] In light of this conclusion, I need not consider the application of s. 22 to the records.

ORDER

[38] Pursuant to s. 58 of FIPPA, the Ministry is authorized to withhold all of the information in dispute under s. 14 of FIPPA.

January 23, 2014

ORIGINAL SIGNED BY

Elizabeth Barker, Adjudicator

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