



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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Order F19-01

MINISTRY OF ATTORNEY GENERAL

Laylí Antinuk
Adjudicator

January 7, 2019

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Summary: An applicant requested records relating to the Ministry's procurement of legal services from external counsel for a specified legal matter. The adjudicator determined that s. 14 of FIPPA authorizes the Ministry to refuse to disclose the withheld information because it is subject to solicitor client privilege.

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

INTRODUCTION

[1] The applicant requested that the Ministry of Attorney General (Ministry) provide a copy of its contract with a specific lawyer and any memos or letters to the lawyer outlining his assignment and pay. The Ministry refused to disclose any information in the requested records under s. 14 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) on the grounds that it is subject to solicitor client privilege.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation did not resolve the matter and the applicant requested that it proceed to inquiry under Part 5 of FIPPA.

Preliminary matter – issues in this inquiry

[3] In his response submission, the applicant submits that the Ministry's duty to assist under s. 6 of FIPPA requires it to create a document that lists the

lawyer's rate of pay.¹ In making this statement, I understand the applicant to refer to s. 6(2) of FIPPA which requires the head of a public body to create a record for an applicant in certain circumstances. The notice of inquiry and the investigator's fact report do not identify s. 6(2) as one of the issues in this inquiry.

[4] In his initial request for review, the applicant also stated that the Ministry had a duty to assist him by creating a record containing the information he seeks. Because of this, I find it reasonable to conclude that the parties and the OIPC investigator were alive to the s. 6(2) issue at the investigation and mediation stages. In general, the OIPC concludes complaints related to a public body's duty to assist under s. 6 at investigation and mediation without sending them to inquiry. Given that the investigator's fact report and the notice of inquiry do not mention s. 6(2), I conclude that the investigator decided that issue was resolved or did not warrant proceeding to inquiry.²

[5] As described in the notice of inquiry received by both parties, the fact report sets out the issues for the inquiry. The Commissioner will not generally consider issues that are not identified in the fact report. Parties will only be permitted to add issues at the inquiry stage in exceptional circumstances and only after receiving permission from the Commissioner to do so.³ To allow otherwise would undermine the effectiveness of the mediation process which exists, in part, to assist the parties in identifying, defining and crystallizing the issues prior to the inquiry stage.⁴

[6] The applicant did not request permission to add the s. 6(2) issue into the inquiry or explain what circumstances would justify adding it at this late stage. Additionally, nothing in the evidence before me indicates that the applicant informed the OIPC that the investigator's fact report and the notice of inquiry did not accurately reflect the issues I must decide in this inquiry.

[7] For all these reasons, I decline to exercise my discretion to add s. 6(2) as an issue in this inquiry.

ISSUE

[8] The issue I must decide in this inquiry is whether s. 14 of FIPPA authorizes the Ministry to refuse access to the information in dispute. The

¹ Applicant's response submission at para. 5.

² For similar reasoning, see Order F18-33, 2018 BCIPC 36 at para. 9.

³ Order F18-11, 2018 BCIPC 14 at para. 5. OIPC, May 2017, online: Office of the Information and Privacy Commissioner, *Instructions for Written Inquiries*, <https://www.oipc.bc.ca/guidance-documents/1744> at p. 4. The notice directs the parties to review this OIPC document and advises that adjudicators will not generally consider issues not contained in the fact report.

⁴ Order F15-15, 2015 BCIPC 16 at para. 10; Order F08-02, 2008 CanLII 1647 (BC IPC) at paras. 28-30.

Ministry bears the burden of proving that the applicant has no right to access the information.⁵

DISCUSSION

Background

[9] The Ministry retained the lawyer as outside legal counsel to provide the Ministry with legal advice respecting the Trans Mountain Pipeline litigation.⁶ The Ministry formalized its relationship with the lawyer by entering into a retainer agreement with him.⁷

[10] Following that, the applicant wrote to the Ministry requesting the lawyer's contract and any memos or letters to the lawyer outlining his assignment and pay.⁸

Records in dispute

[11] The Ministry identified three records as responsive to the applicant's request. The Ministry did not provide me with copies of these records. Instead, it supplied two sworn affidavits⁹ each with an attached list or table describing the records. Taken together, the list and the table describe the records as follows.¹⁰

1. A retainer agreement (retainer) between the lawyer and Her Majesty the Queen in right of the Province of British Columbia represented by the Attorney General.
2. The accompanying cover letter (cover letter) to the retainer agreement written by the Assistant Deputy Attorney General to the lawyer.
3. An email (email) from the Assistant Deputy Attorney General to the lawyer and three of the Ministry's Legal Services Branch (LSB) lawyers. Two members of the Assistant Deputy Attorney General's staff were cc'd on the email. The email includes the agenda of a meeting.

[12] The Ministry withheld all three records under s. 14 of FIPPA.

⁵ Section 57(1) of FIPPA.

⁶ Lawyer's affidavit at para. 5; applicant's response submission at para. 1 on page 1 and para. 9 on page 2.

⁷ Lawyer's affidavit at para. 3.

⁸ Team lead's affidavit at para. 5.

⁹ The Ministry provides affidavits sworn by: (a) the LSB lawyer responsible for overseeing the retainer agreement (I call this the "lawyer's affidavit"); and (b) a team lead with Information Access Operations at the Ministry of Finance (I call this the "team lead's affidavit").

¹⁰ Table of records at exhibit A of the lawyer's affidavit; list attached as exhibit D of the team lead's affidavit. The Ministry also provided a summary of the records at para. 11 of its initial submission.

Solicitor-client privilege – section 14

[13] Section 14 of FIPPA states:

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

Section 14 includes both types of solicitor client privilege found at common law: legal advice privilege and litigation privilege.¹¹ Based on its submissions, I understand that the Ministry claims legal advice privilege over the records in dispute.

[14] Solicitor client privilege does not protect as inviolate every communication between a lawyer and client. Rather, a communication must meet the following four conditions in order for legal advice privilege to apply to the communication and records related to it.¹²

1. There must be an oral or written communication.
2. The communication must be confidential in character.
3. The communication must be between a client (or agent) and a legal advisor.
4. The communication must be directly related to the seeking, formulating, or giving of legal advice.

Previous OIPC orders¹³ have applied this four-part test in the context of s. 14 and I will do the same.

Parties' Positions

[15] The Ministry submits that the applicant has requested records that are subject to solicitor client privilege “by their very nature.”¹⁴ According to the Ministry, the retainer, cover letter and email meet all four conditions to establish solicitor client privilege: they are confidential written communications between the client Ministry and the lawyer as legal advisor made for the purpose of seeking and formulating legal advice.¹⁵

¹¹ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 26.

¹² *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22; *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 837.

¹³ For a few examples, see Order F18-33, *supra* note 2 at para. 15-16; Order F17-43, 2017 BCIPC 47 at para. 38; Order F15-52, 2015 BCIPC 55 at para. 10; and Order F15-15, *supra* note 4 at para. 15.

¹⁴ Ministry's initial submission at para. 13.

¹⁵ *Ibid* at para. 28.

[16] In his request for review, the applicant disputes that the records he requested are protected by solicitor client privilege, stating “the ministry has incorrectly applied the s. 14 exemption to these records.”¹⁶ The applicant goes on to submit that the four conditions to establish solicitor client privilege have not been met in this case.

[17] However, in his response submission the applicant changes his position. After listing the four conditions necessary to establish solicitor client privilege, he states:

The Ministry cites several cases to argue that documents related to [the lawyer’s] contract, including the contract itself or related memos and letters would be covered by solicitor-client privilege. I concede that those types of *documents* would satisfy those four requirements and can be withheld under s. 14 of the Act.¹⁷

In making this statement, the applicant appears to concede that the three specific records at issue in this inquiry are protected by solicitor client privilege.

Analysis

[18] For the reasons that follow, I find that the records meet all four conditions for solicitor client privilege to apply.

[19] Each record is a written communication between the Ministry as client and the lawyer as legal advisor. Additionally, the LSB lawyer responsible for overseeing the retainer and familiar with all three records says each record contains confidential communications.¹⁸ The evidence before me indicates that the email is the only communication that involved individuals other than the Assistant Deputy Attorney General and the lawyer. Each of the named individuals included in that email works for the Ministry. As such, I am satisfied that the email was intended to be a confidential communication between the client and its legal advisor. Thus I find that each record is a confidential written communication between the client and legal advisor.

[20] The final condition requires the communication to directly relate to the seeking, formulating, or giving of legal advice. The records at issue consist of the retainer, its cover letter and an email. Retainer agreements generally contain a written record of what the lawyer and client discussed and agreed to in relation to legal services, fees, billing, reporting and other related matters. The relevant case law and previous OIPC orders have established that the terms of the solicitor client relationship contained in a retainer agreement and associated documents relate directly to communications involved in the seeking, formulating

¹⁶ Applicant’s request for review at para. 4.

¹⁷ Applicant’s response submission at para. 4. Emphasis in original.

¹⁸ Lawyer’s affidavit at para. 5.

or giving of legal advice.¹⁹ I make the same finding in this case. Based on the Ministry's evidence and submissions, I am satisfied that the retainer, cover letter and email are records of the communication between the Ministry and its lawyer about matters that pertain to seeking and providing legal advice.

[21] The applicant submits that the lawyer's "rate of pay is not related to the *seeking, formulating, or giving of legal advice*" and is not a "communication."²⁰ I disagree. The terms of a solicitor client relationship, including financial arrangements between the solicitor and client, are privileged.²¹ The lawyer's rate of pay is integral to the terms of the solicitor client relationship and it reveals the client and lawyer's communication about the financial aspect of the provision of legal advice.

[22] Taking all this into account, I find that all three records relate to the seeking, formulating and giving of legal advice. As a result, I find that each record meets the four conditions necessary to establish solicitor client privilege.

CONCLUSION

[23] For the reasons set out above, pursuant to s. 58 of FIPPA, I order that the Ministry is authorized under s. 14 of FIPPA to refuse to disclose the information in dispute.

January 7, 2019

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

OIPC File No: F17-71876

¹⁹ *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, ("Gaffney") 1996 CanLII 1780 (BC SC) at para. 16; Order F15-15, *supra* note 4 at para. 17; Order F13-15, 2013 BCIPC 18 at para. 16; Order F05-10, [2005] B.C.I.P.C.D. No. 11 at para. 13.

²⁰ Applicant's response submission at para. 11 (last paragraph on page 2) and at para. 5 on page 1. Emphasis in original.

²¹ *Corp. of the District of North Vancouver v. B.C. (The Information and Privacy Commissioner)*, ("*Municipal Insurance*"), 1996 CanLII 521 (BC SC) at para. 27.