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Order F16-09

MINISTRY OF JUSTICE

Elizabeth Barker
Senior Adjudicator

February 26, 2016

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Summary: The applicant requested access to Ministry records that mention a specific British Columbia Supreme Court decision involving the Superintendent of Motor Vehicles. The Ministry refused the applicant access to the requested information on the basis that it was protected by solicitor client privilege, so s. 14 of FIPPA applies. The adjudicator found that the information met the criteria for legal advice privilege and the Ministry was authorized to refuse to disclose it under s. 14 of FIPPA.

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

Authorities Considered: B.C.: Order 01-53, 2001 CanLII 21607 (BC IPC); Order F12-05, 2012 BCIPC 6 (CanLII).

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Festing v. Canada (Attorney General)*, 2001 BCCA 612 (CanLII); *R. v. B.*, 1995 CanLII 2007 (BC SC); *R. v. Campbell*, [1999] 1 SCR 565; *Balabel v. Air India*, [1988] 2 W.L.R. 1036 (Eng. C.A.); *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88.

INTRODUCTION

[1] The applicant requested access to internal Ministry of Justice (“Ministry”) records that mention the British Columbia Supreme Court decision *Modhgill v. British Columbia (Superintendent of Motor Vehicles)*,¹ [Modhgill] over a specified time period.² The Ministry provided the applicant with responsive records but withheld some information in those records under s. 13 (policy advice or recommendations), s. 14 (solicitor client privilege), s. 15 (harm to law enforcement) and s. 22 (harm to 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 the Ministry’s decision to refuse access to the requested information under s. 14. He did not request a review of the Ministry’s decision regarding ss. 13, 15 and 22. Mediation did not resolve the s. 14 matter, and the applicant requested that it proceed to an inquiry.

ISSUE

[3] The issue in this inquiry is whether the Ministry is authorized to refuse to disclose the requested information under s. 14 of FIPPA because it is protected by solicitor client privilege. Section 57(1) of FIPPA puts the burden on the Ministry to prove that s. 14 authorizes it to refuse access to the information in dispute.

DISCUSSION

[4] **Background** – The Superintendent of Motor Vehicles (“Superintendent”) is a part of the Ministry of Justice. The Superintendent’s statutory decision-making powers under the *Motor Vehicle Act*³ include serving a notice of driving prohibition when there are reasonable and probable grounds to believe that a driver’s ability to drive is affected by alcohol. *Modhgill* was a judicial review related to an immediate roadside driving prohibition and an approved screening device’s calibration and servicing date.

[5] **Records** – The records in dispute are emails and their attachments. The Ministry is withholding them in their entirety under s. 14. For the purposes of the inquiry, the Ministry provided the OIPC with a copy of the records in dispute, totalling 619 pages. It also provided a table of records that includes the date and

¹ 2012 BCSC 1971 (CanLII).

² The applicant specifically asked for “all internal correspondence and documentation, email messages and memorandums” for the period August 1, 2012 to May 28, 2014.

³ [RSBC 1996] c. 318.

a description of each record, as well as the names and job functions of the individuals involved in the communication.⁴

[6] **Solicitor client privilege** – Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. Therefore, when deciding if s. 14 applies, it is necessary to determine if disclosure of the information in dispute would reveal information that is protected by solicitor client privilege.

[7] The law is well established that s.14 of FIPPA encompasses both legal advice privilege and litigation privilege.⁵ In this case, the Ministry submits that the information in dispute is protected by both. However, given my findings below, it is only necessary to determine if legal advice privilege applies to the records.

[8] When deciding if legal advice privilege applies, BC Orders have consistently used the following criteria:

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.

[9] If these four conditions are satisfied then the communications (and papers relating to it) are privileged.⁶ I will apply the above criteria in the same manner as previous BC Orders that have considered legal advice privilege.⁷

The parties' representations

[10] The Ministry provides an affidavit from a lawyer with the Ministry's Legal Services Branch ("Lawyer"). He says that he provides legal advice and representation to the Attorney General of British Columbia and, in particular, to the Superintendent. He deposes that the communications at issue in this inquiry

⁴ The applicant received a copy of table of records when he received the Ministry's submission.

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

⁶ *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22, quoting from the *Report of the Special Committee of the Canadian Bar Association - Ontario, Regarding Solicitor-Client Privilege (1985)*. Also employing the same language for the test: *Festing v. Canada (Attorney General)*, 2001 BCCA 612 (CanLII) at para. 92.

⁷ For example: Order 01-53, 2001 CanLII 21607 (BC IPC); Order F12-05, 2012 BCIPC 6 (CanLII).

consist of his email correspondence with his colleagues in Legal Services Branch (“LSB”) and with the Superintendent’s representatives. He explains that the purpose of the communication was to seek and provide legal advice and instructions. In some of the email correspondence, he says he is providing his LSB colleagues with assistance in preparing legal arguments for cases brought against the Superintendent. Regarding the attachments to the emails, he says that they relate to the legal advice sought by, or given to, the Superintendent. He concludes by saying that the information withheld under s. 14 consists of written solicitor client communications, which he believes were understood to be confidential.

[11] The applicant disputes that all of the information being withheld under s. 14 meets the criteria for privilege. He submits that government lawyers may provide advice that is not legal advice, and having a discussion with a lawyer does not guarantee privilege. He cites *R. v. Campbell*, [1999] 1 SCR 565 (at para. 50) where Binnie J. says the following:

It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected....

[12] The applicant also says:

Some of the communications internally and (some parts) even with counsel will be policy and executive related... Without viewing the material, the Applicant can only speculate on whether these factors exist, or whether ALL the s. 14 redacted material is privileged. The Applicant urges the Commissioner to carefully assess the nature of the redacted material and order that anything not privileged be disclosed.⁸

Analysis and findings

[13] There are three types of communication reflected in the emails in dispute. They are communication between LSB lawyers and the Superintendent’s staff, communication amongst LSB lawyers and staff, and communication amongst the Superintendent’s staff.

⁸ Applicant’s submission, p. 2.

[14] Before turning to the three types of email communications, however, I considered the applicant's submission that: "Some of the communications internally and (some parts) even with counsel will be policy and executive related."⁹ Based on my review of the records and the Lawyer's affidavit evidence, I am satisfied that the various LSB lawyers who participated in the email communications were acting in their capacity as lawyers during those communications. The content and context of the records do not indicate that the lawyers were acting in a business or operational capacity, as suggested by the applicant.

Communication between LSB lawyers and the Superintendent's staff

[15] It is clear from the context and language of the emails that the records contain communication directly related to the seeking, formulating and providing of legal advice related to the Superintendent's activities. This also applies to the attachments to the emails because they are an integral part of the communication contained in the emails. In my view, these email attachments are part of what has been described in the case law as the "continuum of communications" between a solicitor and client:

... There will be a continuum of communication and meetings between the solicitor and client... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.¹⁰

[16] I find that the emails and their attachments both comprise information that the Superintendent and its solicitors exchanged so that legal advice could be sought and given.

[17] As for the element of confidentiality necessary to establish privilege, the Lawyer deposes that the communications between himself and his client were confidential and only shared amongst the client and other legal counsel employed by the Ministry. There is nothing to suggest otherwise regarding the Lawyer's communications or those that other LSB lawyers had with the Superintendent. In addition, all of the lawyers' signature blocks contain a statement to the effect that their email is privileged and confidential and intended to be seen by the addressee only. I am satisfied that the Superintendent and its lawyers intended that all of the communication contained in the records at issue would be confidential.

⁹ Applicant's submission, p. 2.

¹⁰ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at page 1046 (Eng. C.A.). See also: *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 40-48.

Communication amongst LSB lawyers and staff

[18] While the majority of the emails are communications between the Superintendent and LSB lawyers, this is not true of all the emails. In several emails, the Lawyer either provides his opinion on legal matters to his LSB colleagues (lawyers and non-lawyers) regarding LSB's representation of the Superintendent,¹¹ or he seeks his lawyer colleagues' input in formulating the legal advice that is being provided to the Superintendent.¹² It is evident that the various LSB lawyers who participated in the email exchanges were acting in their capacity as lawyers, and that their communications directly relate to their provision of legal advice and representation to the Superintendent.

[19] These emails also contain a standard address block to the effect that the emails are privileged and confidential and intended to be seen by the addressee only. Further, nothing suggests that the emails were distributed more widely. Therefore, I am satisfied that these email communications were confidential.

Communication amongst the Superintendent's staff

[20] There are two emails that are communications amongst the Superintendent's staff. In them, they discuss the legal advice that they have sought and will seek from LSB lawyers.¹³ While neither email is a communication between a client and its solicitor, disclosure of these emails would reveal the nature of the privileged communication between the Superintendent and its lawyers and the legal advice sought. Nothing suggests that the information in these emails was shared with anyone other than the Superintendent's staff and the Superintendent's lawyers, so I am satisfied that the communications were confidential.

CONCLUSION

[21] In conclusion, for the reasons provided above, I find that all of the information in dispute in this inquiry meets the criteria for legal advice privilege. Therefore, under s. 58, I confirm the Ministry's decision to refuse the applicant access to the information he requested under s. 14 of FIPPA.

February 26, 2016

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F14-59171

¹¹ Pages 1-40.

¹² Pages 55-56; 61-165; 166-196; 197-359; 360-391.

¹³ Pages 566 and 604.