Office of the Information & Privacy Commissioner for British Columbia

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Order F17-21

COLLEGE OF PHYSICIANS AND SURGEONS OF BC

Elizabeth Barker
Senior Adjudicator

May 2, 2017

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Summary: An applicant asked for the combined total of legal fees and settlement amounts for legal matters between the College and a former employee. The College said that it had no record with this combined amount in its custody or control and it was not obliged to create one under s. 6(2) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). It also said that the following exceptions applied to the requested information: ss. 14 (solicitor client privilege), 17 (harm to financial or economic interests of College), and 22 (unreasonable invasion of third party personal privacy). The adjudicator found that the College had a duty under s. 6(2) to create a record for the applicant that contained the combined amount of legal fees and settlement amounts, and that the College was not authorized or required to refuse to disclose it to the applicant under ss. 14, 17 or 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, 6(2), 6(2)(a), 6(2)(b), 14, 17(1), 17(1)(e), 17(1)(f), 22(1) and Schedule 1 (definition of "personal information").

Authorities Considered: BC: Order 00-45 2000 CanLII 14410 (BC IPC); Order 01-31 2001 CanLII 21585 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Sable Offshore Energy Inc. v. Ameron International Corp.* 2014 SCC 37; *Maranda v. Richer*, 2003 SCC 67; *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342; *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427; *Richmond (City) v. Campbell*, 2017 BCSC 331.

INTRODUCTION

[1] This order arises out of a request to the College of Physicians and Surgeons of B.C. (College) for information about legal fees and settlement amounts related to legal matters involving a former employee (plaintiff). The College refused to disclose any records to the applicant on the basis that s. 14 (solicitor client privilege), s. 17 (harm to financial or economic interests), and s. 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) applied.

[2] The applicant, who is a former registrant of the College, asked the Office of the Information and Privacy Commissioner (OIPC) to review the College's decision. During mediation, the applicant narrowed his request to "the combined legal fees and settlement dollars paid by the College to settle the [plaintiff's] matter." Mediation did not resolve the matter and the applicant requested that it proceed to inquiry.

Preliminary matters

[3] In its initial inquiry submissions the College raised several new issues.

Duty to assist applicant, s. 6(2)

[4] In its initial submissions the College says that it has no record in its custody or under its control that is responsive to the request for a "combined" amount. It also submits that it is not obliged to create a new record with the "combined" amount requested.[1] This appears to be the first time these issues have been raised, as they are not mentioned in the investigator's fact report or the notice of inquiry.

[5] In light of the College's submissions, I determined that the College had raised a new issue that should be included in this inquiry, specifically whether it had complied with its obligation under s. 6(2) with respect to the creation of records. I provided the College and the applicant an opportunity to make submissions regarding s. 6(2). They both did so.

Authorization to disregard request, s. 43

[6] In its initial submissions, the College also asks the Commissioner for authorization under s. 43 to disregard the applicant's access request. It submits that the request is frivolous and vexatious. Section 43 of FIPPA states:

[1] I have no information about whether this issue was even raised during the OIPC review and, if it was, why it was not included in the investigator's fact report.

> *Power to authorize a public body to disregard requests*
>
> 43 If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 or 29 that:
>
> …
>
> (b) are frivolous or vexatious

[7] In my view, any s. 43 decision would be moot here because the College has already responded to the applicant's request. It is the College's response and decision that led to this inquiry. Thus, a decision to disregard is academic and would have no practical effect. In this case, I can see no circumstances that warrant hearing and deciding this moot issue.[2] Therefore, the College's request for authorization to disregard the applicant's request under s. 43 is denied.

ISSUES

[8] The issues to be determined in this inquiry are as follows:

1. Is the College required under s. 6(2) of FIPPA to create a record that contains the combined legal fees and settlement amount?

2. If the College has a duty under s. 6(2) to create the requested record, is the College authorized or required to refuse to disclose information in that record under ss. 14, 17 and 22 of FIPPA?

[9] Section 57 of FIPPA states the burden of proof in an inquiry. It says that the College has the burden to establish that ss. 14 and 17 authorize it to refuse to disclose information, and the applicant has the burden to establish that disclosure of any personal information would not unreasonably invade third party personal privacy under s. 22. However, s. 57 is silent respecting s. 6. I agree with previous orders that have said that the burden is on the public body to prove that it has complied with its s. 6 duties.[3]

DISCUSSION

Records in Dispute

[10] The College says that it does not have a record with the combined amount of legal fees and settlement amount.[4] It explains that information about the legal

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[2] *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342.
[3] Order 00-45 2000 CanLII 14410 (BC IPC) and Order 01-31 2001 CanLII 21585 (BC IPC).
[4] The applicant does not dispute the College's assertion that it does not currently have a record with the combined amount.

fees and the amount of the settlement is spread amongst various records and in its electronic accounting database.[5]

[11] The College also says that the settlement amount consists of two parts: the amount actually paid to the plaintiff and the amount "deducted at source". Although the College does not explain what it means by "deducted at source", I understand them to mean that this was a portion of the settlement that the College withheld and remitted directly to Canada Revenue Agency as income tax on the plaintiff's behalf.

Duty to assist applicants, s. 6(2)

[12] The first issue is whether the College has a duty under s. 6(2) to create a record that contains the combined legal fees and settlement amount. Section 6 states:

> 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.
>
> (2) Moreover, the head of a public body must create a record for an applicant if
>
> > (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
> >
> > (b) creating the record would not unreasonably interfere with the operations of the public body.

[13] The College submits that it is not possible to create a record that contains the combined total using its normal computer hardware, software and technical expertise. It says that the only way to create such a record is "manually" and that s. 6(2) of FIPPA imposes no duty on it to do that.[6]

[14] The College provided affidavit evidence from its Director of Finance and Corporate Services who says that he used the College's electronic accounting database to link some of the information needed to create the combined total of legal fees and settlement amount. Specifically, he says that he was able to electronically "link" the legal fee invoice amounts and one portion of the settlement amount into a single record. However, he was unable to then link that with the other portion of the settlement amount (*i.e.*, the "deducted at source"

[5] The College did not provide the OIPC with a copy of any of the records it mentions because, it says, they are not responsive to the request and they are protected by solicitor client privilege and settlement privilege.
[6] College's February 2017 submissions, para. 5.

amount) by using the College's normal computer hardware, software and technical expertise. He says that linking of the two amounts would have to be done "manually".[7]

[15] On the matter of manually creating a record, the College says:

> Section 6(2)(b) is not applicable in the circumstances, but if the Commission disagrees then the College does not take the position that manually creating a record of the combined legal fees and settlement monies paid by the College in this particular case would unreasonably interfere with its operations.[8] [emphasis in original]

[16] The applicant disputes the College's assertion. He disagrees that "because there is an element of manual input into creating a single record this alone provides sufficient basis for it to be exempted from the duty set out in [s. 6(2)]."[9]

Analysis and findings, s. 6(2)

[17] The College provides evidence that all of the information necessary to determine the combined amount exists in its accounting database, specifically the legal fee invoice amounts and the two portions that comprise the settlement amount. It was able to electronically link the legal fee invoice amounts with one portion of the settlement amount into a single record (the "first number"). However, it was unable to also link up the portion of the settlement that is the "deducted at source" amount (the "second number"). As I understand it, the College's evidence is that this linking of the first and second numbers would have to be done "manually". It does not explain, however, what it means by that term.

[18] The College did not explain in what way it would need anything other than its normal computer hardware, software and expertise to link up these two numbers to create a record with the combined number. For instance, there was nothing to suggest that adding these numbers would require programming unusual accounting reports or using outside or specialized expertise. It is evident to me that this simple math and the recording of the resulting sum could easily be done using normal computer hardware, software and expertise (*i.e.*, Excel, Google Docs, Word, etc.).

[19] Further, there is no evidence (or argument) that calculating the combined number and then recording it in a record would unreasonably interfere with the College's operations.

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[7] Director of Finance and Corporate Services February 2017 affidavit, para. 6.
[8] College's February 2017 submissions, para. 14.
[9] Applicant's February 2017 submissions, p. 2.

[20] In conclusion, I am not persuaded by the College's assertion that it cannot create the requested record from machine readable records in its custody or under its control using its normal computer hardware and software and technical expertise. I also find that there is no evidence that creating the record would unreasonably interfere with its operations. Therefore, I find that the College must meet its duty under s. 6(2) to create a record that contains the combined legal fees and settlement amount.

[21] I will now consider whether the College is required or authorized to refuse to disclose the combined legal fees and settlement amount under ss. 14, 17 and/or 22.

Solicitor client privilege, s. 14

[22] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The courts have held that there is a rebuttable presumption that lawyers' billing information is privileged. The reason for the presumption is explained by the Supreme Court of Canada in *Maranda v. Richer*, where Justice LeBel wrote:

> Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls prima facie within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved.[10]

[23] In this case, the information in dispute is neither legal fees nor a settlement amount. To my mind, it is something altogether different - a total amount comprised of both. Given that context, it is not clear to me that the information in dispute can properly be categorized as a lawyer's billing information. However, given the inherent importance of privilege and because the legal fees are part of the requested information, I have proceeded on the basis that the rebuttable presumption applies to the combined total amount requested.

[24] In *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*[11] the BC Supreme Court said that the correct approach to determining whether the presumption has been rebutted is to consider the following two questions:

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[10] *Maranda v. Richer*, 2003 SCC 67 at para.33.

[11] *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427 (CanLII), at para. 104. The Ontario courts have also applied the rebuttable presumption of privilege to freedom of information legislation and access requests: *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner), 2005 CanLII 6045 (ON CA)*.

1. Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege?
2. Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

Parties' submissions

[25] The College submits that the presumption that lawyer's invoices and payments for legal services are subject to solicitor client privilege applies to the information in dispute. It provides details of the applicant's advanced education and says that he is an intelligent, vigorous and assiduous inquirer. It says he has researched the legal matter that resulted in the settlement and he is aware of its background. The College points to the applicant's evidence in this inquiry, specifically that he obtained court records filed by the plaintiff that provide information about her remuneration.[12] It says that there is a reasonable possibility that he could use the information in dispute, along with information he has already gathered and other publicly available information, to "make inferences and reach reasonably accurate conclusions about privileged communications" between the College and its solicitors. The College says:

> For instance, the Applicant could deduce from the amount whether there was minimal or significant expenditure on the matter and whether or not senior counsel was substantially involved in providing the services, from which he could reach reasonably educated conclusions on the College's legal strategy, the time and level of effort spent, and the significance of the issues involved to the College.[13]

[26] The College cites the recently decided *Richmond (City) v. Campbell*,[14] [*Richmond*], as support for its position that the information in dispute is protected by solicitor client privilege (and settlement privilege). *Richmond* was a judicial review of OIPC's Order F15-31. There were two discrete types of information in dispute in that case, the combined legal fees and the combined settlement amount for harassment claims made by two individuals against the City. The City claimed legal advice privilege over one amount and settlement privilege over the other amount. The Court held that the combined amount of legal fees would reveal privileged information about the City's instructions to its legal counsel and how much it was willing to pay in its defence. The Court said that if the amount were large, an assiduous observer could conclude that the City instructed its counsel to take significant and expensive steps before settling the claims, and "knowledge of the amount spent on the two prior claims would reveal privileged

[12] College's November 2016 submissions, para. 22.
[13] College's September 2016 submissions, para. 47.
[14] *Richmond (City) v. Campbell*, 2017 BCSC 331.

information about the City's instructions to its legal counsel about how much it was willing to pay in its defence."[15]

[27] For his part, the applicant submits that the College has failed to provide evidence that the lump sum amount that he has requested is protected by solicitor client privilege. He says:

> While it might be argued that production of an itemized account including the information found in an itemized account might lead to an "assiduous researcher" to form conclusions about strategy or negotiations, I say the production of a global figure could never reveal this information to even the most assiduous researcher.
>
> For example, (say) the information provided is the combined total of the settlement and legal fees is $100…. Because the total includes two components, neither of which is specifically quantified, there is no way to determine if the amount of the settlement was $1, $10, or $99, and legal fees made up the balance, or the reverse, or something in between.[16]

Analysis and findings, s. 14

[28] As noted above, I accept for the purpose of the analysis here that the amount in question attracts the rebuttable presumption. However, for the reasons that follow I find that the presumption is rebutted.

[29] I have considered the parties' submissions and evidence and conclude that one could not determine how much of the combined dollar figure relates to legal fees. In my mind, there is no reasonable possibility that disclosure of the lump sum would directly or indirectly reveal, with any accuracy, the amount of the legal fees. Further, the College has submitted *in camera* evidence about factors unknown to the applicant, which would further complicate any educated guess at the amount of legal fees.[17]

[30] Knowledge of the combined amount of fees and settlement amount would not allow anyone to accurately deduce anything about communication protected by privilege, even an assiduous inquirer such as the applicant who has spent time researching the legal matter. For instance, the combined amount would not reveal the magnitude of the legal fees such that one could accurately infer anything about the College's assessment of the strengths of the case. It also reveals nothing about what legal advice was sought or provided, the College's litigation strategy and its state of preparation (if any) for trial, when and how often legal advice was sought or provided, whether one or more lawyers provided the services, and how many hours were spent providing those legal services. In my

[15] *Ibid* at para. 88.
[16] Applicant's October 2016 submissions, p. 2
[17] College Registrar's September 14, 2016 affidavit, para. 3.

view, the combined total amount in this case reveals only the fact that legal fees were incurred. It would not be possible to accurately infer anything else about the College's and its solicitors' privileged communications.

The information in *Richmond* was different than what is at issue here. The legal fee information in *Richmond* was its own discrete aggregate amount. In the present case, the information at issue is a combined total of two different things, only one of which is legal fees. For that reason I find that *Richmond* is not persuasive in this case.

[31] In conclusion, I find that the College has not established that the combined amount of legal fees and settlement amount is subject to solicitor client privilege. Therefore, the information may not be withheld under s. 14.

Settlement privilege

[32] The College also submits that the information in dispute is protected by common law settlement privilege.[18] Settlement privilege is a class privilege that protects confidential communications made in the context of settlement negotiations. It also applies to concluded settlements.[19]

[33] In *Sable Offshore Energy Inc. v. Ameron International Corp.*, Abella J. said the following about the purpose of settlement privilege:

> The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.[20]

[34] In *Richmond*, Justice Gray said that settlement privilege was not encompassed within the term "solicitor client privilege" in s. 14. However, she held that settlement privilege is a fundamental common law privilege that ought not to be taken as having been abrogated absent clear and explicit statutory language, which FIPPA does not have. She found that the settlement amount in that case, "whether in aggregate form or not", was protected by common law settlement privilege, and the OIPC adjudicator was incorrect in ordering the City to disclose it.[21]

[35] In the circumstances of this case, as already mentioned above, I do not think it is possible to determine how much of the combined dollar figure relates to the settlement amount. The facts are not the same as in *Richmond* where a discrete amount was at issue, specifically the total settlement amount paid to two

[18] City's September 2016 submissions, paras. 30-42.
[19] *Sable Offshore Energy Inc. v. Ameron International Corp.*2014 SCC 37 at paras 12 and 18.
[20] *Ibid* at para. 2.
[21] *Richmond, supra* at note 15, at para. 73.

former employees. In the present case, I find that disclosure of the combined legal fees plus the settlement amount does not reveal the settlement amount or any other previously undisclosed information that might be protected by settlement privilege.[22]

Disclosure harmful to financial or economic interests, s. 17

[36] The College is also withholding the combined amount under s. 17(1)(e) and (f), which state:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> …
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[37] The standard of proof under s. 17(1) is whether disclosure of the information could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described this standard as "a reasonable expectation of probable harm." It is a middle ground between that which is probable and that which is merely possible. A public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to meet the standard. The determination of whether the standard of proof has been met is contextual, and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[23]

[38] The College submits that the combined amount of legal fees plus the settlement amount is information that is "intimately related to negotiations carried on by or for the public body",[24] and disclosing it could reasonably be expected to harm the College's negotiating position by giving valuable financial information to third parties seeking to commence similar claims. Specifically, third parties would learn how much the College might be willing to spend to settle such an issue, both in terms of legal fees and settlement offers. It says that this would weaken

[22] The College has already disclosed the fact that it paid a settlement amount to the plaintiff.
[23] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3.
[24] College's March 2017 submissions, para. 15.

its negotiating position and damage its ability to effectively bargain with third parties and reach financially favourable resolutions of future claims. The College says that these feared harms are "very likely" given the applicant has said he will publicize the information.[25]

[39] Once again, I find that disclosure of the combined amount would not reveal information that one could use to determine the amount of the settlement. Further, I am not satisfied that disclosing the combined amount could reasonably be expected to harm the College's negotiating position or financial or economic interests in the way it claims. I am not persuaded, even though I can see that disclosure of the combined amount would allow those who negotiate with the College in the future to know the total amount the College was prepared to pay to address the plaintiff's legal issues. That is because it is self-evident that the issues, individuals and circumstances that played a role in the plaintiff's legal dispute and settlement would not be identical in future negotiations. Anyone engaged in those future negotiations would understand that their negotiations and settlement must be based on the factors unique to their own case.

[40] In conclusion, I am not persuaded that disclosing the combined amount could reasonably be expected to result in the s. 17 harms the College alleges. Therefore the College may not withhold that information under s. 17.

Disclosure harmful to personal privacy, s. 22

[41] The College is also refusing to disclose the combined amount on the basis that disclosure would be an unreasonable invasion of the plaintiff's personal privacy under s. 22.

[42] The first step in the s. 22 analysis is to determine if the information in dispute is personal information.[26] Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information". Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual".[27]

[43] The College submits that the combined amount reveals personal information about the plaintiff, specifically about her employment history and a settlement payment she received.[28] The applicant submits that disclosure of the information does not constitute and unreasonable invasion of the plaintiff's personal privacy. He says that the plaintiff willingly put her financial history with

[25] College's March 2017 submissions, para. 16.
[26] For example, Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.
[27] See Schedule 1 of FIPPA for these definitions.
[28] College's September 2016 submissions, paras. 60-75 and March 2017 submissions paras. 17-21.

the College into the public record when she commenced the legal action. He points to the information that he was able to obtain about the plaintiff from the court records (*e.g.*, her personal services contract with the College, details of her remuneration, pension and years of service).

[44] Although the settlement amount would be the plaintiff's personal information, the College's legal fees are not. As discussed, it is not possible to determine how much of the combined dollar figure relates to legal fees as opposed to the settlement amount. That is so, even in light of the information that the applicant has obtained from court records about the plaintiff. I am not persuaded that the combined amount is personal information because, at best, one could only speculate about what part of it is the amount of money paid to the plaintiff. In conclusion, I find that the information in dispute - i.e., the combined amount of legal fees and settlement amount - does not meet the definition of personal information. Therefore, s. 22 does not apply, and the College may not refuse to disclose it the applicant on that basis.

CONCLUSION

[45] For the reasons given above, I make the following orders under s. 58 of FIPPA:

1. The College is required to under s. 6(2) to create a record for the applicant that contains the requested combined total of legal fees and settlement amount.

2. The College is not authorized by ss. 14 or 17 or required by s. 22 to refuse to disclose the record created in compliance with paragraph 1 above.

3. I require the College to give the applicant access to the record created in compliance with paragraph 1 above by June 14, 2017. The College must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the record.

May 2, 2017

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

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