Order F22-26

MINISTRY OF HEALTH

Ian C. Davis
Adjudicator

May 30, 2022

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Summary: An individual made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Health (Ministry) for records relating to hearing panels established under the *Medicare Protection Act*. In response, the Ministry withheld a 28-page PowerPoint presentation in its entirety under s. 14 (solicitor-client privilege) of FIPPA. The adjudicator confirmed the Ministry's s. 14 decision.

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

INTRODUCTION

[1] An individual (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Health (Ministry) for access to records relating to hearing panels established under the *Medicare Protection Act*[1] and, in particular, to the selection and employment of hearing panel members. The applicant also requested information about specific panel members and a Ministry employee. The applicant was the subject of an audit and hearing panel decision regarding billings he made as a practitioner under the Medical Services Plan (MSP), British Columbia's public health insurance program.

[2] The Ministry disclosed some responsive records to the applicant with information withheld under s. 22(1) (unreasonable invasion of a third party's personal privacy) of FIPPA. The Ministry also withheld another record in its entirety under s. 14 (solicitor-client privilege).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's s. 14 decision. The applicant is not

[1] R.S.B.C. 1996, c. 286.

disputing the Ministry's s. 22(1) decision, so s. 22(1) is not an issue in this inquiry.[2] Mediation did not resolve the s. 14 issue and it proceeded to this inquiry.

PRELIMINARY MATTERS

[4] Some preliminary matters arise in this case. They relate to the scope of the applicant's submissions, the *in camera* material, and the Ministry's submission that the disputed record is not responsive to the access request.

Applicant's submissions and the scope of this inquiry

[5] First, the Ministry submits that parts of the applicant's submissions go beyond the scope of this inquiry and appear primarily to be an expression of his grievances relating to the audit of his MSP billings.[3] The Ministry also says the applicant makes accusations against provincial government employees and legal counsel that are unfounded, inappropriate and should be completely disregarded.[4]

[6] I have considered the entirety of the applicant's submissions. However, in my view, parts of the submissions stray away from the s. 14 issue in this inquiry and raise new issues. For example, the applicant makes submissions about how *Medicare Protection Act* hearing panels and their members are not independent and impartial, and that his MSP billings were justified.[5]

[7] I decline to consider any new issues beyond s. 14. In general, the OIPC will not consider new issues at the inquiry stage unless the OIPC grants permission.[6] The applicant did not seek, and the OIPC did not grant, permission to raise any issues beyond s. 14. At any rate, the applicant raises matters under the *Medicare Protection Act*, which I do not have jurisdiction to decide.[7] I have focused my discussion below only on the evidence and submissions relevant to deciding the s. 14 issue.[8]

Applicant's objection to in camera material

[8] The second preliminary matter in this case relates to *in camera* material (i.e., material that a party submits for the OIPC to see, but not the opposing

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[2] Investigator's Fact Report at para. 4; applicant's submissions at p. 1.
[3] Ministry's reply submissions at para. 3.
[4] *Ibid.*
[5] Applicant's submissions at pp. 17-23, 28 and 35-37.
[6] See, e.g., Order F16-30, 2016 BCIPC 33 at para. 13.
[7] The applicant also invokes s. 74 of FIPPA (now s. 65.2), which makes it an offence to, for example, wilfully mislead the commissioner. I do not have jurisdiction to decide this issue (Order F21-04, 2021 BCIPC 4 at para. 7) and, at any rate, I see no credible evidence of an offence.
[8] I cannot, and am not required, to discuss every point the applicant makes: *White v. The Roxy Cabaret Ltd.*, 2011 BCSC 374 at paras. 40-41.

party). Prior to filing its submissions in this inquiry, the Ministry requested permission from the OIPC to submit parts of its evidence and submissions *in camera*. The Director of Adjudication considered the request and granted the Ministry permission to submit some of its evidence and submissions *in camera*.

[9] The applicant objects to this. He says the admission of *in camera* material is "highly irregular", "inappropriate", "makes a mockery of this entire process" and the information "must be revealed to allow a full argument."[9] He says he awaits the Ministry's evidence and submissions in full, without any redactions.

[10] I decline to reconsider the *in camera* decision. It has already been made. That said, I note that the courts have expressly recognized the commissioner's power under s. 56(4)(b) to accept inquiry material *in camera*.[10] The OIPC decides *in camera* requests in accordance with the principles of procedural fairness and aims to strike an appropriate balance between a public body's ability to fully argue its case and an opposing party's right to understand that case and respond to it.[11] I can see that the Director took that approach in this case.

Whether the record in dispute is responsive to the access request

[11] Finally, the Ministry submits that the record in dispute in this inquiry is "not relevant" to the access request and the Ministry employee who gathered the responsive records "may have been overzealous in their collection of the records."[12]

[12] It is not clear to me whether the Ministry is asking me to find that the record is non-responsive. If it is, I decline to decide the issue. The responsiveness of the record is not stated as an issue in the notice of inquiry and the OIPC did not grant permission to add the issue. At any rate, the Ministry chose not to provide me with the record on the basis that it is privileged under s. 14. I question whether I could determine whether the record is responsive without reviewing its contents.

ISSUE AND BURDEN OF PROOF

[13] The issue in this inquiry is whether the Ministry is authorized under s. 14 to refuse the applicant access to the record in dispute. The Ministry has the burden to prove that s. 14 applies.[13]

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[9] Applicant's submissions at pp. 2 and 4.
[10] See, for example, *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, 1999 CanLII 6922 (BC SC) at paras. 90-92.
[11] See the OIPC's *Instructions for Written Inquiries*, available online: https://www.oipc.bc.ca/guidance-documents/1744.
[12] Ministry's initial submissions at paras. 24.
[13] FIPPA, s. 57(1); *Canada (Attorney General) v. Williamson*, 2003 FCA 361 at para. 11.

BACKGROUND

[14] The Ministry is responsible for health care services in British Columbia.[14] As part of this responsibility, the Ministry established MSP. MSP is a public health insurance program under which enrolled practitioners provide services to eligible beneficiaries and can bill the government directly for those services.

[15] The Medical Services Commission (Commission) manages MSP on behalf of the government of British Columbia in accordance with the *Medicare Protection Act* and related regulations. The Commission has the legislated authority to audit a practitioner's MSP billings.

[16] The Commission conducts audits through the Ministry's Billing Integrity Program and the Commission's committees, including the Audit and Inspection Committee. The Billing Integrity Program is part of the Ministry and provides audit services to MSP and the Commission. The Audit and Inspection Committee receives and considers recommendations from the Billing Integrity Program about whether a physician should be audited. The Committee decides whether an audit is appropriate in the circumstances.

[17] The applicant was a physician enrolled with MSP. In 2014, the Billing Integrity Program recommended to the Audit and Inspection Committee that the applicant be audited. In 2017, a team from the Billing Integrity Program audited the applicant's billings. The team produced an audit report in 2018, concluding that the applicant made significant billing errors (the applicant disputes this).

[18] In late 2018, the Commission commenced proceedings against the applicant under the *Medicare Protection Act* seeking, among other things, to recover funds. The matter proceeded to a hearing in 2020. The hearing panel ordered that the applicant pay back hundreds of thousand of dollars and that he be de-enrolled from MSP for at least three years. The panel's decision is currently the subject of judicial review proceedings.

[19] In late 2019, the applicant made the FIPPA access request at issue in this inquiry. He requested the following:

> … information for how the panel is selected, the terms of reference of that hearing panel, the qualifications and requirements to serve [as] a member of the panel, the names of those who may be on the current pool from which they are selected, the selection process, the terms of employment and oaths of such employment, the information that is sent to the panelists in their appointment and prior to any hearing, and details of compensation for the panelists.[15]

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[14] The information in this background section is based on the evidence, which I accept, in Affidavit #1 of MT at paras. 3-8 and 18-20.

[15] Letter from the applicant to the Ministry dated October 19, 2019.

[20] The applicant also requested, in respect of five named panel members and a named hearing coordinator, “their contracts or terms/engagements of employment including statements generally that they have no conflict of interest or reasonable apprehensions of bias in regard to any hearing panel participation.”[16]

RECORD IN DISPUTE

[21] As noted, the Ministry chose not to provide the record in dispute for my review on the basis that it is subject to solicitor-client privilege under s. 14. However, the general nature of the record is not contested. The Ministry provided sworn evidence, which I accept, that the disputed record is a 28-page PowerPoint presentation (PowerPoint).[17] I provide more detail, and make findings, about the PowerPoint below.

SECTION 14 – SOLICITOR-CLIENT PRIVILEGE

[22] The Ministry is withholding the PowerPoint in its entirety under s. 14. Section 14 states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. This section encompasses solicitor-client privilege (or “legal advice privilege”) and litigation privilege.[18] In this case, the Ministry claims solicitor-client privilege and not litigation privilege.

[23] The test for solicitor-client privilege has been expressed in various ways, but the essential elements are that there must be:

1. a communication between solicitor and client (or their agent[19]);
2. that entails the seeking or giving of legal advice; and
3. that is intended by the solicitor and client to be confidential.[20]

[24] The confidentiality ensured by solicitor-client privilege allows clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better assist their clients.[21] Given its function, solicitor-client privilege is so important to

[16] *Ibid*.
[17] Affidavit #1 of MT at paras. 11 and 13 and Exhibit “D”.
[18] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.
[19] *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at pp. 872-873 and 878-879.
[20] *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837.
[21] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34. For more on the rationale behind solicitor-client privilege, see *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA) per Doherty J.A.

the legal system that it should apply broadly and be as close to absolute as possible.[22]

[25] That said, not every communication between a lawyer and a client is privileged.[23] A communication is only subject to solicitor-client privilege where "the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity", such as a government lawyer providing purely policy advice.[24]

Should I order the Ministry to produce the PowerPoint for my review?

[26] The applicant objects to the Ministry not providing the PowerPoint for my review. He suggests that I should order the Ministry to produce the record so that I can review the disputed information.[25]

[27] The Ministry submits that its written submissions and affidavit evidence "should be sufficient" for me to decide the s. 14 issue.[26] The Ministry says its evidentiary approach under s. 14 is consistent with the strict protection of solicitor-client privilege and the practice in civil litigation and OIPC inquiries.[27]

[28] Section 44(1)(b) of FIPPA grants the commissioner the discretion to order a party to produce for inspection records that a public body claims are subject to solicitor-client privilege. The court has a similar discretion.[28]

[29] However, the preference and established practice in civil litigation, which OIPC inquiries follow, is to decide privilege claims based on affidavit evidence.[29] This approach "ensures that the process is open rather than secret, and as a result, the parties can understand the basis for the decision."[30] As a general rule, the decision-maker should only exercise their discretion to inspect the records where doing so would facilitate a fair and expedient resolution to the privilege claim.[31] For example, it may be appropriate to inspect the records where the

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[22] *R. v. McClure*, 2001 SCC 14 at para. 35; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 10 and 13 [*Camp*].
[23] *R. v. Campbell*, [1999] 1 S.C.R. 565, 1999 CanLII 676 at para. 50.
[24] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 10 [*Blood Tribe*].
[25] Applicant's submissions at p. 2.
[26] Ministry's initial submissions at para. 10.
[27] Ministry's reply submissions at paras. 4 and 10-18.
[28] Rule 7-1(20) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.
[29] *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 at para. 74 [*Keefer Laundry*]; *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para. 76-85.
[30] *Keefer Laundry*, *ibid*.
[31] *Keefer Laundry*, *ibid* at paras. 72-77; *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at paras. 122-125; *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 36-45.

party claiming privilege cannot prove privilege through affidavit evidence without revealing the privileged information itself.[32]

[30] Considering the above, I decline to order the Ministry to produce the PowerPoint for my inspection. I see no legitimate basis to depart from established practice and interfere with the Ministry's decision to present its case as it sees fit, which is to rely on affidavit evidence and not the record itself. I am not persuaded that delaying these proceedings further to order production and review the record would produce a just and speedy determination of the Ministry's privilege claim. I am satisfied that I can decide the privilege issue based on the Ministry's affidavit evidence and not the record itself.

[31] For the reasons provided above, I will assess the Ministry's s. 14 privilege claim based on the affidavit evidence it has chosen to present.[33] I turn now to the three-part test for solicitor-client privilege set out above.

Is the PowerPoint a communication between lawyer and client?

[32] The first part of the privilege test asks whether the disputed information is a communication between lawyer and client.

[33] The Ministry submits that the PowerPoint is a communication between lawyer and client.[34] In support of its position, the Ministry submitted affidavits sworn by KD and MT. KD is the supervising solicitor with the Justice, Health and Revenue Group, Legal Services Branch (LSB), Ministry of Attorney General. MT is the Executive Director of the Ministry's Audit and Investigations Branch. MT and KD both reviewed the access request and the PowerPoint.

[34] KD and MT depose that:

- The Ministry (including the Billing Integrity Program) and the Commission (including its committee members) receive legal advice and services from LSB lawyers.[35]
- In 2014, MT asked an LSB lawyer, RM (now retired), to prepare a presentation on a particular topic that the Ministry describes *in camera*.[36]
- The PowerPoint is a written summary of oral legal advice that RM provided to Ministry and Commission clients, at MT's request, during a presentation given at a joint meeting of the Health Care Practitioner Special Committees on or about December 16, 2014, which MT

[32] *Keefer Laundry*, *ibid* at para. 75.
[33] For a similar approach, see Order F22-04, 2022 BCIPC 4 at paras. 16-25.
[34] Ministry's initial submissions at paras. 48-60.
[35] Affidavit #1 of MT at para. 9; Affidavit #1 of KD at para. 5.
[36] Affidavit #1 of MT at para. 11.

attended. The oral legal advice was summarized into PowerPoint form to make it easier to follow and understand.[37]

- All of the attendees of the December 16, 2014 presentation, and individuals who received copies of the PowerPoint the following day, were "Ministry employees or LSB employees."[38]

[35] The applicant questions whether the PowerPoint is a communication between lawyer and client. He says, for example, that the individuals who received the PowerPoint were "not direct clients."[39]

[36] First, I am satisfied that the PowerPoint is a "communication". I make the following findings based on MT's evidence, which I find persuasive given her personal involvement. There was a joint meeting of the Health Care Practitioner Special Committees on or about December 16, 2014 (Meeting). RM presented at the Meeting at MT's request, the PowerPoint summarizes the substance of RM's presentation, and the PowerPoint was provided to attendees and, subsequently, other individuals (recipients). Since the PowerPoint was provided to the recipients, I find it is a "communication".

[37] Turning to whether the communication was between solicitor and client, the Ministry's evidence establishes that, although RM is now retired, he was a lawyer with LSB in 2014 when he created the PowerPoint and provided it to the recipients. As a result, the PowerPoint is clearly a communication from a lawyer. The question is whether the recipients were RM's clients.

[38] I am satisfied that the recipients were RM's clients. Based on MT's evidence, I find that the PowerPoint was only provided, either at the Meeting or subsequently, to "Ministry employees or LSB employees."[40] The *in camera* evidence supports this[41] and I see no evidence to suggest that the PowerPoint was disclosed to anyone else. I also accept the Ministry's evidence that Ministry employees are LSB's clients and were, in particular, RM's clients in 2014. This makes sense given that MT, a Ministry employee, requested legal advice from RM. Accordingly, I conclude that the PowerPoint is a communication between a solicitor and client, in this case RM and Ministry employees.

[39] To be clear, I accept that "Ministry employees" may also include employees or members of the Commission and its committees. The "client", for the purposes of solicitor-client privilege, "should not be defined restrictively nor technically".[42] Given the close operational connection between the Ministry and

[37] Affidavit #1 of MT at paras. 11-12; Affidavit #1 of KD at para. 9.
[38] Affidavit #1 of MT at para. 12.
[39] Applicant's submissions at p. 10.
[40] Affidavit #1 of MT at para. 12.
[41] Exhibits to Affidavit #1 of MT.
[42] *Baker v. Commercial Union Assurance Company of Canada*, 1995 NSCA 32 at p. 6 (cited to CanLII).

the Commission,[43] as outlined in the background above, I am satisfied that the Ministry and the Commission are either joint clients or part of one client, which in this case does not affect the privilege analysis either way.

Was the PowerPoint intended to be confidential?

[40] The next question is whether RM and his Ministry clients intended the PowerPoint to be confidential. In general, if a third party (i.e., anyone other than the lawyer or their client, or their agents) is included in a solicitor-client communication, that may indicate that the communication was not intended to be confidential.

[41] The Ministry submits that the PowerPoint was intended to be confidential.[44] In support, MT and KD depose that:

- It is generally understood that advice LSB lawyers provide to Ministry clients is confidential.
- The Meeting attendees, including MT, intended and understood the PowerPoint to be confidential.
- The Meeting was held in a government building with no public access and no one from the public was invited to the meeting.
- The Meeting would not have gone ahead if the public was involved.
- The advice RM provided indicated that his presentation was intended to be confidential, and that the information contained in it would only be given to Ministry employees.[45]

[42] The applicant submits that the PowerPoint was not intended to be confidential because it was provided to third parties. Specifically, he says RM gave his presentation to a group of individuals that included public representatives serving on Health Care Practitioner Special Committees, as well as LSB employees other than RM.[46] The applicant also says RM's presentation was like a law professor speaking to a law class or an article in a legal publication;[47] in other words, the PowerPoint was presented publicly, not confidentially.

[43] In reply, the Ministry submits that the PowerPoint was not provided to any third parties or public representatives, so there is no basis to question the confidentiality of the communication.[48] The Ministry says public representatives sit on a sub-committee of the Health Care Practitioner Special Committees, but

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[43] Ministry's initial submissions at paras. 48-55; Order F21-50, 2021 BCIPC 58 at para. 36.
[44] Ministry's initial submissions at para. 61.
[45] Affidavit #1 of MT at para. 15; Affidavit #1 of KD at para. 12.
[46] Applicant's submissions at pp. 4-7, for example.
[47] Applicant's submissions at pp. 5-6.
[48] Ministry's reply submissions at paras. 20 and 23-31; Affidavit #1 of MT at para. 16.

that sub-committee is not the committee that met at the Meeting.[49] Further, the Ministry submits that LSB employees other than RM who attended the Meeting are not third parties, but rather "various legal counsel and administrative support staff" assisting in providing legal advice.[50] Regarding the applicant's analogies to a law class or legal publication, the Ministry says those circumstances are public and no solicitor-client relationships exist between the speaker and the audience whereas the Meeting involved a private and confidential presentation between solicitor and client.

[44] In my view, the Ministry's evidence is sufficient to establish that the PowerPoint was intended to be confidential. MT says she intended the PowerPoint to be confidential. I find her evidence persuasive given that she requested RM's advice and attended the Meeting. Although RM did not provide evidence, I am satisfied by the *in camera* evidence and KD's evidence that RM also intended the PowerPoint to be confidential. Further, the Ministry's evidence establishes that no third parties received the PowerPoint. No members of the public attended the Meeting or received a copy of the PowerPoint, so the Meeting was not like a law class or legal publication. Finally, I accept that LSB employees other than RM received the PowerPoint; however, they are part of the solicitor team and are not third parties, so their presence does not undermine confidentiality.

Does the PowerPoint entail the seeking or giving of legal advice?

[45] The third part of the solicitor-client privilege test asks whether the communication in dispute entails the seeking or giving of legal advice.

[46] The Ministry submits that the PowerPoint entails RM giving his Ministry clients legal advice.[51] In support, MT and KD depose:

- The PowerPoint is a written summary of oral legal advice RM provided at the Meeting.[52]
- RM's legal advice deals with complicated areas of law. New and existing Ministry staff needed to be educated or refreshed on these areas for their work, which includes being called as witnesses to provide evidence on these areas at hearings.[53]
- RM used his legal expertise to put the PowerPoint together and focus slides on legal aspects of the issues that he thought important to bring to his clients' attention.[54]

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[49] Ministry's reply submissions at para. 25.
[50] Ministry's reply submissions at para. 31.
[51] Ministry's initial submissions at paras. 64-70; Ministry's reply submissions at paras. 19-22.
[52] *Supra* note 37.
[53] Affidavit #1 of MT at para. 14; Affidavit #1 of KD at para. 13.
[54] Affidavit #1 of KD at para. 11.

[47] The applicant submits that the PowerPoint was provided on an "educational basis", is "purely pedagogical" and "has more of a business, not legal, character."[55] In other words, the applicant submits that the PowerPoint provides information, not advice, and the information is not sufficiently legal to attract solicitor-client privilege.

[48] In my view, the PowerPoint entails RM giving his Ministry clients legal advice. First, I am not persuaded that the PowerPoint simply provided information rather than advice. I find that RM was advising his clients on specific topics, in response to a specific request from MT, relating to particular aspects of the Ministry's work. RM was not simply lecturing on the law in the abstract with no direct connection to a client's legal issues. Second, I am satisfied that RM's advice, as summarized in the PowerPoint, was legal advice. KD is a lawyer who reviewed the PowerPoint, so I find her evidence that RM's advice was legal advice persuasive. The *in camera* evidence, which sets out the topics of RM's advice, also satisfies me that the advice was indeed legal advice and not business or policy advice. Finally, it makes sense that the advice was legal given that the Ministry works within the complex legal scheme of the *Medicare Protection Act*.[56]

[49] I conclude that the PowerPoint entails the providing of legal advice, so the third part of the solicitor-client privilege test is met.[57] However, that is not the end of the matter in this case. The applicant raises an exception to privilege, as well as waiver, so I discuss those issues below.

Does the future crimes and fraud exception apply?

[50] The applicant alleges that, in the course of the audit of his MSP billings and subsequent proceedings, government lawyers and employees "could have potentially promoted fraud, potential extortion, and several other criminal abuses (breach of privacy, perjury, malicious prosecution, among others)."[58] He submits that "[w]hen there is a reasonable likelihood that a lawyer has participated in a criminal activity, that correspondence leading to the criminal activity must be released."[59]

[51] I understand the applicant to be invoking the "future crimes and fraud" exception to privilege. That exception states that privilege does not apply to solicitor-client communications which are in themselves unlawful or were made to

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[55] Applicant's submissions at pp. 7 and 12.
[56] See, for example, *Pacific Centre for Reproduction Medecine v. Medical Services Commission*, 2015 BCSC 53 at para. 31, affirmed 2019 BCCA 315.
[57] For a similar finding regarding PowerPoint presentations, see *R. v. Colegrove*, 2022 NSSC 33.
[58] Applicant's submissions at p. 30.
[59] Applicant's submissions at p. 30.

obtain legal advice for the purpose of committing a crime.[60] The exception is "rare" and "extremely limited in nature".[61]

[52] The exception applies if the applicant demonstrates that:

- the challenged communications relate to proposed future conduct;
- the client is seeking to advance conduct which they know or should know is unlawful; and
- the wrongful act contemplated is clearly wrong.[62]

[53] If the applicant establishes a *prima facie* case that the above requirements are met, the procedure is for me to order the Ministry to produce the records so that I can review them and decide whether the exception applies.[63]

[54] The Ministry did not explicitly address the future crimes and fraud exception, but its position is clearly that the exception does not apply. The Ministry says the applicant's allegations are unfounded, inappropriate and should be completely disregarded.

[55] I am not persuaded that the applicant has established a *prima facie* case that the future crimes and fraud exception applies. In my view, the applicant's allegations are speculative and fall well below the threshold of a *prima facie* case for this extremely limited exception. Further, the applicant fails to establish the requisite connection to the PowerPoint. I see no persuasive evidence to establish even a *prima facie* case that the PowerPoint itself is unlawful or that it was made to advance unlawful conduct by the Ministry.

Did the client waive privilege?

[56] Finally, the applicant argues that, even if the PowerPoint is privileged, the Ministry waived privilege.[64] He says PowerPoint slides were provided to him in response to another access request, so they should also be provided to him here. The applicant provided two of these other slides with his submissions.

[57] In reply, the Ministry submits that it did not waive privilege.[65] It says there is no evidence to suggest that the other PowerPoint slides the applicant refers to were privileged in the first place, let alone that privilege was waived. At any rate, the Ministry says waiver over one set of records does not carry over to a

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[60] *Descôteaux*, *supra* note 19; *Camp*, *supra* note 22 at paras. 22-29.
[61] *Blood Tribe*, *supra* note 24 at para. 10.
[62] *Camp*, *supra* note 22 at para. 28; *Industrial Alliance Securities Inc. v. Kunicyn,* 2020 ONSC 3393 at para. 28.
[63] *Camp*, *ibid* at para. 24.
[64] Applicant's submissions at p. 34.
[65] Ministry's reply submissions at paras. 32-34.

separate record. The Ministry says it is entitled to exercise its discretion differently in respect of different records.

[58] Privilege belongs to, and can only be waived by, the client.[66] To establish waiver, the party asserting it must show:

1. the privilege-holder knew of the existence of the privilege and voluntarily evinced an intention to waive it; or
2. in the absence of an intention to waive, fairness and consistency require disclosure.[67]

[59] I am not persuaded that the Ministry voluntarily evinced an intention to waive privilege over the PowerPoint. I see no evidence to establish that. At any rate, I do not understand the applicant to be arguing express waiver.

[60] The applicant, as I understand him, is arguing implied waiver. Implied waiver occurs where "a party does not explicitly waive the privilege but takes some action that is inconsistent with maintaining the privilege."[68] The applicant argues that it would be unfair and inconsistent for the Ministry to withhold some PowerPoint slides, but not others.

[61] In my view, the applicant has not established implied waiver. The applicant provided examples of PowerPoint slides that have previously been disclosed to him, but they do not appear to me to contain legal advice. As a result, it is not clear to me that there was even any privilege over these slides to waive. Further, even if there was a prior waiver, I am not persuaded that this establishes waiver over subsequent PowerPoint material. PowerPoint is simply a format; different PowerPoint presentations have different content. I do not consider it inconsistent or unfair to treat records with different content differently.

Conclusion regarding solicitor-client privilege

[62] For the reasons provided above, I conclude that the PowerPoint is subject to solicitor-client privilege: it meets the privilege test, the future crimes and fraud exception does not apply and the privilege has not been waived.

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[66] *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 39.

[67] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 1983 CanLII 407 (BC SC), 45 B.C.L.R. 218 (S.C.) at para. 6.

[68] Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014) at s. 7.104, cited in *Nova Scotia (Attorney General) v. Cameron*, 2019 NSCA 38 at para. 50, leave to appeal ref'd 2020 CanLII 13153 (SCC).

CONCLUSION

[63] For the reasons given above, under s. 58(2)(b) of FIPPA, I confirm the Ministry's decision that it is authorized under s. 14 of FIPPA to refuse the applicant access to the disputed record, i.e., the PowerPoint.

May 30, 2022

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F20-81906