



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F18-36

MINISTRY OF ATTORNEY GENERAL

Chelsea Lott
Adjudicator

August 14, 2018

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Summary: A journalist requested information concerning the government's legal costs for a high profile lawsuit. The Ministry of Attorney General created a record in response to the request but refused to disclose it under s. 14 of FIPPA on the grounds that it was subject to solicitor client privilege. The adjudicator confirmed the Ministry's decision. She also concluded that the Ministry was not required to disclose the information pursuant to s. 25(1)(b) (clearly in the public interest) of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14 and 25(1)(b).

INTRODUCTION

[1] The applicant, a journalist with a national newspaper, requested information concerning the government of British Columbia's costs to litigate *Cambie Surgeries Corporation v British Columbia (Attorney General)* [Cambie Litigation] between January 1, 2016 and April 11, 2017.¹ The Ministry of Attorney General (Ministry) responded advising that it was withholding the records in their entirety pursuant to s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision to withhold the records.

¹ Investigator's fact report. *Cambie Surgeries Corporation v British Columbia (Attorney General)*: Docket: S090663, Registry: Vancouver. I will refer to all reported decisions arising out of the case as "*Cambie Surgeries Corporation*" along with its citation.

[2] The matter was sent directly to an inquiry at the same time as Order F18-35 which is being issued concurrently. Both matters involve information concerning legal costs for the Cambie Litigation but cover different time periods. The information at issue in Order F18-35 is the Province's total legal cost between January 1, 2009 and January 18, 2017.

ISSUE

[3] The issues to be decided are:

1. Is the Ministry authorized to refuse to disclose the information under s. 14 of FIPPA because it is subject to solicitor client privilege?
2. Is the Ministry required by s. 25(1)(b) of FIPPA to disclose the information?

[4] Pursuant to s. 57(1), the Ministry bears the burden of proving that it is authorized to withhold the information under s. 14.

[5] There is no statutory burden on the applicant to establish that s. 25(1) applies or on the Ministry to establish that it does not apply. As a practical matter, however, it is in the interests of each party to provide submissions and evidence as to their respective positions on whether s. 25(1) compels disclosure. It is ultimately up to the commissioner to decide, in all the circumstances and on all of the evidence, whether or not it applies to particular information.²

DISCUSSION

Background

[6] The Cambie Litigation is a lawsuit before the British Columbia Supreme Court concerning the constitutionality of sections of the *Medicare Protection Act* in the face of wait times for public health care. The litigation commenced in 2009 and the trial started September 6, 2016.³ The matter is ongoing and over 100 days into trial.⁴

[7] The record at issue was created by the Ministry in response to the applicant's access request and contains information concerning the Province's legal costs for the Cambie Litigation between January 1, 2016 and April 11, 2017.⁵ The Ministry did not provide a copy of the record to the OIPC. The Ministry's evidence is contained in an affidavit from a Ministry lawyer who

² Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 37–39.

³ *Cambie Surgeries Corporation*, 2018 BCSC 749 at para. 5.

⁴ *Cambie Surgeries Corporation*, 2018 BCSC 1063 at para. 3.

⁵ Affidavit of Supervising Counsel with Legal Services Branch, Lawyer L at para. 3 (affidavit of Lawyer L).

is supervising the litigation.⁶ The Ministry's evidence is that the record contains a summary of Ministry's legal department's fees and disbursements for files pertaining to individual court applications or other matters relating to the litigation.⁷ It also has a breakdown of those fees and disbursements by cost type, including billing amounts by type of position and disbursement type, including expert witness fees.⁸ By "type of position" I infer that the Ministry has differentiated billing by seniority of counsel, as well as any paralegal or articulated student billings.

Solicitor client privilege and legal fees

[8] 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 case law relevant to whether legal fees are subject to solicitor client privilege is fully set out in Order F18-35 and I will not repeat it here. Information regarding legal fees is presumptively subject to solicitor client privilege.⁹ The presumption may be rebutted if it is established that there is no reasonable possibility that disclosure would directly or indirectly reveal any communications protected by privilege.¹⁰ This test must be considered from the perspective of an "assiduous inquirer."¹¹

Presumptively privileged?

[9] Neither party addresses whether the information in the record is presumptively privileged. The Ministry's evidence is that the record contains "information concerning billing for the Cambie Litigation."¹² More specifically, it says that the information relates to the Ministry's Legal Services Branch's fees and disbursements.¹³ As the record reveals information about the legal services provided to the Province, I am satisfied that the information is presumptively privileged.

Presumption rebutted? Parties' submissions

[10] The next question is whether the presumption has been rebutted. The Ministry argues that the information in dispute would enable an assiduous inquirer to draw a number of conclusions about matters subject to solicitor client privilege including:

- the time lawyers have spent on the litigation, including preparing for specific court applications;

⁶ *Ibid* at para. 1.

⁷ *Ibid* at para. 3.

⁸ *Ibid*.

⁹ *Maranda v Richer*, 2003 SCC 67 at para. 32.

¹⁰ *Donell v GJB Enterprises Inc*, 2012 BCCA 135 at para. 59.

¹¹ *Ibid* at para. 58.

¹² Affidavit of Lawyer L at para. 3.

¹³ *Ibid*.

- the non-lawyer resources spent on document review and production;
- the state of the Province’s preparation;
- the amount of resources the Province is willing to spend;
- if the case involves “hotly contested issues,” novel issues or unclear areas of the law;
- the importance of the case to the Province;
- the amount attributed to expert witnesses could reveal the Province’s litigation strategy;
- whether the costs were front loaded early in the proceeding and as a result the Province’s views on the strength of its position;¹⁴ and/or
- the importance of particular interlocutory applications or phases of the litigation.

[11] The Ministry points out that if disclosed, the information would be available to other parties to the litigation and suggests that it could be used by them to gain a strategic advantage in the litigation. The Ministry stresses the fact that the information relates to a single matter which is ongoing.

[12] The applicant submits that it is “absurd to suggest that the government’s opponents in the Cambie case have been left with any impression other than that the province takes this matter extremely seriously.”¹⁵ The applicant states that it is “abundantly clear” that the government has invested enormous resources in the litigation.¹⁶ The applicant argues that knowing the precise dollar figure would not give the plaintiffs any significant insight into the government’s position, or any advantage in the case. The applicant suggests the government is withholding the information for political reasons because its legal costs could be embarrassing to the Province, “especially when it concerns a health-care system that is itself chronically short of funds.”¹⁷

Analysis

[13] The Ministry suggests a number of inferences which could be drawn from the information in dispute. However, many of these inferences would be evident to anyone knowledgeable about the litigation. For reasons more fully discussed in Order F18-35, it is clear that the Province believes that the litigation involves hotly contested issues, including novel or unclear legal issues and that the case is important to the Province. The Cambie Litigation is a significant constitutional case with ramifications for the Canadian public health care system. The number of reported decisions from the litigation, over 40 by the close of submissions, also reveals the tenor of the Province’s legal strategy, which is to vigorously defend

¹⁴ The Province suggests that early expenditure on a lawsuit indicates a party views its position as vulnerable.

¹⁵ Applicant submissions at para. 9.

¹⁶ *Ibid* at para. 10.

¹⁷ *Ibid* at para. 18.

the lawsuit. It would also be plain to anybody knowledgeable about litigation in general, that the Province is incurring substantial legal fees and disbursements. The foregoing is all apparent from the public record.

[14] However, in contrast to Order F18-35, in which I found that the Province's total legal cost over an eight year period would not reveal any solicitor client communications, I have arrived at a different result in the present inquiry. The information in dispute in the present case is recent, more detailed, and covers a shorter time period. It is also significant that I have ordered the Province in Order F18-35 to disclose its total cost of litigation between 2009 and 2017. Based on these distinguishing circumstances, for reasons I will discuss, I find that the presumption that the legal fees are privileged has not been rebutted.

[15] I will first address the detailed information in the record before considering the aggregate total cost of the lawsuit. As discussed, the record contains a summary of the Ministry's legal department's fees and disbursements for files pertaining to individual court applications or other matters relating to the litigation.¹⁸ It also has a breakdown of those fees and disbursements by cost type, including billing amounts by type of position (i.e., lawyer or paralegal) and disbursement type, including expert witness fees.¹⁹

[16] With details about how much the Province spent on each individual file relating to the Cambie Litigation, the applicant could make some reasonable inferences about the Province's legal strategy and/or the importance of the certain aspects of the proceedings to the Province. The record would also reveal how the work is being allocated between different files and legal professionals during a discrete time period. This again could reveal strategy for the particular time frame the record covers. The record may contain expert witness fees for experts whose evidence the Province has decided not to disclose or rely on at trial. This fact would reveal solicitor client communications. In addition, it may be open to the plaintiffs to argue that the court should draw an adverse inference against the Province for failing to tender evidence from the expert at trial. This would clearly prejudice the Province.

[17] I also find that the presumption has not been rebutted for the total litigation costs. The record contains information regarding billing over a fifteen month period, January 2016 through April 2017. Unlike in Order F18-35, the fees cover a relatively recent and short time frame and may reveal the Province's strategy for identifiable steps in the litigation. My conclusion is consistent with Order F16-35, in which the adjudicator held that legal costs incurred over a 21 month time frame could be linked to particular steps in the litigation, and therefore the presumption was not rebutted.²⁰

¹⁸ Affidavit of Lawyer L at para. 3.

¹⁹ *Ibid.*

²⁰ Order F16-35, 2016 BCIPC 39.

[18] The fact that the costs could be linked to identifiable steps in the litigation is sufficient to conclude that the presumption has not been rebutted. However, the risk that privileged communications might be revealed is heightened because the Ministry is required to disclose litigation costs between January 2009 and January 2017 pursuant to Order F18-35. If the legal costs between January 2016 and April 2017 were also disclosed here, they could be compared to the costs between January 2009 and January 2017. Thus, the applicant would be able to deduce the approximate costs that the Province incurred between January 1, 2009 and January 1, 2016, nine months before the trial started. If that number is compared to what was spent between January 2016 and April 2017, in the final months before trial and for the first months of the trial, there is a possibility that an assiduous inquirer could make inferences about the Province's state of preparation for trial as of January 2016.

[19] In summary, I am satisfied there is a reasonable possibility that disclosure of the information in dispute may reveal to an assiduous inquirer, matters protected by solicitor client privilege. Unlike the legal costs at issue in Order F18-35, the information is detailed and covers a shorter and more recent time period. I find that the presumption that the information is protected by solicitor client privilege has not been rebutted. The Ministry is authorized under s. 14 of FIPPA to refuse to disclose the information in dispute.

Public interest disclosure – s. 25

[20] The applicant argues that s. 25(1)(b) applies to the information in dispute. Section 25 requires a public body to disclose information where disclosure is in the public interest. It overrides all of FIPPA's exception to disclosure. In other words, if I find that s. 25 applies, the Ministry is required to disclose the information even though I have found that s. 14 authorizes the Ministry to withhold it. Section 25 reads in part:

Information must be disclosed if in the public interest

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.

(2) Subsection (1) applies despite any other provision of this Act.

[21] Section 25(1)(b) only applies where disclosure is clearly in the public interest and the information concerns a matter justifying mandatory disclosure. As former Commissioner Denham explained in Investigation Report F16-02:

There must be an issue of objectively material, even significant, public importance, and in many cases it will have been the subject of public discussion...disclosure must be plainly and obviously required based on a disinterested, reasonable, assessment of the circumstances.²¹

[22] In addition, Commissioner Denham identified a non-exhaustive list of factors to consider in determining whether s. 25(1)(b) applies, such as whether disclosure of withheld information would:

- contribute to educating the public about the matter;
- contribute in a substantive way to the body of information that is already available about the matter;
- enable or facilitate the expression of public opinion or enable the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions?²²

[23] It is also appropriate to consider the interests represented in the exceptions to disclosure in FIPPA, such as s. 14, because “the exceptions themselves are indicators of classes of information that in the appropriate circumstances may weigh against the disclosure of information.”²³

[24] The Ministry says that it has considered the factors listed in Investigation Report F16-02 and concluded that they are not relevant. The Ministry also stresses that I must consider the competing public interest of solicitor client privilege in determining whether s. 25(1) applies. The Ministry reiterates the importance of solicitor client privilege as a civil and legal right and principle of fundamental justice. The Ministry suggests that where such a right is engaged it cannot be in clearly in the public interest to disclose information protected by solicitor client privilege.

[25] The applicant says that this is “a highly unusual and important piece of litigation.”²⁴ The applicant submits that the litigation costs would educate the public about how and where tax revenue is spent and whether the expense was justified. It suggests that there has been criticism about how the government has handled the case and in particular, that the government has needlessly prolonged the litigation. It says that any claim to privilege is “a truly marginal example of solicitor-client privilege.”²⁵ It argues that the public would be far more concerned with how their tax dollars are being spent, than intruding on solicitor client privilege in this instance.

²¹ Investigation Report F16-02, 2016 BCIPC No 36 at p. 36.

²² *Ibid* at p. 27.

²³ *Ibid* at p. 38.

²⁴ Applicant submissions at para. 18.

²⁵ *Ibid*.

Analysis

[26] The applicant argues that there is public debate about whether the Province has needlessly prolonged the litigation. The implication being, that the government has wasted taxpayer funds on legal fees. There is no question that the litigation is being hard fought. The Province’s supervising counsel describes it as “highly contentious.”²⁶ By the close of submissions the proceeding had over 40 reported decisions, mostly addressing evidentiary disputes. However, vigorously defending a matter is not the same as needlessly prolonging litigation to the detriment of the privately funded plaintiffs. Besides, both sides blame the other for the “protracted and numerous disputes” prolonging the litigation.²⁷ I am not persuaded that the Province’s alleged “legal tactics” are in any way unethical in the way the applicant alludes to, or that the Province is being careless with taxpayer money, such that its legal costs should be disclosed for accountability purposes.

[27] This case has similarities to Order 03-28 in which a journalist requested access to accounts of the lawyers, who at public expense, defended an accused in the Air India bombing prosecution. Commissioner Loukidelis held that the information in dispute was subject to solicitor client privilege and that the information was not subject to s. 25(1)(b):²⁸

The importance of solicitor-client privilege, generally and specifically in relation to the disputed records, is relevant in considering whether s. 25(1)(b) requires disclosure.

In my view, the generalized public interest in disclosure of information respecting expenditure of taxpayer funds is not, despite the public’s interest in the tragic and high-profile criminal case against the third party, sufficient to trigger a clear public interest under s. 25(1)(b) in the disclosure of the privileged information at stake. Nor do I consider that the information in the disputed records contributes, in a substantive way, to the body of information that is already available to enable or facilitate effective use of various means of expressing public opinion, and making political choices. The immediate mandatory disclosure of this information is not clearly necessary in the interests of public debate and political participation.

[28] Similarly, in the present case, there is no doubt a significant public interest in the outcome of the litigation. However, I am not satisfied that a general public interest in how tax payer money was spent during the litigation is enough to trigger mandatory disclosure of the legal fees in this case. I conclude that s. 25(1)(b) does not apply to the information in dispute.

²⁶ Affidavit of Lawyer L at para. 5.

²⁷ *Cambie Surgeries Corporation*, 2018 BCSC 514 at para. 5.

²⁸ Order 03-28, 2003 CanLII 49207 (BC IPC) at paras. 28–29.

CONCLUSION

[29] For the reasons above, under s. 58 of FIPPA, I confirm the Ministry's decision to refuse to give the applicant access to the information it withheld under s. 14. I also confirm the Ministry's conclusion that it was not required to disclose the information pursuant to s. 25(1)(b).

August 14, 2018

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator

OIPC File No.: F17-70008