Protecting privacy. Promoting transparency.

Order F16-11

MINISTRY OF HEALTH

Ross Alexander
Adjudicator

March 15, 2016

CanLII Cite: 2016 BCIPC 13
Quicklaw Cite: [2016] B.C.I.P.C.D. No. 13

Summary: An applicant requested a memo about a medical residency program for international medical graduates. The Ministry of Health disclosed some information, but it withheld other information on the basis that it was exempt from disclosure under s. 13 (policy advice or recommendations) and s. 14 (legal advice) of FIPPA. The adjudicator determined that ss. 13 applies to some of the withheld information, and that s. 14 applies to the balance of the withheld information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 13 and 14.

Authorities Considered: B.C.: Order F14-57, 2014 BCIPC No. 61 (CanLII); Order F15-41, 2015 BCIPC 44 (CanLII); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F07-17, 2007 CanLII 35478 (BC IPC); Order F14-17, 2014 BCIPC No. 20 (CanLII); Order F13-29, 2013 BCIPC No. 38 (CanLII); Order F15-67, 2015 BCIPC 73 (CanLII).

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36; *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC); *R. v. Campbell*, [1999] 1 S.C.R. 565; *Lac La Ronge Indian Band* v. Canada, 1996 CanLII 6897 (SK QB).

INTRODUCTION

[1] This inquiry relates to an applicant's request to the Ministry of Health ("Ministry") for a 2009 "information note" drafted by a senior Ministry official for the Minister ("Memo")[1]. The Memo deals with the integration of International Medical Graduates ("IMGs") into the workforce.

[2] The Ministry responded to the applicant's request by disclosing some information in the Memo to her, but withholding other information under s. 13 (policy advice or recommendations), s. 14 (legal advice) and s. 17 (disclosure harmful to the financial or economic interests of the public body) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[3] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the Ministry's decision to deny access to the information. Mediation did not resolve the matter, and the applicant requested that it proceed to an inquiry under Part 5 of FIPPA. The Ministry advised in its initial submissions that it is no longer relying on s. 17 of FIPPA, so the Ministry is now only withholding information in the Memo under ss. 13 and 14 of FIPPA.

ISSUES

[4] The issues in this inquiry are as follows:

a) Is the Ministry authorized to refuse access to information in the Memo because disclosure would reveal advice or recommendations under s. 13 of FIPPA?

b) Is the Ministry authorized to refuse access to information in the Memo because it is subject to solicitor client privilege under s. 14 of FIPPA?

[5] The Ministry has the burden of proof in this inquiry pursuant to s. 57(1) of FIPPA.

DISCUSSION

[6] **Background -** A medical undergraduate program takes four years to complete. Upon completion, these individuals are required to complete postgraduate medical training (residency) and pass national certification exams prior to obtaining a full license to practice medicine independently.

[7] Medical residency positions in Canada are posted with the Canadian Residency Matching Service, and are competed for nationally.

[1] The applicant's request is for "Cliff 797405".

[8] The Canadian Residency Matching Service has two parallel streams for residency positions. The first stream is the Canadian Medical Graduate stream, which is for graduates of Canadian medical schools and Canadian citizens who graduate from accredited American medical schools. The second is the IMG stream, which is for graduates of international medical schools who meet the necessary eligibility criteria. Canadian citizens in the IMG stream are referred to as Canadians Studying Abroad or "CSAs".

[9] The 2008 and 2010 BC Government Throne speeches stated that government would increase access to medical residencies for CSAs.[2]

[10] In December 2011, the Ministry, the Ministry of Advanced Education and UBC prepared a briefing document. It states in part:

> Question: Shouldn't we be giving CSAs preferential treatment over naturalized IMGs; after all, they grew up here? [bolding removed]
>
> Given that the greatest barrier for IMGs/CSAs to access postgraduate training positions in Canada is the fact that international medical school education and training is not necessarily comparable or equivalent to Canadian medical school education, there are no measures that could be introduced to privilege or otherwise treat differently CSAs who apply for postgraduate training positions in Canada or BC. CSAs must be treated in the same manner as all other IMGs. To do otherwise would breach human rights and Canadian Charter legislation.[3]

[11] Shortly thereafter, MLA Moira Stilwell sent a letter and provided a report to the Minister of Health Services recommending that the policies and regulations for CSAs be identical to those in place for Canadian and American trained medical school graduates. It states in part:

> The Ministry of Health Services and the UBC Faculty of Medicine maintain that BC medical students studying abroad must be treated the same as immigrant physicians applying to the BC IMG program because to do otherwise would be a violation of human rights and the Canadian Charter of Rights. Yet no argument to clarify the position has been provided...[4]

---

[2] The Ministry's reply submissions at para. 5.

[3] *International Medical Graduate Program (IMG-BC) Challenges Facing Canadians Studying Abroad*", a briefing document prepared by the Ministry of Health, Ministry of Advanced Education, and the UBC Faculty of Medicine, December 2011 at p. 5: appendix to the applicant's submissions.

[4] *Action Plan for Repatriating BC Medical Students Studying Abroad*, a briefing document prepared for the Honourable Mike de Jong (Minister of Health Services) by Moira Stilwell, MLA, December 2011 at p.10: appendix to the applicant's submissions.

[12] CSAs remain part of the IMG stream. The number of IMG residency positions has significantly increased since 2011, and the Ministry has recently opened a new pathway for IMG family physicians to get their license to practice in BC. However, it is still advantageous to be in the Canadian Medical Graduate stream rather than the IMG stream.[5]

[13] The applicant is affected by the policy that separates the Canadian Residency Matching Service process into two streams.[6] It is apparent from the materials that she is particularly concerned that CSAs do not get to compete for the initial Canadian Medical Graduate stream postings.

[14] **Information in Dispute** - The information in dispute is part of the Memo, which is a document a senior Ministry official prepared for the Minister in 2009 about advancing the integration of IMGs into the workforce. The Ministry has already disclosed most of it to the applicant. However, the Ministry is withholding one excerpt in the discussion portion of the Memo under s. 14. It is also withholding several excerpts that deal with options, and the implications of those options, under s. 13.

Policy Advice or Recommendations – s. 13

[15] Section 13 of FIPPA authorizes public bodies to refuse to disclose policy advice or recommendations, subject to specified exceptions in s. 13(2).

[16] In determining whether s. 13 applies, it is first necessary to establish whether disclosing the information "would reveal advice or recommendations developed by or for a public body or a minister". If so, it is then necessary to consider whether the public body cannot withhold the information under s. 13(1) because it falls within any of the categories listed in s. 13(2) of FIPPA.

[17] As the Supreme Court of Canada stated in *John Doe v. Ontario (Finance)* [*John Doe*], the purpose of exempting advice or recommendations from disclosure "is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice."[7] The British Colombia Court of Appeal similarly stated in the *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)* that s. 13 of FIPPA

[5] IMG stream positions come with a two to three year return of service obligation, while Canadian Medical Graduate stream positions have no return of service obligation. Further, Canadian Medical Graduate stream positions have more choices in terms of the fields of medicine. However, I note that if a residency position is unfilled after it is first posted in its respective stream, it is posted again in a process in which Canadian Medical Graduate and IMG students compete for all unfilled positions, regardless of what stream the position was originally designated.

[6] The applicant's submissions at C.3.

[7] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 43. This decision was with respect to Ontario's legislative equivalent to s. 13(1) of BC's FIPPA.

"recognizes that some degree of deliberative secrecy fosters the decision-making process."[8]

Positions of the Parties

[18] The Ministry submits that s. 13(1) of FIPPA applies to the information it is withholding under s. 13, and that none of it falls under s. 13(2). Further, it submits that it appropriately exercised its discretion in determining to withhold this information under s. 13.

[19] The applicant submits that while she does not have the benefit of reviewing the withheld information, the information appears to fall squarely within s. 13(2)(l) of FIPPA (a plan or proposal to establish or change a program or activity, if the decision has been made) and it may fall under s. 13(2)(m) (information that has been publicly cited at the basis for making a decision). She also submits that discretion should be exercised to release the information, in part because the pertinent decision has been made, so the information is no longer sensitive.

Section 13(1)

[20] Section 13(1) states that:

> (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[21] Previous orders have stated that s. 13(1) applies to information that would directly reveal advice or recommendations if disclosed, as well as information that would enable an individual to draw accurate inferences about advice or recommendations.[9] For s. 13(1) to apply, the information must also have been developed by or for a public body or minister.

[22] The information withheld under s. 13 is options, recommendations, and the financial implications of those options and recommendations, all of which were developed by and for the Ministry. Section 13(1) expressly includes "recommendations", so s. 13(1) applies to the recommendations in the Memo. Further, the Supreme Court of Canada determined in *John Doe* that policy options constitute "advice".[10] Therefore, s. 13 also applies in this case to the withheld policy options. The remaining information does not directly reveal policy options, or other advice or recommendations, but I am satisfied that disclosure of this information would enable accurate inferences about advice or

[8] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at para. 105.
[9] Order F14-57, 2014 BCIPC No. 61 (CanLII) at para. 14.
[10] *John Doe* at para. 46, et. al.; also see Order F15-41, 2015 BCIPC 44 (CanLII) at para. 30.

recommendations. I therefore find that all of the information the Ministry is withholding under s. 13 would reveal advice or recommendations developed by or for the Ministry.

Section 13(2)

[23] As stated above, the Ministry must not refuse to disclose information under s. 13(1), if s. 13(2) applies to the information. The applicant submits that ss. 13(2)(l) and (m) may apply to the withheld information. Section 13(2)(l) applies to "a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body." Section 13(2)(m) applies to "information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy".

[24] The applicant submits that s. 13(2)(l) applies to the information withheld under s. 13(1). She cites Order F15-41[11] in support of her position. That order related to a different inquiry between the applicant and the Ministry, in which I determined that s. 13(2)(l) applied to a table entitled "Proposed Framework for IMGs". The applicant submits that the record in Order F15-41 and the Memo at issue in this inquiry are similar as they are both part of the process that led to the ultimate determination regarding medical residency positions in BC.

[25] For s. 13(2)(l) to apply, the record must be a *plan or proposal* to establish a new program or activity or to change a program or activity. The record in this case is a Memo that presents options for how to advance the integration of IMGs into the workforce. The Memo itself states that its purpose is to "provide an update on work to create more opportunities for IMGs, including [CSAs]".[12] I find that this record – which provides an update on work being completed and potential options regarding this issue – does not constitute a plan or proposal within the meaning of s. 13(2)(l) of FIPPA. Therefore, s. 13(2)(l) does not apply.

[26] Section 13(2)(m) relates to "information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy". Based on the materials before me, including my review of the Memo, I find that none of the withheld information has been cited publicly as the basis for making a decision or formulating a policy. Further, I note that most of the withheld information is explanations of the options themselves, not discussions of the rationale for making a decision. I therefore find that s. 13(2)(m) does not apply to the withheld information.

[27] In summary, I find that the withheld information does not fall under s. 13(2) of FIPPA.

---

[11] Order F15-41, 2015 BCIPC 44 (CanLII).
[12] The Ministry has previously disclosed this information to the applicant.

Discretion

[28] The Ministry submits that it considered the following factors in exercising its discretion under s. 13 in this case: the general purposes of FIPPA, which include making information available to the public while protecting personal privacy; the fact that s. 13 is discretionary; the interests that s. 13 attempts to protect; whether the applicant could be satisfied by severing the record and providing her with as much information as is reasonably practicable; the historical practice of the Ministry with respect to releasing similar types of records; the nature of the record, including the significance and sensitivity of the record; whether disclosure of information will increase public confidence in the operation of the Ministry; the age of the record; whether there is a sympathetic or compelling need to release the information; whether previous OIPC Orders have ruled that similar types of records or information should be disclosed; and whether the decision to which the advice or recommendations relates has already been made.

[29] The applicant submits that the Ministry should exercise discretion to release the information the Ministry is withholding under s. 13 for a number of reasons, including the following: the withheld information is related to a decision that has already been ordered and made; the objectives of the Ministry's policy affect the applicant; the principles of accountability and transparency favour disclosure; disclosure would not harm the Ministry because the information is old and no longer sensitive; IMGs deserve to know what led to the two separate Canadian Residency Matching Service streams; and the public is negatively affected by the Ministry's current policy.

[30] As former Commissioner Loukidelis stated in Order 02-38,[13] the issue of discretion is not about determining whether I believe the head of a public body ought to disclose the information. It is about confirming that the head of the public body considered whether to disclose the information, and that the exercise of this discretion was not in bad faith, or based on irrelevant or extraneous grounds. Previous orders have stated that when exercising discretion to refuse access under s. 13(1), a public body should consider relevant factors such as: the age of the record; past practice in releasing similar records; the nature and sensitivity of the record; the purpose of the legislation; and the applicant's right to have access to his or her own personal information.[14] Based on the materials before me, I am satisfied that Ministry has appropriately exercised its discretion when deciding whether to refuse to disclose the withheld information under s. 13 of FIPPA.

[13] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 147.
[14] For example, see Order F07-17, 2007 CanLII 35478 at paras. 41 to 43, and Order F14-17, 2014 BCIPC No. 20 (CanLII) at para. 52.

Conclusions for s. 13

[31] For the reasons above, I find that the Ministry is authorized to refuse to disclose the information withheld under s. 13.

Solicitor Client Privilege – s. 14

[32] The Ministry is withholding one excerpt in the Memo under s. 14 of FIPPA. Section 14 states:

> The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[33] Previous orders have stated that s. 14 encompasses both legal advice privilege (also referred to as solicitor-client privilege or legal professional privilege) and litigation privilege. The Ministry says that it is withholding the Memo on the basis that it is subject to legal advice privilege. The test for legal advice privilege is as follows:

> 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.
>
> If these four conditions are satisfied then the communications (and papers relating to it) are privileged.[15]

[34] The Ministry states the evidence in this case demonstrates that the information withheld under s. 14 is clearly subject to solicitor client privilege. It submits that the information, if disclosed, would reveal legal advice that was prepared by legal counsel for the Province in response to a request for legal advice from a client.

[35] The applicant is seeking an independent review of the excerpt withheld under s. 14 of FIPPA. She submits that it is difficult for her to challenge the Ministry's position that solicitor client privilege applies without being able to see the withheld information, so she is relying on the OIPC to make this determination.

[36] Based on my review of the Memo and consideration of the context in which it was written, I am satisfied that it is a written communication of

[15] *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC).

a confidential character. The Memo is internal Ministry correspondence. It is not addressed to or written by a legal advisor, but the withheld excerpt reveals legal advice from the Ministry's lawyer. I find that legal advice privilege applies to this information, subject to findings below regarding waiver of privilege, since it reveals a communication between the Ministry and its legal advisor that is directly related to legal advice.[16]

Waiver

[37] The applicant submits that the Ministry may have waived privilege over the withheld excerpt. She cites a number of cases regarding waiver of privilege, and provides argument for why she believes these cases apply. The Ministry submits that there has been no waiver of privilege.

[38] In Order F15-67, Senior Adjudicator Barker set out the law of waiver of privilege as follows:

> A waiver of solicitor client privilege is ordinarily established where it is shown that the possessor of the privilege knows of the existence of the privilege and voluntarily demonstrates an intention to waive that privilege. However, waiver may also occur in the absence of an express intention to waive where fairness and consistency so require. Thus, in some circumstances, a waiver of privilege respecting part of a communication may be held in the interests of fairness to require waiver in respect of the whole communication. In a case involving a partial waiver, the preferred approach is to look at all the circumstances of the case and ask whether the conduct in disclosing part of a privileged communication is likely to mislead the other party or the court. This approach to partial disclosure is consistent with the principles that solicitor client privilege must be as close to absolute as possible and that disclosure of information, which is properly subject to solicitor client privilege, is only ordered when it is absolutely necessary to achieve the ends of justice.[17]

[39] I adopt the above principles and apply them here.

[40] The applicant submits that the Ministry waived privilege over the withheld information because it has stated in public government documents that CSAs must be treated in the same manner as all other IMGs (*i.e.* there are references to this effect in the briefing note and the MLA's report). In her submission, this

[16] This is consistent with previous orders, such as Order F13-29, 2013 BCIPC No. 38 (CanLII).

[17] Order F15-67, 2015 BCIPC 73 (CanLII) at para. 19 citing *S&K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.,* 1983 CanLII 407 (BCSC), para. 6 and 10; *Power Consol.(China) Pulp Inc. v. B.C. Resources Invt. Corp.*, 1988 CanLII 3214 (BCCA) at para. 10*,* adopting *Lowry* v. *Canadian Mountain Holidays Ltd*. 1984 CanLII 378 (BC SC), para. 18**;** *Gill v. Canada (Attorney General)*, 2012 BCSC 1807 (CanLII) at para. 32; *R. v. Basi*, 2009 BCSC 777 (CanLII) at para. 22; *Chapelstone Developments Inc. v. Canada*, 2004 NBCA 96 (CanLII), para. 58; *Descôteaux v. Mierzwinski* [1982] 1 S.C.R. 860 and p. 13; and *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209 at para. 36.

amounts to the partial disclosure of legal advice. In support of her position, she cites a number of cases where a party pleaded in court documents – or led evidence – that it took a certain action because it was relying on legal advice. She also cites cases where fairness principles required disclosure of an entire record because a party had already voluntarily disclosed part of it. The applicant submits that similar principles of fairness resulting in waiver apply in the freedom of information and government accountability contexts generally, and in this inquiry in particular. In her view, the government is using its statement that CSAs must be treated in the same manner as all other IMGs as a sword to justify denying CSAs access to scarce government benefits (*i.e.* medical residency positions). The applicant questions the legal accuracy of the statement that CSAs must be treated the same manner as all other IMGs, and states that there is "a real question as to whether this statement by the Ministry of Health accurately reflects the actual legal opinion [it] received or whether [it has] justified segregation by using a portion of [a legal] opinion out of context".

[41] The applicant also submits that the circumstances in this case are analogous to *R. v. Campbell*,[18] a Supreme Court of Canada decision in which RCMP officers sold narcotics in a reverse sting operation. In *Campbell*, the Court determined that the RCMP waived its right to solicitor client privilege by asserting that its good faith belief in the legality of the reverse sting was based on legal advice. The applicant submits that the case for waiver is even stronger here than it was in *Campbell*. She submits that the law provides that the principles of fairness prevent a party from denying someone of a right (*i.e.* to compete for medical residency positions in the Canadian Medical Graduate stream) by relying on the summary of a legal opinion, then refusing to disclose the legal opinion on which that decision is based.

[42] In this case, the applicant asserts that the statements in the government briefing note and the MLA's report reveal legal advice the Ministry received. She submits that the legal advice is reflected in the statements that CSAs must be treated in the same manner as others in the IMG stream because to do otherwise would be a violation of human rights and the *Canadian Charter of Rights and Freedoms*. I understand the applicant to be arguing that these statements are legal advice, or that they reveal legal advice.

[43] In my view, these statements do not disclose privileged information. They are statements expressing a view about the law, which do not refer to legal advice. Further, waiver of solicitor client privilege ordinarily occurs when the possessor of privilege voluntarily demonstrates an intention to waive that privilege. There is nothing in the evidence that indicates the Ministry was intending to waive privilege over any privileged information when these statements were made.

[18] *R. v. Campbell*, [1999] 1 S.C.R. 565.

[44] In my view, the circumstances in *Campbell* and the other cases cited by the applicant are materially different than the situation here. The cases cited by the applicant relate to situations where parties in court proceedings were attempting to justify their actions on the basis of legal advice, or where the lawyer had given evidence on behalf of his clients.[19] These cases involved situations where the contents of legal advice had the potential to impact the outcome of a court proceeding, thus disclosure was necessary to achieve the ends of justice. This is not the case here. The evidence here does not establish anything about the Ministry's conduct that requires disclosure of the withheld information due to fairness.

[45] In summary, I find that the Ministry has not waived privilege, either wholly or partially, over the information it is withholding under s. 14. I therefore find that the Ministry is authorized to withhold it on this basis.

CONCLUSION

[46] For the reasons given above, under s. 58 of FIPPA, I confirm the Ministry's decision that it is authorized to refuse to disclose the withheld information under s. 13 and s. 14 of FIPPA.

March 15, 2016

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

OIPC File No.: F14-58073

[19] The exception to this is *Lac La Ronge Indian Band* v. Canada, 1996 CanLII 6897 (SK QB), where the plaintiff who was alleging waiver conceded that the defendant had not pleaded reliance on legal advice. In that case, the Court determined that the defendant had not waived privilege, in part because the plaintiff did not demonstrate that the defendant was using legal advice to justify or excuse its actions regarding the dispute.