Order P21-05

OCCUMED CONSULTING INC.

Laylí Antinuk
Adjudicator

June 21, 2021

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Summary: The applicant requested a variety of information related to herself from OccuMed Consulting Inc. (OccuMed). OccuMed provided some records and information in response, but withheld other records, claiming the withheld records were not under OccuMed's custody and control and, even if they were, solicitor-client privilege authorized OccuMed to withhold them. The adjudicator found that the disputed records are under the control of OccuMed, but solicitor-client privilege applies. Accordingly, OccuMed is authorized to withhold the records under s. 23(3)(a) of PIPA.

Statutes Considered: *Personal Information Protection Act*, ss. 4(2), 23(1), 23(3)(a).

INTRODUCTION

[1] Section 23(1) of the *Personal Information Protection Act* (PIPA) gives an individual the right to access their personal information under the control of an organization and the right to know how that information has been used and disclosed by the organization, subject to certain exceptions.[1] One such exception is s. 23(3)(a), which says that an organization is not required to disclose information protected by solicitor-client privilege.

[2] In this case, the applicant made a request to OccuMed Consulting Inc. (OccuMed), a clinical consulting business, for access to her personal information and details about how that information has been used and disclosed by OccuMed. More specifically, the applicant requested the following seven types of information or records:[2]

- specific faxes;

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[1] Section 1 of PIPA defines the terms "organization" and "personal information".
[2] I have paraphrased the applicant's access request in order to remove all identifying information.

- information related to specific alleged phone calls;
- certain correspondence;
- a full description of a specific conversation;
- a complete copy of her file from a specific date onwards;
- information about the way OccuMed used and continues to use the personal information referred to in her request; and
- the names of individuals and organizations to whom OccuMed disclosed the personal information referred to in her request.

[3] OccuMed responded to the applicant's request.[3] The applicant then asked the Office of the Information and Privacy Commissioner (OIPC) to review OccuMed's response. As noted, the applicant's request to OccuMed had seven parts. During mediation, the OIPC concluded the matters related to six parts of the applicant's request. However, mediation did not to resolve the applicant's request for a complete copy of her file, which is at issue in this inquiry. The records in dispute in this inquiry relate to the applicant's request for a complete copy of her file. OccuMed says that it does not have custody or control over these records and solicitor-client privilege applies.

[4] Both parties provided inquiry submissions.

Preliminary matters

[5] In her inquiry submissions, the applicant raises several matters that are not identified as inquiry issues in the Notice of Inquiry received by both parties.[4] I will address those matters here.

Narrowing the access request

[6] The applicant submits that the OIPC investigator who worked on this file prior to inquiry "unilaterally narrowed" the applicant's access request "and allowed OccuMed to dictate the parameters of the disclosure."[5] Specifically, the applicant claims that the OIPC investigator treated her request for her complete file as though it was a request only for her "[Named Organization] Clinical Care Management File" (Clinical File). As a result, the applicant argues that the OIPC

[3] OccuMed's response is not included in the material before me, so I do not know precisely what it entailed. However, OccuMed provided a revised response to the applicant once the OIPC became involved in this matter and I have reviewed that response.
[4] Applicant's response submission at paras. 12-15, 17-19 and 21-23. I note that the Applicant's additional submission also discusses some of these and other procedural concerns. However, as I made clear to the parties in my May 25, 2021 letter, I invited additional submissions in respect of solicitor client privilege only (for more details, please see paragraphs 50-55 below). Therefore, while I have carefully read the applicant's entire additional submission, I will not discuss aspects of that submission that relate to matters other than solicitor-client privilege.
[5] Applicant's response submission at para. 13.

Investigator's Fact Report (Fact Report) fails to identify all the information in dispute.[6]

[7] I am not persuaded that the OIPC investigator unilaterally narrowed the applicant's access request. The Fact Report sets out the applicant's seven-part access request verbatim. When it comes to the applicant's request for her file, the Fact Report states that the applicant asked OccuMed to:

> Provide a complete copy of my file from [date period] on including/not limited to: notes, call notes, faxes, emails and other correspondence with [named organization]."

The Fact Report does not say that the applicant requested only her Clinical File. Additionally, it is clear to me that the Investigator did not narrow the scope of the applicant's access request to only the applicant's Clinical File because the disputed records before me in this inquiry are not from the applicant's Clinical File. Having reviewed the records, I find that they do not relate to the applicant's clinical care. Instead, I find that they relate to complaints the applicant made to two different oversight bodies. If the OIPC investigator had narrowed the scope of the applicant's access request to only the applicant's Clinical File – as the applicant submits – these records would not be before me.

[8] Accordingly, I am not persuaded by the argument that the OIPC investigator unilaterally narrowed the scope of the applicant's access request. I am satisfied that the Fact Report accurately describes the applicant's access request and the information in dispute in this inquiry.

Missing records

[9] The applicant argues that OccuMed has not disclosed or identified all the information and records that respond to her request.[7] I understand this to be a complaint that OccuMed failed to make a reasonable effort to respond to her as accurately and completely as reasonably possible pursuant to its duty under s. 28(b) of PIPA.

[10] As described in the Notice of Inquiry (Notice) received by both parties, the Fact Report sets out the issues for the inquiry. If a party wants to add a new inquiry issue, it must request and receive permission to do so.[8] The OIPC grants such permission in exceptional circumstances only. To allow otherwise would undermine the effectiveness of the mediation process which exists, in part, to

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[6] Applicant's response submission at paras. 21-22.
[7] Applicant's response submission at paras. 5-11, 23 and 39, and Schedules A and B.
[8] Order F12-07, 2012 BCIPC 10 at para. 6; Order F10-37, 2010 BCIPC 55 at para. 10; and Decision F07-03, 2007 CanLII 30393 (BC IPC) at paras. 6-11.

identify, define and crystallize the issues prior to inquiry.[9] Mediation also provides an opportunity for applicants to raise additional issues.[10]

[11] The Notice and the Fact Report do not identify the applicant's s. 28(b) complaint as an issue to be decided in this inquiry. In my view, there are no exceptional circumstances that warrant the addition of this new issue to the inquiry.

[12] In coming to this conclusion, I have kept in mind the fact that the applicant raised her concerns respecting missing and/or unidentified records during the investigation.[11] Therefore, this is not a situation in which a party seeks to raise a new issue because new facts that the party could not have known came to its attention *after* the OIPC issued the Fact Report and Notice. Furthermore, the applicant requested and received a reconsideration of the OIPC investigator's decision prior to this file coming to inquiry. That was the appropriate time to raise all concerns respecting the OIPC's investigation and, given that a reconsideration occurred, I am satisfied that the OIPC dealt with those concerns.

[13] To summarize, for the reasons identified above, I will not consider the applicant's arguments that OccuMed has not disclosed or identified all the information and records that respond to her request.

Procedural fairness

[14] The applicant raises two concerns with the inquiry process. She takes issue with the fact that the Registrar acted as a communication intermediary for a time during the inquiry process, relaying messages between the parties at the request of OccuMed.[12] She also complains that when OccuMed requested a time extension for filing its inquiry submissions, neither OccuMed's request nor the grounds for it were shared with the applicant. The applicant says she raised procedural fairness concerns at the time, which she submits the OIPC disregarded.

[15] I note that the Registrar did act as go-between and exchanged correspondence between the parties for a brief time. In my view, that was justifiable given the circumstances of this inquiry and the parties' previous interactions. The applicant has not explained how this violates procedural fairness and I do not see how it does.

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[9] Order 15-15, 2015 BCIPC 16 at para. 10; Order F08-02, 2008 CanLII 1647 (BC IPC) at paras. 28-30.
[10] Order F08-02, 2008 CanLII 1647 (BC IPC) at para. 29.
[11] Applicant's response submission at para. 9 and Schedule B.
[12] Applicant's response submission at para. 17.

[16] I am also not persuaded that the process used to decide the adjournment request was unfair. The Registrar informed the applicant of OccuMed's request, explained its nature in general terms when asked, provided the applicant with an opportunity to be heard, and considered what the applicant said before deciding to grant a brief adjournment.

The evidentiary record

[17] The applicant also raises concerns with what the OIPC said in the inquiry about the records. In essence, the Notice said that this adjudication would be based on the disputed records already provided to the OIPC investigator, unless OccuMed wanted to resend them as part of its inquiry submission. OccuMed chose not to provide another copy.

[18] The applicant submits that it is inconsistent with procedural fairness to allow an evidentiary record to change on review.[13]

[19] I can confirm that the evidentiary record has not changed – the records before me are the same records that were before the OIPC investigator.

ISSUES

[20] In this inquiry, I will decide:

1. Whether the personal information contained in the records at issue is under the control of OccuMed; and
2. If so, whether s. 23(3)(a) authorizes OccuMed to withhold the records because they are protected by solicitor-client privilege.

[21] OccuMed bears the burden of proving that the applicant has no right to access the records.[14]

[22] I note that the Fact Report and Notice say that the first inquiry issue is whether the records are under the "custody and control" (Notice) or "custody or control" (Fact Report) of OccuMed. In my view, the central question is whether the personal information in the records at issue is under OccuMed's control.[15] I say this because under PIPA, an organization is responsible for personal information under its control, including personal information that is not in its

[13] Applicant's response submission at para. 19.
[14] Section 51.
[15] I note that in Order P19-03, 2019 BCIPC 42, Adjudicator Francis identified the same type of issue as being about control only. She made no reference to custody. See paras. 4 and 8.

custody.[16] Additionally, an organization's disclosure and correction duties under PIPA apply to personal information "under the control of the organization".[17]

DISCUSSION

Background

[23] OccuMed is a clinical consulting business run by two business partners who are both nurses.[18] It is a "small company, without support staff".[19] One of the OccuMed nurse-partners (the Nurse) provided clinical care management services to the applicant for a time.

[24] The applicant made a complaint (the Complaint) about the Nurse to what is now known as the British Columbia College of Nurses and Midwives (the College). A Lawyer (the Lawyer) represented the Nurse in the Complaint.[20] The applicant also made complaints about OccuMed to the OIPC and OccuMed retained the Lawyer to provide OccuMed with advice in respect of one of those matters.[21]

Records

[25] The records at issue consist of four emails between the Nurse and the Lawyer and six pages of undated handwritten notes authored by the Lawyer.[22] The emails relate to the Complaint. The notes relate to the OIPC matter.

[26] OccuMed provided the OIPC with a copy of the records and I have reviewed them for this inquiry. Having done so, I can confirm that they contain the applicant's personal information.[23]

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[16] Section 4(2).
[17] Sections 23(1), 24(1), 24(2) and 24(4).
[18] The information summarized in this background section comes from the Applicant's response submission at para. 26; OccuMed's initial submission at para. 4 (my numbering); and OccuMed's additional submission at paras. 3-5 (my numbering). I accept as fact these uncontested aspects of the parties' submissions.
[19] Applicant's response submission at Schedule A-3, which contains OccuMed's December 17, 2018 revised response to the applicant's access request.
[20] The Lawyer is no longer practicing: OccuMed's additional submission at para. 5 (my numbering). However, for convenience and clarity, I will refer to her as the Lawyer throughout this order because she was a practicing lawyer at the time the disputed records came into existence.
[21] OIPC File No. P18-77433, which is the file that led to this inquiry.
[22] OccuMed's additional submissions at para. 5 (my numbering); Lawyer's email dated May 31, 2021 (appended to OccuMed's additional submission).
[23] PIPA defines personal information as information about an identifiable individual. It includes employee personal information but does not include contact information or work product information. See s. 1 of PIPA.

ISSUE 1: CONTROL

[27] The first inquiry issue is whether the personal information in dispute is under OccuMed's control. As noted, s. 4(2) of PIPA states that organizations are responsible for personal information under their control, including personal information that is not in their custody. Additionally, s. 23 of PIPA gives individuals access rights in relation to their personal information under the control of organizations. Section 23(1) states:

> 23 (1) Subject to subsections (2) to (5), on request of an individual, an organization must provide the individual with the following:
>
> > (a) the individual's personal information under the control of the organization;
> >
> > (b) information about the ways in which the personal information referred to in paragraph (a) has been and is being used by the organization;
> >
> > (c) the names of the individuals and organizations to whom the personal information referred to in paragraph (a) has been disclosed by the organization.

Parties' positions – control

[28] OccuMed submits that the records "are the property of an independent counsel to OccuMed" and "are not in the organization's custody or control".[24] OccuMed also says that the records are "not in the possession of OccuMed as a company."[25]

[29] The applicant argues that the information at issue is clearly in OccuMed's custody and control, stating: "It is difficult to understand how OccuMed can argue that these documents are not in OccuMed's custody and control when OccuMed was, and remains, able to deliver them to the OIPC for review."[26]

[30] The applicant further submits that while the Complaint concerned the Nurse's performance as a nurse, she was providing the services in question as one of two nurses and partners in OccuMed. Moreover, the applicant argues, there does not appear to be a distinction between OccuMed's role and the Nurse's role in relation to the Lawyer. The applicant contends that either OccuMed retained the Lawyer, or – to the extent OccuMed "has any truly separate functional existence" from the Nurse – OccuMed and the Nurse jointly

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[24] OccuMed's initial submission at paras. 3-4 (my numbering).
[25] *Ibid*.
[26] The information summarized in this paragraph and the one that follows comes from the applicant's response submission at paras. 25-29.

retained the Lawyer. In other words, the applicant argues that OccuMed is either the client or one of two joint clients. The applicant goes on to submit that "documents in the custody and control of a lawyer in relation to a client are also in the custody and control of the client – the client has a right to ask for them and absent a solicitor's lien for unpaid bills, the lawyer, as agent, is obliged to deliver them."[27]

Analysis and findings – control

[31] As a starting point, I find it more likely than not that OccuMed does not have physical possession of the disputed records. The evidence shows that the disputed records come from a binder of materials originally held by the Lawyer, not OccuMed.[28] When asked to do so, the Lawyer provided the binder to the Nurse who hand-delivered it to the OIPC during the investigation.[29] Additionally, as noted, OccuMed says that the disputed records are "not in the possession of OccuMed as a company."[30]

[32] PIPA does not define "control" and I am not aware of any past PIPA orders that discuss the meaning of control under PIPA. Neither party made submissions about the meaning of "control" under PIPA.

[33] When interpreting a statute, it is appropriate to consider similar language or provisions in other statutes dealing with the same subject matter.[31] The *Freedom of Information and Protection of Privacy Act* (FIPPA) deals with some of the same subject matter as PIPA – namely, the collection, use and disclosure of individuals' personal information – but it applies to public bodies rather than private sector organizations. Specifically, FIPPA gives individuals the right to access any record "in the custody or under the control of a public body" subject to certain exceptions.[32] Past FIPPA orders and court cases provide useful guidance on the meaning of the term "control" in the access to information context, so I will consider them here.

[34] The courts have said that the word "control" in the access to information context must be given a broad and liberal meaning to create a meaningful right of access.[33] To determine whether a public body has control of a record not in its

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[27] Applicant's response submission at para. 29.
[28] Applicant's response submission at paras. 16, 23, 25 and 28; OccuMed's initial submission at para. 4; OccuMed's additional submission at para. 5; Lawyer's May 31, 2021 email (appended to OccuMed's additional submission).
[29] Lawyer's May 31, 2021 email (appended to OccuMed's additional submission).
[30] *Supra* note 24.
[31] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014) at para. 13.25.
[32] Section 4 of FIPPA.
[33] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 [*National Defence*] at para. 48. The Supreme Court of Canada made these statements in interpreting the word "control" under the federal *Access to Information Act*. As discussed further in

physical possession, the Supreme Court of Canada has adopted the following two-part test, which I will modify for use in the PIPA context by substituting the word "organization" for "public body".[34] The test requires an affirmative answer to two questions:

1. Do the contents of the record relate to an organization matter?

2. Could the organization reasonably expect to obtain a copy of the record upon request?[35]

[35] If the answer to the first question is no, that ends the inquiry.[36] If the answer is yes, all relevant factors must be considered in order to determine whether the organization could reasonably expect to obtain a copy upon request, including:

- the substantive content of the record;
- the circumstances in which it was created; and
- the legal relationship between the organization and the record holder.[37]

[36] The reasonable expectation test is objective.

[37] As mentioned previously, the records at issue consist of notes and emails. I will discuss each in turn.

The notes

[38] The notes relate to one of the applicant's PIPA requests to OccuMed. The Lawyer says she took the notes in a meeting she had with OccuMed to assist OccuMed in responding to this PIPA request.[38] OccuMed says it retained the Lawyer to provide legal advice on how to respond to and manage the applicant's numerous privacy complaints.[39] Given this, I have no hesitation in finding that the

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this Order, past OIPC Orders have since used this decision to interpret the meaning of "control" under s. 3 of FIPPA. For example, see Order F15-65, 2015 BCIPC 71; Order F11-31, 2011 BCIPC 37; and Order F20-43, 2020 BCIPC 52.

[34] I note that some past FIPPA orders have taken a slightly different approach when determining whether a public body has control of disputed information which includes consideration of whether or not a public body has physical possession. For example, see Order F20-04, 2020 BCIPC 4 at para. 61. However, I consider the modified *National Defence* test to be the most appropriate test in this case because I have decided on balance that OccuMed does not have physical possession of the disputed records. This was the approach taken recently by Adjudicator Davis in Order F20-43, 2020 BCIPC 52 at para. 22, which I agree with.

[35] *National Defence*, *supra* note 33 at paras. 6, 50, 55-56 and 60.

[36] *National Defence*, *supra* note 33 at para. 55.

[37] *National Defence*, *supra* note 33 at para. 56.

[38] Lawyer's May 31, 2021 email (appended to OccuMed's additional submission).

[39] OccuMed's additional submission at para. 5 (my numbering).

notes relate to an OccuMed matter – namely, how OccuMed should respond to the applicant's PIPA request.

[39] I also find that OccuMed could reasonably expect to obtain a copy of the notes from the Lawyer upon request. The legal relationship between OccuMed and the record holder (the Lawyer) was a solicitor-client relationship. I accept the applicant's uncontested submission that a lawyer is obliged to deliver to her client the documents that relate to the client. Clearly, in this case, the Lawyer delivered the notes to OccuMed when asked.[40] Furthermore, for the reasons set out in the preceding paragraph, I have found that the substantive content of the notes relates to an OccuMed matter. In addition, the circumstances in which the notes were created involved OccuMed seeking help with its response to the applicant's PIPA request and the OIPC's involvement with that request. With all this in mind, I find it abundantly clear that OccuMed could reasonably expect to obtain – and did in fact obtain – the notes upon request.

[40] For these reasons, I find that the notes are under the control of OccuMed.

The emails

[41] Having reviewed the emails, I agree with OccuMed's submission that they relate to the Complaint. Were it not for her work for OccuMed, the Nurse would not have provided the services to the applicant that ultimately led to the Complaint. Given this, I find that the emails relate to an OccuMed matter – namely, the work performed by one of two OccuMed nurses.

[42] Additionally, I accept the applicant's uncontested evidence that: *(a)* certain letters discussing the Complaint were written on OccuMed's letterhead; and *(b)* a document authored by the College's lawyer described the Complaint as a complaint about the "conduct of and provision of services by [the Nurse] (<u>provided through Occumed Consulting Inc.</u>)".[41] In my view, this evidence supports a finding that the emails relate to an OccuMed matter.

[43] Next, I must decide whether OccuMed could reasonably expect to obtain a copy of the emails upon request. Based on my review, I find that the substantive content of the emails relates to the Complaint, which I have found involved an OccuMed matter. The emails were created in circumstances that required the Nurse to respond to a complaint made to her professional governing body about work she did as an OccuMed nurse. As I see it, these factors weigh

[40] I acknowledge that the Lawyer says she initially refused to lend her binder to the Nurse because it was her property and she was concerned about solicitor-client privilege. Lawyer's May 31, 2021 email (appended to OccuMed's additional submission). Be that as it may, the Lawyer did ultimately provide the binder as requested.
[41] Applicant's response submission at para. 27. Emphasis added.

in favour of a finding that OccuMed could reasonably expect to obtain a copy of the emails from the Lawyer upon request.

[44] The legal relationship between OccuMed, the Nurse, and the Lawyer is not entirely clear to me when it comes to the emails.[42] For example, nothing in the evidence explains the corporate structure of OccuMed or the Nurse's role in it. That said, the evidence does show that OccuMed is a small company run by two business partners, one of whom is the Nurse. OccuMed says, when it comes to the emails, the Nurse was the client rather than OccuMed.[43] However, I am not persuaded that the Lawyer, the Nurse and OccuMed drew a clear distinction between the Nurse and OccuMed at the time the emails came into existence. For example, the Nurse sent and received the emails at issue from her OccuMed email address rather than a personal email address.[44] I also note that the Lawyer kept the emails in the same binder of materials that she kept the notes in (which unquestionably relate to an OccuMed matter). As I see it, this evidence demonstrates that the Nurse, OccuMed, and the Lawyer did not draw any clear distinction between the Nurse as an individual and OccuMed as a company at the time the emails came into existence.

[45] Moreover, as noted, the Lawyer did in fact provide the emails to the Nurse when asked. I find it reasonable to infer that the Nurse was acting as a legal representative of OccuMed (rather than in her personal capacity) when she requested the emails from the Lawyer because she was doing so in response to the OIPC's investigation of OccuMed as a company. Given this, I find that the Lawyer effectively provided the emails to OccuMed upon request.

[46] Taking all this into account, I conclude that OccuMed had a reasonable expectation that it could obtain the records from the Lawyer upon request. Accordingly, I find that the emails are under the control of OccuMed.

[47] I will now consider whether solicitor-client privilege applies to the records.

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[42] The relationships at issue here are further complicated by the fact that the Lawyer is a close family relative of the Nurse. Applicant's response submission at para. 26, which OccuMed does not contest.

[43] OccuMed's additional submission at para. 3.

[44] The Lawyer acknowledges this, but says she mostly used the Nurse's OccuMed email "because that's the one that pops up on my phone." Lawyer's May 31, 2021 email (appended to OccuMed's additional submission). To my mind, this further supports my conclusion that there was no clear distinction between the Nurse as an individual and OccuMed as a company at the time the emails were created because it suggests that the Lawyer did not consider it important to ensure she directed communications respecting the Complaint to the Nurse's personal email address.

ISSUE 2: SOLICITOR-CLIENT PRIVILEGE

[48] OccuMed submits that solicitor-client privilege protects the records, so s. 23(3)(a) applies. Section 23(3)(a) says that organizations are not required to disclose information protected by solicitor-client privilege.

[49] The term solicitor-client privilege in s. 23(3)(a) encompasses both legal advice privilege and litigation privilege.[45] While OccuMed does not explicitly say so, I understand that it asserts only legal advice privilege over the records.

Parties' positions – legal advice privilege

[50] The entirety of OccuMed's initial submission respecting privilege reads:

> We stand by our initial response that the records [at issue] are not in the organization's custody or control and are protected by solicitor client privilege and not subject to production as per section 23(3a) [*sic*] PIPA.[46]

[51] In response, the applicant provided several paragraphs of submissions respecting privilege. OccuMed did not make a reply submission.

[52] After reviewing OccuMed's initial submission and the disputed records, I decided that OccuMed had not provided sufficient information to allow me to make findings respecting the application of s. 23(3)(a) to the records. For example, OccuMed's submission did not explain who had been retained as legal counsel or who authored the handwritten notes, when, and why. Because of the vital importance of legal advice privilege to the justice system, I wrote OccuMed to offer it an opportunity to provide additional evidence and submissions respecting privilege.

OccuMed's additional submission

[53] OccuMed provided an additional submission, which included a statement from the Lawyer. In this additional submission, OccuMed says that the emails comprise confidential communications between the Nurse (as the client) and the Lawyer she retained to provide her with legal advice about the Complaint.[47] OccuMed says that the Nurse and Lawyer exchanged the emails so that the Lawyer could: *(a)* provide legal advice about how to best respond to the allegations in the Complaint; and *(b)* prepare draft submissions defending the Nurse against the Complaint.

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[45] P06-01, 2006 CanLII 13537 at para. 53.
[46] OccuMed's initial submission at para. 4 (my numbering).
[47] The information summarized in this paragraph comes from OccuMed's additional submission at paras. 3-5 (my numbering).

[54] Turning to the notes, OccuMed's additional evidence indicates that the Lawyer took the notes in a meeting she had with the two OccuMed business partners. OccuMed says it retained the Lawyer to provide legal advice about how best to respond to and manage the applicant's numerous privacy complaints. OccuMed says that the Lawyer provided legal advice in the meeting.

Applicant's submissions on privilege

[55] Following receipt of OccuMed's additional submissions, I gave the applicant an opportunity to respond. The applicant provided an additional response submission which, for the most part, did not address OccuMed's submissions respecting solicitor-client privilege.[48]

[56] Taken together, the applicant's initial response and additional submissions do not expressly deny that privilege applies to the records. Instead, the applicant draws my attention to considerations I must keep in mind when making my decision about privilege, including the standing of the legal advisor and exceptions to privilege, such as waiver.[49] The applicant also provided a link to an article on the BC Law Society website respecting ownership of client files.[50] I read the article and find that it does not relate to solicitor-client privilege.

Analysis and findings – legal advice privilege

[57] Legal advice privilege arises out of the unique relationship between client and solicitor.[51] The Supreme Court of Canada describes its purpose in the following terms:

> Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent… The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought… Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients.[52]

[58] To this end, legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking, formulating and

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[48] Instead, the applicant continued to discuss her concerns respecting inadequate and unresponsive disclosure and procedural fairness. I made it clear to both parties that I would only accept additional submissions respecting solicitor-client privilege due to its vital importance to the justice system (May 25, 2021 letter to the parties). Therefore, I will not discuss the aspects of the applicant's additional submission that do not relate to solicitor-client privilege.
[49] Applicant's response submission at paras. 35-38.
[50] Applicant's additional submission at p. 4.
[51] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 839 [*Solosky*].
[52] *Smith v. Jones*, 1999 CanLII 674 (SCC) at para. 46.

giving legal advice. In order for legal advice privilege to apply to a communication, the communication must:

1) be between a solicitor and client;
2) entail the seeking or giving of legal advice; and
3) the parties must have intended it to be confidential.[53]

[59] The scope of legal advice privilege extends beyond the explicit requesting or providing of legal advice to include communications that make up "part of the continuum of information exchanged [between solicitor and client], provided the object is the seeking or giving of legal advice."[54]

[60] For the reasons that follow, I find that legal advice privilege applies to the notes and the emails. I will discuss each type of record in turn.

The notes

[61] The evidence shows that OccuMed retained the Lawyer to provide legal advice respecting the applicant's PIPA requests and complaints. The Lawyer says she wrote the notes in a meeting she had with OccuMed, which she says she attended in order to help OccuMed prepare responses to the applicant and the OIPC. The Lawyer also says the notes contain legal advice she gave OccuMed respecting the applicant.

[62] I have reviewed the notes and find that they accord with the Lawyer's description. As such, I find that the notes comprise a written record of communications between OccuMed and its Lawyer that entailed the seeking and giving of legal advice. I am satisfied that OccuMed and the Lawyer intended the communications in their meeting to be confidential. Nothing in the evidence suggests that any third parties attended the meeting. Taking all this into account, I find that legal advice privilege protects the notes, so s. 23(3)(a) authorizes OccuMed to withhold them.

The emails

[63] As mentioned previously, the four emails at issue consist of communications between the Nurse and the Lawyer. OccuMed and the Lawyer both describe the Nurse as being the client when it comes to the emails. Therefore, I find that the emails are solicitor-client communications. Having reviewed the emails, I also find that they entail the seeking and giving of legal advice. I make this finding because, taken together, the emails contain: explicit legal advice; draft submissions prepared by the Lawyer; and information and

[53] *Solosky*, *supra* note 51 at p. 837.
[54] *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83.

a question from the client to allow the Lawyer to provide advice and prepare the draft submissions.

[64] No one else is involved or copied on the emails and OccuMed says the emails were never meant to be shared. As a result, I find that the emails were intended to be confidential.

[65] With all this in mind, I find that legal advice privilege protects the emails, so s. 23(3)(a) authorizes OccuMed to withhold them.

[66] To summarize, I find that OccuMed has control over the records and has proven that it is authorized to refuse to disclose them under s. 23(3)(a) because legal advice privilege applies.

CONCLUSION

[67] For the reasons given above, under s. 52 of PIPA, I confirm OccuMed's decision to withhold the records in dispute under s. 23(3)(a).

June 21, 2021

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

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