



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
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Order F15-15

## MINISTRY OF JUSTICE

Elizabeth Barker  
Senior Adjudicator

March 24, 2015

CanLII Cite: 2015 BCIPC 16

Quicklaw Cite: [2015] B.C.I.P.C.D. No. 16

**Summary:** The applicant requested details of financial transactions between the Ministry and the law firm Borden Ladner Gervais and between the Ministry and a specific lawyer in that firm. The requested information was contained in legal retainer agreements, requests to retain outside legal counsel, legal invoices and associated records. The Ministry refused to disclose the requested information under s. 14 of FIPPA on the grounds that it was subject to solicitor client privilege. The adjudicator found that the Ministry is authorized to refuse to disclose the requested information under s. 14.

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

**Authorities Considered: B.C.:** Order 02-38, 2002 CanLII 42472 (BC IPC); Order 03-28, 2003 CanLII 49207 (BC IPC); Order F08-02, 2008 CanLII 1647 (BC IPC); Order F10-23, 2010 BCIPC 34 (CanLII); Investigation Report F13-05, 2013 CanLII 95961 (BC IPC); Order F13-15, 2013 BCIPC 18 (CanLII); F14-16, 2014 BCIPC 19 (CanLII).

**Cases Considered:** *Canada v. Solosky*, 1979 CanLII 9 (SCC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Corp. of the District of North Vancouver v. B.C. (The Information and Privacy Commissioner)*, (“*Municipal Insurance*”), 1996 CanLII 521 (BC SC); *Donell v. GJB Enterprises Inc.* (“*Donell*”), 2012 BCCA 135 (CanLII); *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 (CanLII); *Maranda v. Richer* (“*Maranda*”), 2003 SCC 67 (CanLII); *R. v. B.*, 1995 CanLII 2007 (BCSC); *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 (CanLII); *Stevens v. Canada (Prime Minister)*, 1998 CanLII 9075 (FCA).

## INTRODUCTION

[1] The applicant requested the Ministry of Justice (“Ministry”) provide details of any financial transactions between the Ministry and the law firm Borden Ladner Gervais and between the Ministry and a specific lawyer (“Lawyer”) at that firm for the period January 2008 to November 2013.

[2] The Ministry refused to disclose the requested information under s. 14 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) on the grounds that it is subject to solicitor client privilege. The applicant asked the Office of the Information and Privacy Commissioner (“OIPC”) to review the Ministry’s decision. Mediation did not resolve the matter and the applicant requested that it proceed to inquiry under Part 5 of FIPPA.

## ISSUE

[3] The issue to be decided in this inquiry is whether the Ministry is authorized to refuse access to the requested information under s. 14 of FIPPA. The burden of proving that the applicant has no right to access the information rests with the Ministry under s. 57(1) of FIPPA.

## DISCUSSION

[4] **Background**—The Ministry’s Legal Services Branch (“LSB”) provides legal services to the Province’s ministries and agencies. In some cases, however, outside legal counsel, such as Borden Ladner Gervais and the Lawyer, are retained by the Ministry to work on files. This may occur if LSB cannot do the work for reasons related to geographic location, workload pressures, conflict of interest or the need for a specialized expertise. Outside counsel are retained through the LSB’s Appointments and Retainers Program.

[5] **Information in Dispute**—The Ministry explains that the contents of more than 85 files fall within the scope of the request, and that the Lawyer played a role in two of those files.

[6] In its submissions, the Ministry provided a detailed description of the responsive records. However, pursuant to s. 44 of FIPPA, the OIPC also requested that the Ministry provide examples of the responsive records for the purposes of the inquiry. As a result, the Ministry provided 93 pages of records, consisting of one complete file as well as examples of the different types of records that are in the 85 files.

[7] I have reviewed the example records provided by the Ministry, and they are as follows:

- a) Outside Counsel Request Forms. These forms (completed by LSB) provide a description of the required legal services, why outside legal counsel is needed, the name of the outside counsel, the name of the client ministry, who will instruct counsel, the maximum amount of the retainer and the time frame for the retainer.
- b) Retainer agreements between the Ministry, on behalf of the Province, and outside legal counsel. They identify the provincial government ministry or agency that will receive the legal services. The retainers also contain details about the legal services to be provided, fees, billing, reporting and other related matters.
- c) Invoices containing descriptions of legal services, time spent providing those services, and the associated fees, disbursements and taxes.
- d) Emails and other records regarding the particulars of the requests for outside legal counsel, retainers and payment of invoices. For example, there are emails, memoranda and letters between LSB, client ministries and Borden Ladner Gervais regarding amendments to retainers, and lists of the hourly billing rates for various Borden Ladner Gervais lawyers.

[8] **Preliminary Matters**—In his initial submissions,<sup>1</sup> the applicant argues for disclosure of the records under s. 25(1)(b) of FIPPA, which states as follows:

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

...

- (b) the disclosure of which is, for any other reason, clearly in the public interest.

[9] The applicant did not raise s. 25 in his request for review, and the Notice of Inquiry and the Investigator's Fact Report do not identify it as an issue in this case.

[10] Parties may not raise new issues at inquiry without first obtaining permission because, among other things, it undermines the effectiveness of the mediation process that assists the parties in defining and crystallizing the issues

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<sup>1</sup> Applicant's initial submissions, para. 37-44.

prior to inquiry.<sup>2</sup> The applicant does not explain why he did not raise this issue prior to his initial submission or why he should be permitted to do so at this late stage.

[11] In any event, previous Orders of this office have interpreted the phrase “without delay” in s. 25(1) as requiring an “element of temporal urgency” such that s. 25 is only triggered if there is an urgent and compelling need for disclosure. The circumstances must be of clear gravity and present significance which compels the need for disclosure without delay.<sup>3</sup> Based on my review of the records and the parties’ submissions, I can see no element of temporal urgency in this case. Therefore, I find that s. 25(1)(b) does not apply.

[12] The applicant’s initial submissions also contain arguments about the applicability of s. 22 of FIPPA to the information in dispute (although he argues that the records do not contain personal information). The Ministry does not rely on s. 22 to withhold information from the records. As s. 22 is a mandatory exception, I will consider its application, but only if I determine that the records may not be withheld under s. 14.

[13] Finally, although the applicant’s submissions focus almost exclusively on his allegations about the Lawyer’s conduct, these are not issues that I need to decide in this inquiry.<sup>4</sup>

[14] **Solicitor Client Privilege**—The Ministry is withholding the requested records under s. 14 of FIPPA, which says that a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. This provision encompasses both legal advice privilege and litigation privilege.<sup>5</sup> The Ministry submits that legal advice privilege applies to all of the records, and that litigation also applies to some of them. The applicant disputes that the records are protected by solicitor client privilege.

[15] 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;

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<sup>2</sup> Order F10-23, 2010 BCIPC 34 (CanLII) at para. 4; Order F08-02, 2008 CanLII 1647 (BC IPC), at para. 30.

<sup>3</sup> Investigation Report F13-05, 2013 CanLII 95961 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 53; Order 03-28, 2003 CanLII 49207 (BC IPC) at para. 25.

<sup>4</sup> The Law Society of British Columbia investigated and determined that his complaint was unfounded, and his petition for judicial review of that decision was dismissed by the BC Supreme Court in 2015 BCSC 211 (CanLII).

<sup>5</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 26.

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.

[16] Not every communication between client and lawyer is protected by solicitor client privilege, but if the four conditions above are satisfied, then privilege applies to the communications and the records relating to it.<sup>6</sup>

*The outside counsel request forms, retainer agreements and related emails and records*

[17] Some of the records at issue in this inquiry are retainer agreements and requests for outside legal counsel and emails and other records related to the matters communicated in those records. I find that these records are written communications between various client ministries or agencies and their legal counsel as a client and legal advisor, and the communications pertain directly to seeking, formulating and giving legal advice. The Ministry states that these were confidential communications, and the content and context of these records indicates that was the case. There is nothing that suggests that they were not kept confidential between the client ministries and their lawyers. Therefore, I am satisfied that these records meet all of the requirements for legal advice privilege to apply. This is consistent with previous case law and orders, which have also found that the terms of a solicitor client relationship contained in a retainer agreement and related documents are privileged because they relate directly to the communication involved in the seeking, formulating or giving of legal advice.<sup>7</sup>

[18] The applicant submits that due to alleged misconduct and conflict of interest, there can be no solicitor client relationship between the Ministry and the Lawyer or Borden Ladner Gervais.<sup>8</sup> According to the applicant, the Lawyer represented both the applicant and the Province in 2008-09 (although not in the same matter) and the Lawyer misled him in order to gain favour with the Province. I am not aware of any law that supports the applicant's assertion that such events would vitiate the solicitor client relationship between the Ministry and the Lawyer, and he did not identify any. Therefore, I am not persuaded by the applicant's submissions that there was no solicitor client relationship between the Ministry and the Lawyer or Borden Ladner Gervais.

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<sup>6</sup> For a statement of these principles see *R. v. B.*, 1995 CanLII 2007 (BCSC), para. 22 and *Canada v. Solosky*, 1979 CanLII 9 (SCC), p. 13.

<sup>7</sup> *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 203 (CanLII), para. 13, upheld on appeal at 2003 BCCA 278; *Corp. of the District of North Vancouver v. B.C. (The Information and Privacy Commissioner)*, ("Municipal Insurance"), 1996 CanLII 521 (BC SC), paras. 25-28; *Stevens v. Canada (Prime Minister)*, 1998 CanLII 9075 (FCA), para. 44; Order F13-15, 2013 BCIPC 18 (CanLII).

<sup>8</sup> Applicant's initial submissions, para. 14 and reply submissions, paras. 14-16.

*Legal invoices and related emails and records*

[19] The sample records provided by the Ministry include legal invoices. There are also emails and other records containing communication between the client ministries and their lawyers, as well as within the client ministries themselves, regarding matters related to legal fees and billing.

[20] The Supreme Court of Canada in *Maranda v. Richer* noted that the calculation and payment of a lawyer's fees constitute an integral element of the solicitor client relationship, and arise out of that relationship and the communication that transpires within it.<sup>9</sup> There is a rebuttable presumption that solicitor client privilege applies to billing information contained in a lawyer's statement of account and related documents.<sup>10</sup> In *Donell v. GJB Enterprises Inc.*, the British Columbia Court of Appeal stated that this presumption may be rebutted if it is established that there is no reasonable possibility that disclosure will directly or indirectly reveal any communications protected by privilege.<sup>11</sup> More than a merely fanciful or theoretical possibility of breach of the privilege would have to exist. The focus should be on what could be deduced or learned by an "assiduous, vigorous seeker of information" (as opposed to a casual reader).<sup>12</sup>

[21] I find that the legal invoices and related emails are presumptively privileged. Therefore, the remaining question is whether the presumption can be rebutted. The Ministry submits that there is a reasonable possibility that disclosure will directly or indirectly reveal communications which are protected by solicitor client privilege. The Ministry submits that the specific dates and amounts billed with respect to legal services rendered on those dates would allow an assiduous researcher to deduce privileged information. The Ministry provided affidavit evidence from its supervising counsel in LSB's Aboriginal Law and Litigation Group. He explains that disclosing the information contained in the records would directly or indirectly reveal information about privileged communications, such as the Province's position regarding the merits of a particular issue, litigation strategy, when and how often the Province communicated with its lawyers, and the terms it negotiated with its lawyers regarding the provision and termination of legal services.

[22] In my view, there is a reasonable possibility that disclosure of the information in dispute would directly or indirectly reveal communications protected by solicitor client privilege. For example, the level of resources

<sup>9</sup> *Maranda v. Richer* ("Maranda"), 2003 SCC 67 (CanLII) at para. 32.

<sup>10</sup> *Maranda*, at para. 33; *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)* ("Central Coast"), 2012 BCSC 427 (CanLII), paras. 100-106; F14-16, 2014 BCIPC 19 (CanLII).

<sup>11</sup> *Donell v. GJB Enterprises Inc.* ("Donell"), 2012 BCCA 135 (CanLII), para. 49-59.

<sup>12</sup> *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 (CanLII), para. 37; *Donell* at paras. 56-58; *Central Coast*, para.104-106.

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expended for legal services and disbursements, in combination with dates and details about those expenditures, could reveal the Province's position and strategy regarding specific legal matters that are part of the public record. This in turn could allow an assiduous inquirer to accurately deduce information about privileged communications between the Province and its lawyers. Therefore, I find that the presumption that the invoices and related records are protected by solicitor client privilege has not been rebutted.

[23] In summary, I find that all of the information in dispute is protected by legal advice privilege. Therefore, find that the Ministry is authorized to refuse to disclose it under s. 14 of FIPPA.

### **CONCLUSION**

[24] For the reasons stated above, pursuant to s. 58 of FIPPA, I order that the Ministry is authorized under s. 14 of FIPPA to refuse to disclose the information in dispute.

March 24, 2015

### **ORIGINAL SIGNED BY**

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Elizabeth Barker, Senior Adjudicator

OIPC File No.: F13-55413