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Order F15-51

ARCHITECTURAL INSTITUTE OF BC

Elizabeth Barker
Senior Adjudicator

September 23, 2015

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Summary: The Architectural Institute of BC's ("AIBC") lawyer investigated a complaint about the applicant. AIBC refused to disclose a copy of the lawyer's investigation report to the applicant, under s. 13 (advice and recommendations), s. 14 (solicitor client privilege) and s. 22 (unreasonable invasion of personal privacy) of FIPPA. The applicant requested that the parties' dispute over the matter proceed to inquiry. AIBC requested the Commissioner exercise her discretion under s. 56 of FIPPA to not conduct an inquiry. The adjudicator granted AIBC's request because it was plain and obvious that the report was protected by solicitor client privilege and could be withheld under s. 14 of FIPPA.

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

Authorities Considered: B.C.: Order F08-11, 2008 CanLII 65714 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC) and Order 13-10, 2013 BCIPC 11 (CanLII); F05-35, 2005 CanLII 48297 (BC IPC); F14-29, 2014 BCIPC 32 (CanLII).

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *R.v. B.*, 1995 CanLII 2007 (BCSC); *Canada v. Solosky*, 1979 CanLII 9 (SCC); *Donnell v. GJB Enterprises Inc.*, 2012 BCCA 135 (CanLII).

INTRODUCTION

[1] This case involves an applicant's request for records related to the Architectural Institute of BC's ("AIBC") investigation of a complaint that her

conduct was unbecoming of an architect. AIBC is refusing to disclose a report prepared by its lawyer, under s. 13 (advice and recommendations), s. 14 (solicitor client privilege) and s. 22 (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[2] The applicant asked the Office of the Information and Privacy Commissioner (“OIPC”) to review AIBC’s decision. Mediation did not resolve the matter, and the applicant requested that it proceed to inquiry under Part 5 of FIPPA. AIBC then asked the OIPC to exercise its discretion under s. 56 of FIPPA to not conduct an inquiry because, AIBC claimed, it is plain and obvious that the record at issue may be withheld under ss. 13 and 14 and must be withheld under s. 22 of FIPPA.

ISSUE

[3] Should the OIPC exercise its discretion under s. 56(1) of FIPPA to not hold an inquiry because it is plain and obvious the record at issue may be withheld under ss. 13 and 14 or must be withheld under s. 22 of FIPPA?

[4] It is well established that in an inquiry of this kind under s. 56, it is the party asking that an inquiry not be held who bears the burden of demonstrating why that request should be granted.¹

RECORD

[5] AIBC’s external legal counsel (“Lawyer”) conducted an investigation into the complaint about the applicant. The record at issue is his October 2013 report (“Report”). Although the AIBC has not provided me with a copy of the Report, AIBC’s affidavit evidence describes it in sufficient detail to allow me to make a decision regarding AIBC’s s. 56 application.

DISCUSSION

[6] **Section 56 principles** - Section 56(1) of FIPPA 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.

[7] The use of the word “may” in s. 56 provides the OIPC with the discretion to decide whether or not to conduct an inquiry. A number of previous orders

¹ Order F09-02, 2009 CanLII 3226 (BC IPC) and F08-11, 2008 CanLII 65714 (BC IPC) at para. 11.

have set out the following factors to consider when exercising discretion under s. 56(1) to not hold an inquiry:

- 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 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.²

[8] I will first consider AIBC’s argument that it is plain and obvious that the Report may be withheld under s. 14 before moving on, if necessary, to consider if it is plain and obvious that ss. 13 and/or 22 apply.

[9] **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. AIBC asserts the Report is protected by solicitor client privilege, so it may be withheld under s. 14. Section 14 encompasses both legal advice privilege and litigation privilege,³ but AIBC does not identify which it believes applies in this case. However, based on its submissions, and the fact that neither party indicates that litigation was in progress or in reasonable prospect, I understand that AIBC is claiming legal advice privilege over the Report.

[10] When deciding if legal advice privilege applies, the decisions of the OIPC have consistently applied the following test described by the BC Supreme Court in *R. v. B.*:

... 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. 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;

² Order F08-11, 2008 CanLII 65714 (BC IPC) at para. 8.

³ *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 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 communications (and papers relating to it) are privileged.⁴

[11] Also germane to this case is the Court of Appeal's decision in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, where the Court considered when solicitor client privilege might apply to communications between solicitor and client during the course of (in that case) a professional misconduct investigation. The Court said as follows:

[32] ... Legal advice privilege arises only where a solicitor is acting as a lawyer, that is, when giving legal advice to the client. Where a lawyer acts only as an investigator, there is no privilege protecting communications to or from her. If, however, the lawyer is conducting an investigation for the purposes of giving legal advice to her client, legal advice privilege will attach to the communications between the lawyer and her client (see Gower at paras. 36-42)...

[39] In my view, the fact that an investigation is mandated by statute is irrelevant to the functional analysis of the lawyer's role. Lawyers must often undertake investigative work in order to give accurate legal advice. In this respect, investigation is integral to the lawyer's function.

[40] The nature of investigative work undertaken by a lawyer was discussed in *Gower* (at para. 19):

...legal advice is not confined to merely telling the client the state of the law. It includes advice as to what should be done in the relevant legal context. It must, as a necessity, include ascertaining or investigating the facts upon which the advice will be rendered. Courts have consistently recognized that investigation may be an important part of a lawyer's legal services to a client so long as they are connected to the provision of those legal services....

AIBC's submissions

[12] AIBC provides affidavit evidence from its general legal counsel, Deputy Executive Director and Director of Professional Conduct and Illegal Practice ("General Counsel"). He explains that the AIBC's rules governing investigations state that the AIBC's Executive Director may conduct an investigation into a matter "to the extent and by whatever fair and reasonable means the Executive

⁴ R.v. B., 1995 CanLII 2007 (BC SC), para. 22. For another statement of these principles see also *Canada v. Solosky*, [1980], 1 S.C.R. 82, p. 13. See also: Order 01-53, 2001 CanLII 21607 (BC IPC) and Order 13-10, 2013 BCIPC 11 (CanLII).

Director determines are appropriate...”⁵ In this case, because the complaint was unusual compared to the typical nature of complaints made to the AIBC against architects (i.e., it pertained to the applicant’s behaviour as an AIBC council member and the complainants were, or had recently been, AIBC council members), the Executive Director chose to engage the Lawyer to investigate and provide legal advice. The General Counsel says that the AIBC asked the Lawyer to investigate for the purpose of providing AIBC with legal advice about the nature, quality and sufficiency of the evidence, legal standards, and substantive and procedural requirements involved in proceeding with a hearing regarding the complaint. He explains:

“The External Counsel Report describes communications between [Lawyer] and various witnesses and attaches a number of background investigation documents including copies of some direct communications between witnesses and [Lawyer]. The External Counsel Report analyses the evidence obtained in relation to each of the four specific allegations made in the Complaint, explains and advises the AIBC in relation to the legal framework applicable to allegations of professional misconduct and provides recommendations for the AIBC’s consideration.”⁶

[13] The General Counsel asserts that the entire Report is integral to the legal advice and recommendations provided by the Lawyer to AIBC. He also says the Report is expressly marked “Confidential – Solicitor-Client Privileged.”

Applicant’s submissions

[14] The applicant submits that privilege does not attach to a report prepared by a lawyer acting only as an investigator and that the Lawyer’s “role was that of an investigator up until the time he was about to submit the Investigation Report...”⁷ She says that while the rules governing AIBC investigations allow the Executive Director to investigate complaints, and to retain the services of private investigators, advisors and experts, this does not allow the AIBC to join the role of investigator and external legal counsel into one. She says that she feels that she was deliberately misled at the start of the investigation about the process and about the role of the Lawyer. The applicant adds, “I assert that the External Counsel Report, though it might be prepared by [Lawyer] for the AIBC and is expressly marked ‘Confidential Solicitor-Client Privileged’ may not in its entirety be privileged.”⁸ The applicant also says, “Privilege may give way when there is a breach of duty or wrongful act.”⁹ The applicant does not explain, but I understand her to be arguing that the crime exception to privilege applies.

⁵ General Counsel’s affidavit, para. 3.

⁶ General Counsel’s affidavit, para. 5.

⁷ Applicant’s submissions, para. 48.

⁸ Applicant’s submissions, para. 72.

⁹ Applicant’s submissions, para. 73.

[15] The applicant provides several letters she obtained during the course of the Lawyer's investigation. In an April 23, 2013 letter, the AIBC's Executive Director informs her that he has appointed the Lawyer to investigate, and he identifies the complainants and the nature of their complaints. The applicant also provides the Lawyer's April 25, 2013 letter informing her that he had been retained by the AIBC to investigate the complaint against her. She also provides two letters the Lawyer sent to her lawyer, in which he says:

We can advise that we expect to submit our Investigation Report to the AIBC within the next week. This advice will remain privileged until such time as our client determines otherwise. (October 9, 2013 letter)

The AIBC appointed us as external counsel to investigate the complaint made against [the applicant] and to provide the Institute with advice on how to proceed. In these circumstances, our client claims solicitor-client privilege. (October 15, 2013 letter).

[16] The applicant also provided a December 18, 2013 letter in which the Executive Director tells her that he has reviewed the investigation report, discussed it with the Lawyer and decided not to continue the investigation because the "complaints appear incapable of substantiation."

AIBC's reply

[17] In its reply submission, the AIBC says that the October 2013 letter the applicant received from the Lawyer establishes that he was appointed as external legal counsel to investigate and provide advice. AIBC submits that her misunderstanding of the Lawyer's role does not negate that he was conducting the investigation for the purposes of giving legal advice to AIBC.

[18] **Findings** - Based on the information provided by the parties (in particular the General Counsel's affidavit and the Lawyer's October 2013 letters), it is evident that when the Lawyer investigated and created the Report, he was acting as AIBC's lawyer and the Report was a communication of his legal analysis, opinion and advice to AIBC. As a result, AIBC has satisfied me that all of the criteria to establish a claim of solicitor client privilege over the Report have been met. Specifically: the Report is a written communication between AIBC and the Lawyer acting in his role as AIBC's legal counsel; the communication relates directly to AIBC seeking, and the Lawyer formulating and giving, legal advice on how AIBC should deal with the complaint; and the Report is confidential as it is marked "Confidential – Solicitor-Client Privileged".

[19] In my view, the Report clearly falls within the scope of solicitor client privilege. This finding is consistent with previous BC Orders where the adjudicator found, in similar circumstances, that a lawyer's investigative work was integral to the lawyer's function of formulating and giving legal advice and

s. 14 applied.¹⁰ It is also consistent with what was said in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*.

[20] Finally, the applicant argued that privilege “may give way when there is a breach of duty or wrongful act”. The crime exception to privilege applies when a person seeks legal advice with the intention of facilitating the commission of a crime, in which case, the involvement of the lawyer does not attract protection. Solicitor client privilege may also be lost if the lawyer is duped or becomes a conspirator.¹¹ There is no evidence that supports a finding that this exception applies in this case.

[21] In conclusion, I find that it is plain and obvious that the Report is protected by solicitor client privilege and it may be withheld under s. 14 of FIPPA. Given that finding, it is not necessary for me to also consider whether it is plain and obvious that ss. 13 and/or 22 apply. As a result, there is no arguable issue in this case that warrants an inquiry.

CONCLUSION

[22] Based on the reasons above, I have determined that the OIPC will not conduct an inquiry into this matter pursuant to s. 56 of FIPPA.

September 23, 2015

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F14-59262

¹⁰ For example: F05-35, 2005 CanLII 48297 (BC IPC), F14-29, 2014 BCIPC 32 (CanLII);

¹¹ *Donnell v. GJB Enterprises Inc.*, 2012 BCCA 135 (CanLII), para. 70.