



Order F20-09

MINISTRY OF HEALTH

Erika Syrotuck
Adjudicator

March 13, 2020

CanLII Cite: 2020 BCIPC 10
Quicklaw Cite: [2020] B.C.I.P.C.D. No. 10

Summary: The applicant pharmacy requested information from the Ministry of Health relating to the investigation of the pharmacy and the termination of its licence, including communications with the College of Pharmacists. The Ministry provided over 3500 pages of records but withheld information in those records under a number of exceptions in FIPPA. The adjudicator found that only ss. 14 (solicitor client privilege) and 13 (advice and recommendations) were at issue in the inquiry. The adjudicator also found that the Ministry could withhold some but not all of the information at issue under s. 14 and that s. 13 did not apply. The adjudicator ordered the Ministry to provide the applicant with access to the information to which ss. 13 and 14 did not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 13, s. 14.

INTRODUCTION

[1] The applicant is a pharmacy. The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Health (Ministry) for all records relating to the investigation of the pharmacy and the termination of its licence, including all communications with the College of Pharmacists (College) pertaining to the pharmacy and any of its owners, directors, employees and related persons over a period of approximately four years.

[2] The Ministry disclosed some of the approximately 3500 pages of responsive records but withheld other records in whole or in part under ss. 13 (advice or recommendations), 14 (solicitor client privilege), 15 (disclosure harmful to law enforcement), 19 (disclosure harmful to individual or public safety), 21 (disclosure harmful to business interests of a third party) and 22 (unreasonable invasion of personal privacy). The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's

decision. As a result of mediation, the Ministry disclosed additional information to the applicant. After this, the Ministry located approximately 50 pages of additional records, but refused access to them under s. 14. Mediation did not resolve the remaining issues and the applicant requested that they proceed to inquiry.

Background and Narrowing of Issues

[3] The Ministry operates the PharmaCare program. PharmaCare reimburses pharmacies for all or part of eligible pharmaceutical products on behalf of eligible BC residents. The Ministry's PharmaCare Audit unit investigates and audits pharmacies' claims for drugs, medical supplies and services. As a result of an audit, a pharmacy's claim may be disallowed and the pharmacy will have to repay that money to the Province. Audit results can also lead to sanctions, such as permanent de-enrollment from PharmaCare.

[4] The Ministry's PharmaCare Audit unit and the College jointly investigated the applicant pharmacy. The applicant says that, after this, the College initiated disciplinary proceedings against the pharmacy. The applicant says that the College levied a fine against it, and the applicant agreed to pay the fine to the College, in installments. The applicant says that it erroneously believed it was resolving all issues related to the investigation by paying the fine, however, the day after it paid the final installment, the Ministry notified the applicant that it was terminating its PharmaCare Enrollment Agreement.¹

[5] In its submissions, the applicant explained that it was only interested in documents showing that the Ministry delayed action until the College received its last instalment.² The applicant says it has no interest in anyone's personal health numbers, prescribing doctors, types of medication or frequency of dosages or the amount of any claim in the audit, or in anything that would identify the undercover inspectors who investigated.³

[6] I have reviewed the records provided to me by the Ministry with the applicant's comments in mind. Specifically, I have considered what information the applicant says it is and is not interested in. In my view, all of the information being withheld under ss. 15, 19 and 22 is the type of information that the applicant says it does not want. Therefore, I find that the Ministry's decision to withhold information under ss. 15, 19, or 22 is no longer at issue in this inquiry because the applicant does not want this information.

[7] In addition, I note that in its initial submissions, the Ministry relied on s. 17 to withhold some information in dispute. Section 17 was not an issue listed on the Notice of Inquiry or in the investigator's fact report. The Ministry did not seek

¹ Applicant's submissions, para. 2(a).

² Applicant's submissions, para. 2(f).

³ Applicant's submissions, paras. 5 and 26.

permission to add this as an issue, nor did it provide any reasons why it was relying on a new exception at such a late stage. However, the applicant says that the information the Ministry withheld under s. 17 does not appear to be the information it is interested in.⁴ I have reviewed the information in dispute under s. 17 and agree, so I conclude that the applicant does not dispute the Ministry's decision not to disclose that information. Therefore, I do not have to decide whether to allow the Ministry to add s. 17 as an issue in this inquiry.

[8] Finally, the applicant confirmed that it no longer wanted information that the Ministry withheld under s. 21.⁵ Therefore, the information in dispute under s. 21 is no longer an issue in this inquiry.

[9] In summary, ss. 15, 17, 19, 21 and 22 are no longer at issue in this inquiry. The only remaining issues are whether the Ministry can withhold information under ss. 13 and 14 of FIPPA.

ISSUES

[10] The issues in this inquiry are whether the Ministry is authorized to withhold the records in dispute under ss. 13 and 14 of FIPPA. Under s. 57(1) the Ministry has the burden of establishing that the applicant has no right of access to all or part of the records in dispute.

DISCUSSION

Records in Dispute

[11] The Ministry did not provide any of the records in dispute for my review because it asserts that they are protected by solicitor client privilege. Instead, the Ministry provided an affidavit from a lawyer (Lawyer A) from the Legal Services Branch of the Ministry of Attorney General who was personally involved in most of the emails at issue in this inquiry.⁶ Lawyer A's affidavit describes the background and the nature of the advice that she and other Attorney General lawyers gave to the Ministry.

[12] The Ministry also provided a separate table of records⁷ showing that the records in dispute are all emails or email chains. The table also shows the date(s) of the email or email chain and who was involved in each email or chain. The emails or chains described in the table fall into two categories:

- Emails or chains between lawyers from the Legal Services Branch of the Ministry of Attorney General (LSB Lawyers) and Ministry employees; or

⁴ Applicant's submissions, para. 25.

⁵ See Ministry's email, dated July 11, 2018.

⁶ Dated July 17, 2018.

⁷ The Ministry's initial submissions, Appendix B.

- Emails or chains between Ministry employee(s) and employee(s) of the College, some of which also include LSB Lawyers, and one of which includes three attachments.

[13] Neither Lawyer A's affidavit nor the table of records described how each email or chain relates to seeking, formulating or giving legal advice.

[14] After reviewing the affidavit and table, I decided that I did not have enough evidence to adjudicate the Ministry's claim of solicitor client privilege. I wrote to the Ministry to ask for further evidence about s. 14. In particular, I requested more evidence about the nature of the communications with the College and about the attachments.⁸ In response, the Ministry provided an updated version of the table which also described the nature of the communications in dispute and specified the type of privilege the Ministry was applying to each email or chain.⁹

[15] I wrote to the Ministry again to ask a specific question about one record in dispute¹⁰ and to seek additional information about two other records.¹¹ The applicant objected to allowing the Ministry to make additional submissions. I considered the applicant's objection and decided to accept the Ministry's evidence because the risk of disclosing information that is subject to solicitor client privilege outweighed the risk of prejudice to the applicant.

[16] In its response to my request, the Ministry answered my question about the one record and provided a description of the records at pages 2274-2276 and 2277-2280.¹² After reviewing these descriptions, I wrote to the Ministry again to outline my concerns about the evidence and requested that the Ministry provide the two records at pages 2274-2276 and 2277-2280 for my review.¹³ The Ministry declined to provide the records but described each email on those pages.¹⁴

[17] I then ordered the Ministry, under s. 44 of FIPPA to provide me with a copy of the records at pages 2031-2032 and 2277-2280 so that I could decide whether s. 13 applies to this information in dispute.¹⁵ Subsequently, I determined that I could decide about the application of s. 13 based on the evidence that the Ministry had already provided, so I rescinded the s. 44 order.¹⁶

⁸ By way of letter dated November 2, 2018.

⁹ Ministry's November 22, 2018 letter and updated Appendix B.

¹⁰ Page 461 of the records in dispute.

¹¹ At pages 2274 – 2276 and 2277 – 2280. By way of letter dated January 25, 2019.

¹² Ministry's letter dated February 5, 2019.

¹³ By way of letter dated June 3, 2019.

¹⁴ Ministry's June 17, 2019 letter.

¹⁵ By way of letter dated July 4, 2019.

¹⁶ The Ministry filed a petition for judicial review of the s. 44 order. The court has not yet heard the matter.

Section 14

[18] Section 14 allows a public body to refuse to disclose information that is subject to solicitor client privilege. It is well established that s. 14 includes litigation privilege and legal advice privilege.¹⁷ The Ministry claims legal advice privilege over all of the records in dispute. The Ministry also argued that the communications with the College were subject to the common interest exception to waiver.

[19] Legal advice privilege does not apply to every communication between a client and lawyer.¹⁸ If the following four conditions are satisfied, then the communications (and papers relating to it) are privileged;

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.¹⁹

[20] It is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice.²⁰

[21] I will now turn to whether legal advice privilege applies to the emails in dispute.

Email chains between LSB Lawyers and Ministry employees

[22] As I described above, some of the email chains at issue in this inquiry contain emails that are only between LSB Lawyers and Ministry employees. Based on my review of the updated table of records,²¹ and Lawyer A's affidavit, I am satisfied that the email chains that only include LSB Lawyers and Ministry employees are privileged.

[23] Lawyer A says that she was asked to give legal advice regarding whether the Province should terminate the applicant pharmacy's PharmaCare Enrollment Agreement and also with respect to whether the Province should enroll the

¹⁷ See for example, Decision F05-04 2005 CanLII 18155 (BC IPC) at para 13, *College of Physicians of B.C. v British Columbia (Information and Privacy Commissioner)* 2002 BCCA 665 at para. 26.

¹⁸ *R v B* 1995 CanLII 2007 (BC SC) at para. 22.

¹⁹ *Ibid.*

²⁰ *Samson Indian Nation and Band v. Canada*, 1995 CanLII 3602 (FCA).

²¹ Updated Appendix B, attached to the Ministry's November 22, 2018 letter.

applicant pharmacy as a Pharmacare Provider pursuant to the *Provider Regulation*. She also says that other LSB lawyers were consulted and provided legal advice on these matters.²²

[24] Based on the Ministry's additional submissions,²³ I am satisfied that the emails between the LSB Lawyers and Ministry employees are written communications between a client and legal advisor and that many of them are directly related to giving, formulating or seeking legal advice. For example, on many of the email chains, the LSB Lawyers seek instructions from the Ministry and the Ministry provides them. In other emails, LSB Lawyers provide draft materials for Ministry review and comment. These communications directly relate to seeking and giving legal advice.

[25] In some email chains, the Ministry says that it provides information or documents to LSB Lawyers, sometimes in response to a request from LSB Lawyers. I am satisfied that these emails contain information passed back and forth between the client and solicitor so that legal advice may be given. In other words, these communications are part of the continuum of communications in which the solicitor tenders her advice.

[26] Finally, with regards to the confidentiality requirement, Lawyer A has made a general assertion that all of the email chains at issue in this inquiry are confidential in nature. Further, from the Ministry's description of the records I can see that there are no other parties on these email chains. Considering this and context of the legal advice, I am satisfied that these emails were intended to be confidential communications between a client and lawyer.

[27] In conclusion, all of the emails in the email chains that are only between the Ministry and the LSB Lawyers are privileged.

Email chains including the College

[28] There are six email chains²⁴ that include one or more individuals from the College.²⁵ This raises the issue of whether these are confidential communications between solicitor and client.

[29] As I noted above, communications must be confidential in order for legal advice privilege to apply. The presence of third parties can affect this

²² Affidavit of Lawyer A, dated July 17, 2018 at paras. 5-7.

²³ Updated Appendix B, attached to the Ministry's November 22, 2018 letter.

²⁴ Records at pages 2031 – 2032, 2274 – 2276, 2277 – 2280, 3428 – 3467, 3468 – 3469 and 3472 – 3473.

²⁵ The individuals from the college are Complaints Coordinator and FOI Officer, the Complaints Resolution Officer and the Deputy Registrar.

confidentiality requirement. In *General Accident Assurance Co. v Chrusz*,²⁶ Doherty JA set out two principles relating to communications with third parties:

- not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by client-solicitor privilege; and
- where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege so long as those communications meet the criteria for the existence of the privilege.

[30] In addition, where the third party cannot be described as a channel of communication between the solicitor and client, privilege should depend on the true nature of the function that the third party was retained to perform for the client.²⁷ In this regard, Doherty JA also said:

If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.

Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.

If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.²⁸

[31] In *College of Physicians*, the BC Court of Appeal adopted the reasons of Doherty JA and found that third party communications are protected by legal advice privilege only where the third party is performing a function, on the client's behalf, which is integral to the relationship between the solicitor and the client.²⁹

²⁶ *General Accident Assurance Co. v Chrusz*, 1999 CanLII 7320 (ON CA), Doherty JA dissenting in part [*Chrusz*].

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 50.

[32] In *College of Physicians*, one of the documents at issue was a summary of the information and opinions obtained by the lawyer in a meeting with an expert, and the lawyer's comments concerning that information.³⁰ In applying the analysis from *Chrusz*, the BC Court of Appeal said that experts who provided opinions, while relevant or even essential to the advice given, did not perform a function on behalf of the client that was integral to the relationship between the client and lawyer.³¹ It found that the part that recorded the lawyer's comments is privileged but that the communications with the third parties, which were not privileged, could reasonably be severed.³²

[33] There is no evidence in this case that the College served as a channel of communication between the Ministry and the LSB Lawyers or performed a function integral to the relationship. Rather, from the Ministry's description of the records, the College was a source of documents or information for the Ministry and/or its Lawyers.³³ This is not a function integral to the solicitor client relationship.

[34] I now turn to whether each of the six email chains involving the College are privileged.

[35] I find that none of the emails in the first email chain³⁴ are privileged. The first email chain involves LSB Lawyers, the Ministry and the College. Therefore, I find that all of the emails on the first email chain are not confidential communications between a client and a lawyer because of the presence of the College.

[36] The second email chain³⁵ is between only the Ministry and the College. There is no lawyer on this chain, so there is no communication between a lawyer and client and no evidence that the emails reveal a communication between lawyer and client. I find that privilege does not apply to this email chain.

[37] In my view, the third email chain³⁶ is also not privileged. The Ministry described the email chain as follows:

"Emails exchanged between [Deputy Registrar] and [Ministry employee], one of which (dated February 5, 2015) copied to [Lawyer A] (in part). That email copied to [Lawyer A], attaches an earlier communication between [Ministry employee] and [Deputy Registrar], which, in part, refers to advice

³⁰ Ibid, para. 60.

³¹ Ibid. para. 51.

³² Ibid. paras. 67-68.

³³ See descriptions for the records at pages 2031 – 2032, 2274 – 2276, 2277 – 2280, 3468 – 3469, and 3472 – 3473 in updated Appendix B, attached to the Ministry's November 22, 2018 letter.

³⁴ Records at pages 2031 – 2032.

³⁵ Records at pages 3468 – 3469.

³⁶ Records at pages 3472 – 3473.

received from [Lawyer A]. The email copied to [Lawyer A] is followed by another email between [Ministry employee] and [Deputy Registrar] that deals, in part, with issues relating to issue of legal matters under review.”³⁷

[38] The Ministry described the nature of the communication as “The emails provided to [Lawyer A] were provided for the purpose of the provision of legal advice by her.”³⁸

[39] I understand the Ministry to be saying that this email chain is between the Deputy Registrar of the College and a Ministry employee, partially copied to Lawyer A. I understand the Ministry to be asserting privilege on the basis that the email chain copied to Lawyer A was given to her so that she could subsequently provide legal advice. I am not satisfied that any communications in the third email chain are confidential communications between a lawyer and a client regarding the seeking, formulating or giving of legal advice because of the presence of the College on each part of the communication.

[40] I find that none of the emails in the fourth email chain are confidential communications between a lawyer and client. Except for the last email, all emails in the fourth email chain³⁹ include the College. The last email is between Ministry employees only. Therefore, I find that this email chain is not privileged.

[41] The fourth email chain also includes three attachments. I have considered whether these attachments themselves are privileged, even though they are not attached to a privileged communication. For the reasons that follow, I find they are not.

[42] With regard to the attachments, the Ministry said that:

“it is able to confirm that the release of those attachments would allow a reader to accurately infer the nature of the issue upon which legal counsel was advising. In fact, the communications from Legal Services Branch make express reference to the attachments. As such the Ministry submits that the attachments and the communications to which they are attached are related.”⁴⁰

[43] I understand the Ministry to be saying that the attachments are privileged on the basis that they were attached to privileged emails. In other words, I do not understand the Ministry to be saying that the documents attached to the emails

³⁷ See Ministry’s description of the records at pages 3472 – 3473 in updated Appendix B, attached to the Ministry’s November 22, 2018 letter.

³⁸ See Ministry’s description of the records at pages 3472 – 3473 in updated Appendix B, attached to the Ministry’s November 22, 2018 letter.

³⁹ Records at pages 3428 – 3467.

⁴⁰ Ministry’s November 22, 2018 letter.

are privileged on their own. Since I have found that the emails are not privileged, I see no independent basis on which to find that the attachments are privileged.

[44] The fifth and sixth email chains⁴¹ include some emails that are only between the LSB Lawyers and the Ministry and some emails that include the College.

[45] Both email chains begin with two emails between Lawyer A and the College, which Lawyer A forwards to Ministry employees. The remaining emails are between LSB lawyers and Ministry employees.⁴²

[46] The Ministry has explained that the fifth email chain is counsel obtaining information from third parties, forwarding this information to the Ministry and seeking instructions.⁴³ I am satisfied that the latter emails between the Ministry and LSB are directly related to seeking legal advice. While the two initial emails between the College and Lawyer A are not confidential communications between a client and lawyer, I am satisfied that, if disclosed, they would allow an accurate inference to be made about the nature of the instructions sought by LSB from the Ministry. Therefore, severing the first two emails from the chain would not be appropriate.

[47] The sixth email chain contains eleven emails.⁴⁴ The Ministry says that the two initial emails between Lawyer A and the College relate to the joint investigation between the College and the Ministry.⁴⁵ Lawyer A then forwards these two emails to Ministry employees. The remaining emails are between LSB Lawyers and Ministry employees. The Ministry describes this record as counsel obtaining information from third parties.⁴⁶ The Ministry says that the emails between the College and Lawyer A are privileged because they are part of the same email chain.⁴⁷

[48] I am not satisfied that the emails in this chain are privileged communications. The first two emails are between the College and Lawyer A and as such are not confidential communications between a client and a lawyer. The balance of the emails in the sixth email chain are only between LSB and the Ministry. However, as I described above, not every communication between a client and a lawyer is privileged. The Ministry's description of this email chain is

⁴¹ Records at pages 2274 – 2276 and 2277 – 2280.

⁴² The Ministry described each email in both chains in its letter dated June 17, 2019.

⁴³ See Ministry's description of the records at pages 2274 – 2276 in updated Appendix B, attached to the Ministry's November 22, 2018 letter.

⁴⁴ Records at pages 2277 – 2280. The Ministry described each email in its letter dated June 17, 2019.

⁴⁵ Ministry's June 17, 2019 letter.

⁴⁶ See Ministry's description of the records at pages 2277 – 2280 in updated Appendix B, attached to the Ministry's November 22, 2018 letter.

⁴⁷ Ministry's February 5, 2019 letter.

only that it is collecting information from a third party. In other words, the Ministry does not describe the nature of the communications between it and LSB. The Ministry does not explain how anything on the email chain is related to seeking, formulating or giving legal advice. The Ministry also does not explain how these emails are part of the continuum of communications between client and lawyer so that advice may be given. The Ministry had multiple opportunities to provide evidence in this inquiry. Without this type of information, I am unable to conclude that the email chain is privileged.

[49] In summary, five of the six email chains including the College are not privileged because the presence of the College means that the communications were not confidential communications between a client and a lawyer. I find, however, that the fifth email chain is privileged.

Waiver

[50] The Ministry submits that the common interest privilege exception to waiver applies to the communications that include the College. The applicant made submissions on why the common interest exception to waiver does not apply.

[51] The issue of waiver arises when privilege has already been established and the privileged information is subsequently shared.⁴⁸ Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege knows of the existence of the privilege and shows an intention to voluntarily waive the privilege. Waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.⁴⁹

[52] However, when privileged information is subsequently shared with a third party who has a common interest, the privilege is not waived. This is referred to as “common interest privilege” and it is an exception to the rules of waiver. It is only necessary to determine whether there is a common interest exception to waiver if the shared information is protected by solicitor client privilege.

[53] I have found that privilege does not apply to five of the six email chains that involve the College, so I do not need to consider whether there is a common interest exception to waiver with respect to those emails.

[54] I found that privilege applies to the balance of the emails. There is no evidence before me that any of these emails were later shared, so there is nothing to suggest that there may have been a waiver. Therefore, there is no

⁴⁸ Adam Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014) § 7.1.

⁴⁹ *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC) at para. 6.

need for me to further discuss whether there is a common interest exception to waiver.

Litigation Privilege

[55] As previously mentioned, when I wrote to the Ministry to request more evidence about the nature of the communications with the College and the attachments being withheld under s. 14, the Ministry provided an updated table of the s. 14 records.⁵⁰ In the updated table of records, the Ministry indicated that litigation privilege applies to some of the records in dispute.

[56] The Ministry did not assert litigation privilege in its initial or reply submissions and the Ministry's affidavit evidence says nothing about litigation privilege. In its response to my request for more evidence about privilege, the Ministry did not say anything about litigation privilege; reference to this type of privilege only appears in the table to show what kind of privilege the Ministry is asserting over which emails.

[57] Litigation privilege protects documents or communications that are made for the dominant purpose of litigation from disclosure.⁵¹ The purpose of litigation privilege is to create a "zone of privacy" in relation to pending or apprehended litigation⁵² by providing a protected space for parties involved in the adversarial process of litigation to investigate, prepare and develop respective positions and strategies, free from the intrusion of their adversary.⁵³ Litigation privilege ends upon the termination of the litigation that gave rise to the privilege.⁵⁴

[58] In the table of records, the Ministry says that the documents it claims litigation privilege over were made or obtained for the dominant purpose of litigation or anticipated litigation. However, the Ministry has not explained what litigation forms the basis of litigation privilege and if that litigation is ongoing. As a result, I am not satisfied that litigation privilege applies.

Section 13

[59] The Ministry claims s. 13(1) to withhold two of the email chains⁵⁵ that I found were not subject to solicitor client privilege.

[60] Section 13(1) is a discretionary exception to disclosure. It allows a public body to refuse to disclose advice or recommendations developed by or for a public body or a minister. The purpose of the exception is to preserve an

⁵⁰ See Ministry's November 22, 2018 letter and updated Appendix B.

⁵¹ *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 at paras. 20 and 23.

⁵² *Blank v. Canada (Minister of Justice)* 2006 SCC 39 at para. 34.

⁵³ *Raj v Khosravi* 2015 BCCA 49, at para. 7.

⁵⁴ *Blank v. Canada (Minister of Justice)* 2006 SCC 39 at para. 36.

⁵⁵ Records at pages 2031 – 2032, and 2277 – 2280.

effective and neutral public service so as to permit public servants to provide free, full and frank advice.⁵⁶

[61] In its initial submissions, the Ministry submits in a general way that the information severed under s. 13(1) includes advice to the Ministry from legal counsel and information that would explicitly or implicitly reveal such advice.⁵⁷

[62] I have also reviewed the table of records provided by the Ministry to support its claim of privilege under s. 14.⁵⁸ On this table, the Ministry indicated that it applied s. 13(1) to the two email chains at issue. The Ministry describes both email chains as being about legal counsel obtaining documents from the College. Nothing in the Ministry's description of the nature of the records in the table of records indicates that the emails at issue contain any advice or recommendations developed by or for a public body.

[63] On the information before me, I am not satisfied that disclosing either email chain would reveal advice or recommendations developed by or for the Ministry. I find that s. 13(1) does not apply to any information in the two email chains.

CONCLUSION

[64] For the reasons above, under s. 58(1):

1. I confirm the decision of the Ministry of Health, in part, to refuse access to the information in dispute under s. 14.
2. The Ministry of Health is not authorized to withhold information in dispute under s. 13.
3. I require the Ministry to give the applicant access to the records at pages 2031 – 2032, 2277 – 2280, 3428 – 3467, 3468 – 3469, and 3472 – 3473.
4. The Ministry of Health must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

⁵⁶ *John Doe v Ontario (Finance)* 2014 SCC 36 at para. 43.

⁵⁷ Ministry's initial submissions, para. 66.

⁵⁸ Updated Appendix B, attached to the Ministry's November 22, 2018 letter.

[65] Under s. 59, the Ministry of Health is required to give the applicant access to information by April 28, 2020.

March 13, 2020

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F15-63856