



Order P23-06

## DLA PIPER (CANADA) LLP

Erika Syrotuck  
Adjudicator

July 14, 2023

CanLII Cite: 2023 BCIPC 63  
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**Summary:** An applicant requested her personal information from DLA Piper (Canada) LLP (DLA Piper) under the *Personal Information Protection Act*. In response, DLA Piper identified 22 sets of documents containing references to the applicant but refused to disclose the information under ss. 23(3)(a) (solicitor-client privilege), 23(4)(c) (personal information about another individual) and 23(4)(d) (identity of an individual who has provided personal information about another individual). The adjudicator found that the information in dispute was the applicant's personal information and that s. 23(3)(a) authorized DLA Piper to refuse access to most of it. The adjudicator ordered DLA Piper to produce the remaining documents for the purpose of determining whether ss. 23(4)(c) and (d) applied to the remaining information in dispute.

**Statutes Considered:** *Personal Information Protection Act*, [SBC 2003], c. 63 ss. 23(3)(a), 23(4)(c), 23(4)(d), 23(5), and 38(1).

## INTRODUCTION

[1] An applicant requested her personal information from DLA Piper (Canada) LLP (DLA Piper) under the *Personal Information Protection Act* (PIPA). Specifically, she asked for statements about or attributed to her, including in communications among named lawyers and “other DLA Piper parties” and between those lawyers/parties and named entities and individuals.

[2] In response, DLA Piper refused access under s. 23(3)(a) of PIPA, which allows an organization to refuse access because the information is protected by solicitor-client privilege. It also said that ss. 23(4)(c) and (d) may apply. These provisions require an organization to refuse access if the information would reveal personal information about another individual or would reveal the identity of an individual who has provided personal information about another individual.

[3] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review DLA Piper's response.

[4] Mediation did not resolve the issues in dispute and the matter proceeded to inquiry.

[5] As a preliminary matter, the applicant requested that the OIPC accept some audio recordings *in camera*. I accepted some audio recordings *in camera* but required that the applicant provide a description of them in open evidence, which she did.

[6] At the inquiry, the parties provided extensive submissions and evidence. I have only referred to what I have found is relevant to the specific issues in this inquiry.

### ***Preliminary Issues – issues not in the notice***

[7] In their submissions, both parties raise issues that were not on the Notice of Inquiry.

[8] For example, both parties raise the scope of the applicant's request for her personal information. In short, the parties disagree about whether the access request includes the applicant's personal information in communications between the applicant and DLA Piper.

[9] The Notice of Inquiry only lists ss. 23(3)(a), 23(4)(c) and 23(4)(d) as the issues in the inquiry. In general, parties may not add new issues to the inquiry without the OIPC's prior consent. Adding issues at this late stage undermines the OIPC's processes because it does not allow the commissioner to attempt to resolve the issues through mediation.<sup>1</sup>

[10] In this case, neither party formally requested to add any new issues to the inquiry or explained why I should do so now. I am not persuaded it would be fair to add a new issue at this late stage. I decline to add the above issue to this inquiry.

### **ISSUES**

[11] At this inquiry, I must decide:

1. Is DLA Piper authorized to refuse access to the applicant's personal information under s. 23(3)(a) of PIPA?

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<sup>1</sup> Other OIPC Orders have said the same, for instance: Order F22-22, 2022 BCIPC 24 (CanLII) at para 10; and Order F20-44, 2020 BCIPC 53 (CanLII) at para 6.

2. Is DLA Piper required to refuse access to the applicant's personal information under ss. 23(4)(c) or (d) of PIPA?

[12] Under s. 51(a) of PIPA, it is up to the organization to prove that the applicant has no right of access to her personal information.

## DISCUSSION

### *Background*

[13] DLA Piper is a law firm. It provided legal services to an individual (Client) and a corporation through which the Client carried on his business.<sup>2</sup> After the Client died, DLA Piper also acted for the trust corporation (Trust Corporation) that acted as the executor of the Client's will, the administrator of his estate and the trustee of trusts he established during his lifetime.<sup>3</sup>

[14] The applicant was a friend of the Client, and, at one point, acted for him under a power of attorney. DLA Piper says that, several years ago, the Client revoked that power of attorney and gave it to an employee of the Trust Corporation.<sup>4</sup> A Partner in DLA Piper's litigation department (Partner) says that, around this time, the relationship between the applicant and the Client became difficult.<sup>5</sup> The applicant says she had no direct contact with the Client after this time.<sup>6</sup>

[15] Both DLA Piper's submissions and documents provided by the applicant indicate that, after the relationship between the Client and the applicant became difficult, the applicant contacted various individuals and agencies about her concerns relating to the Client.<sup>7</sup>

[16] The applicant also complained to the Law Society of BC about a lawyer at DLA Piper who conducted litigation relating to the Client's business (Law Society Complaint).<sup>8</sup> The applicant's submission includes a copy of the Law Society Complaint.<sup>9</sup>

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<sup>2</sup> Documents provided by the applicant indicate that the Client controlled this corporation; Applicant's response submission, Appendix C page 4.

<sup>3</sup> Partner's affidavit, para 5.

<sup>4</sup> DLA Piper's initial submissions, para 22.

<sup>5</sup> Partner's affidavit, para 21.

<sup>6</sup> Description of item A in Appendix A of the applicant's submissions.

<sup>7</sup> See Appendix B to the applicant's submissions and the Partner's affidavit at para 33.

<sup>8</sup> Partner's affidavit at para 32.

<sup>9</sup> Applicant's response submissions, Appendix B, item 6.

***Information in dispute***

[17] The information in dispute is contained in 22 sets of documents. DLA Piper did not provide the documents for my review. However, it provided two tables describing them.<sup>10</sup> According to the tables of records, I find the documents to be as follows:

- Emails among lawyers at DLA Piper (Internal Communications);
- Emails between lawyers at DLA Piper and individuals other than the Client (External Communications);
- Documents relating to the Law Society Complaint.

[18] Before deciding whether DLA Piper is authorized or required to refuse the applicant access to the information in dispute, I will first decide whether the information in dispute is the applicant's personal information.

***Is the information at issue the applicant's personal information?***

[19] Section 23(1)(a) gives an individual the right to access their own personal information under the control of the organization, subject to some exceptions set out in s. 23(3) and s. 23(4). First, I must determine whether the information in the documents at issue is the applicant's "personal information" as defined in PIPA.

[20] Under s. 1 of PIPA, "personal information" means information about an identifiable individual and includes employee personal information but does not include "contact information" or "work product information". These terms are also defined in s. 1 as follows:

"contact information" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;

"work product information" means information prepared or collected by an individual or group of individuals as a part of the individual's or group's responsibilities or activities related to the individual's or group's employment or business but does not include personal information about an individual who did not prepare or collect the personal information.

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<sup>10</sup> At first, DLA Piper provided a table of records indicating that there are 435 documents that refer to the applicant across three of the law firm's files. I wrote back to ask DLA Piper to confirm which privilege it was applying to which documents and it provided an updated table that organized the documents into 22 sets.

[21] DLA Piper says that statements about or attributed to the applicant in the documents at issue are not necessarily her “personal information” as defined in PIPA. More specifically, DLA Piper submits that details about the applicant’s behaviour provided to DLA Piper are not her “personal information” under the definition in PIPA.<sup>11</sup>

[22] Rather, DLA Piper says that “personal information” should be interpreted consistently with the purpose set out in s. 2 of PIPA. DLA Piper says that “the interpretation must strike a balance between two objectives: preventing the abuse by organizations of information about individuals that is vulnerable to such abuse, while at the same time enabling organizations to obtain and use such information for bona fide purposes, to the extent that is necessary, judged by a reasonableness standard.”<sup>12</sup>

[23] It also references the provincial government’s *Guide to the Personal Information Protection Act*, which states:

Personal information means information about an identifiable individual, including:

- Name, age, weight, height.
- Home address and phone number.
- Race, ethnic origin, sexual orientation.
- Medical information.
- Income, purchases and spending habits.
- Blood type, DNA code, fingerprints.
- Marital status and religion.
- Education.
- Employment information.<sup>13</sup>

[24] It says that the information at issue in this inquiry is not “uncontroversial data” about the applicant, like the above examples.<sup>14</sup> DLA Piper does not explain what it means by that term but I gather it means factual, objective information about an individual.

[25] The applicant disputes this and says references to her are her personal information.<sup>15</sup>

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<sup>11</sup> DLA Piper’s initial submissions, para 77.

<sup>12</sup> DLA Piper’s initial submissions, para 49.

<sup>13</sup> At paragraph 46 of its initial submissions, DLA Piper says that the guide is the OIPC’s guide. The link it submitted is broken but indicates the guide was on the provincial government’s website rather than the OIPC’s.

<sup>14</sup> DLA Piper’s initial submissions, para 77.

<sup>15</sup> Applicant’s submissions “Analysis Narrative”, page 1.

[26] In my view, limiting personal information to “uncontroversial data,” as DLA Piper seems to suggest, is too narrow and inconsistent with how past orders have interpreted this term. The starting point for determining whether information is personal information under PIPA is whether it is “reasonably capable of identifying a particular individual, either alone or in combination with other available sources of information...”<sup>16</sup> Nothing in this approach limits personal information to ‘uncontroversial data’ or to information that is not subjective. In fact, OIPC adjudicators have consistently found that “personal information” includes information that is entirely subjective. For example, in Order P18-01, the adjudicator found that an individual’s opinion about the applicant was the applicant’s personal information.<sup>17</sup>

[27] I have no trouble concluding that the information at issue is the applicant’s “personal information.” In particular, I am satisfied that statements about or attributed to the applicant including details and/or allegations about her behaviour are her personal information because it is information that is capable of identifying her and it is not “contact information” or “work product information.”

[28] Having found that the documents at issue contain the applicant’s personal information, I turn to whether PIPA authorizes DLA Piper to withhold it.

### **Section 23(3)(a) – solicitor-client privilege**

[29] Section 23(3)(a) says that an organization is not required to disclose personal information under subsection (1) or (2) if the information is protected by solicitor-client privilege.

[30] In the context of s. 23(3)(a), the term “solicitor-client privilege” includes legal advice privilege and litigation privilege.<sup>18</sup> DLA Piper says that legal advice privilege applies to the External Communications. As I discuss below, it is unclear whether DLA Piper also intended to apply litigation privilege to some or all of the records.

[31] DLA Piper also argued that “lawyer’s brief privilege” applies to all the documents in dispute. In doing so, it referenced the BC Supreme Court’s decision in *Keefe Laundry v Pellerin Corp et al [Keefe Laundry]*.<sup>19</sup> DLA Piper went on to say that the Ontario IPC applied this principle in Order MO-4173.<sup>20</sup> However, the portion of this Ontario decision that DLA Piper cites refers to legal advice privilege, not “lawyer’s brief privilege.”

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<sup>16</sup> Order P12-01, 2012 BCIPC 25 (CanLII) at para 85.

<sup>17</sup> Order P18-01, 2018 BCIPC 6 (CanLII) at paras 14 and 15.

<sup>18</sup> Order P06-01, 2006 CanLII 13537 (BCIPC) at para 53. See also Order P22-06, 2022 BCIPC 54 (CanLII) at para 31.

<sup>19</sup> 2006 BCSC 1180 [*Keefe Laundry*].

<sup>20</sup> 2022 CanLII 16745 (ON IPC) at paras 48-50 (see DLA Piper’s initial submissions at para 80).

[32] I will first consider whether legal advice privilege applies to all of the documents containing the personal information in dispute. If necessary, I will return to “lawyer’s brief privilege” and litigation privilege, below.

[33] As I mentioned above, DLA Piper did not provide any of the documents containing the applicant’s personal information for my review in this inquiry. Because of the importance of solicitor-client privilege as a substantive right, the commissioner makes an exception to the usual practice of reviewing the records in dispute when deciding whether privilege applies.<sup>21</sup> Rather, the party seeking to establish privilege can choose to provide affidavit evidence. This approach has been endorsed by the BC Supreme Court.<sup>22</sup> The Court also acknowledged that the use of affidavit evidence means that “some weight has to be given to the judgment of counsel when the [OIPC] is adjudicating claims of solicitor-client privilege.”<sup>23</sup>

[34] In this case, DLA Piper provided affidavit evidence from the Partner along with two tables of records (an original and revised).<sup>24</sup>

#### *Legal advice privilege*

[35] Legal advice privilege applies to communications that:

- i) are between solicitor and client;
- ii) entail the seeking or giving of legal advice; and
- iii) are intended to be confidential by the parties.<sup>25</sup>

[36] In addition, legal advice privilege extends to other kinds of documents and communications that do not strictly meet the above test. For example, legal advice privilege applies to the “continuum of communications” between lawyer and client that do not specifically request or offer advice but are “part of the necessary exchange of information between solicitor and client for the purpose of providing advice.”<sup>26</sup>

[37] In addition, legal advice privilege applies to communications involving third parties (i.e. a party other than the client or lawyer) if the third party:

- serves as a channel of communications; or

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<sup>21</sup> For a more detailed discussion, see Order F22-34, 2022 BCIPC 38 at paras 83-85.

<sup>22</sup> *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner)* 2021 BCSC 266 (CanLII) at para 85.

<sup>23</sup> *Ibid* at para 86.

<sup>24</sup> The original table of records provided along with DLA Piper’s initial inquiry submissions and the revised table in response to a request from me to provide a further description.

<sup>25</sup> *Solosky v The Queen*, 1979 CanLII 9 (SCC) at page 837.

<sup>26</sup> *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority* 2011 BCSC 88 (CanLII) at para 42.

- performs a function integral to the solicitor-client relationship.<sup>27</sup>

[38] I turn to whether the documents at issue are privileged, starting with the Internal Communications.

#### Internal Communications

[39] There are eight sets of internal communications. In its revised table of records, DLA Piper describes these documents as:

- Discussions among lawyers at DLA Piper about a replacement attorney for the Client;<sup>28</sup>
- Emails between the Partner and another lawyer at DLA Piper to arrange a meeting about matters involving the Client;
- Email from a lawyer at DLA Piper to another lawyer at DLA Piper who was taking over conduct of the Client's file;
- Emails between lawyers at DLA Piper about matters involving the Client and an external agency, including advice from the Partner for the Client on a response;
- Draft legal advice sent between DLA Piper lawyers for comment;
- Email from the Partner to another lawyer at DLA Piper asking for assistance with a matter affecting the Client;
- Communications with another branch of DLA Piper referring to the Client; and,
- An internal search by a lawyer at DLA Piper relating to the Client.<sup>29</sup>

[40] DLA Piper explains that many different lawyers at DLA Piper provided legal services to the Client, including the named lawyers in its description of the documents.<sup>30</sup>

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<sup>27</sup> *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) [*College of Physicians*] at paras 47-48.

<sup>28</sup> DLA Piper did not provide the names of the lawyers in this instance. In all other instances, the lawyers are named.

<sup>29</sup> DLA Piper's revised table of records numbered 21973784, 23454370, 24563924, 28072093, 28074818, 28979383, 29755027, and 29785898.

<sup>30</sup> DLA Piper's initial submissions, para 9.

[41] The Partner says that the purpose of the internal documents was to prepare legal advice for the Client. For example, the Partner says that he participated in numerous discussions with colleagues at DLA Piper to consider the best advice to provide to the Client and his caregivers and other advisors in dealing with the applicant's behaviour.<sup>31</sup> The Partner says that these discussions were always confidential.<sup>32</sup>

[42] The applicant says that DLA Piper does not explain how the responsive information forms part of an exchange of confidential information relating to legal advice it provided or how the content is legal in nature.<sup>33</sup> She says that the references between her personal information and the legal advice are not evident.<sup>34</sup>

[43] For the reasons that follow, I am satisfied that the Internal Communications are protected by legal advice privilege.

[44] I accept that there was a solicitor-client relationship between the Client, as an individual and through the corporation through which he carried on his business, and lawyers at DLA Piper, including the Partner.

[45] I am satisfied that the Internal Communications are among lawyers at DLA Piper who all worked on providing legal advice to the Client and that they are confidential. It is well-established that lawyers and staff who work together on a file can share privileged information among themselves without negating the confidentiality of the communications.<sup>35</sup>

[46] I also accept the Partner's evidence that the internal communications were made for the purpose of preparing legal advice for the Client. To this end, I am satisfied that disclosing the Internal Communications would reveal or could allow an accurate inference to be made about communications, including the content of legal advice, between the Client and his lawyers at DLA Piper.

[47] As a result, I find that legal advice privilege applies to all of the Internal Communications.

#### Document relating to Law Society Complaint

[48] Next, I must determine whether legal advice privilege applies to internal documents relating to the Law Society Complaint.

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<sup>31</sup> Partner's affidavit at para 37.

<sup>32</sup> *Ibid.*

<sup>33</sup> Applicant's response submission "Analysis Narrative" page 1.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Shuttleworth v Eberts et al*, 2011 ONSC 6106 (CanLII) at paras 67 and 70-71; *Weary v Ramos* 2005 ABQB 750 (CanLII) at para 9. See also Order F20-16, 2020 BCIPC 18 (CanLII) at para 65 and Order F20-01, BCIPC 1 (CanLII) at para 36.

[49] In its submissions, DLA refers to a previous communication with the applicant in which it explained that it is claiming privilege over these documents because the material in its files relating to the Law Society Complaint “relate to the legal services that were provided to [the Client] and [his company] and were intended to be confidential.”<sup>36</sup>

[50] The applicant provided a copy of the Law Society Complaint and a follow up request to the Law Society’s Complaint’s Review Committee about it.<sup>37</sup>

[51] I am satisfied that DLA Piper’s internal documents relating to the applicant’s complaint to the Law Society, which is about how DLA Piper conducted litigation, would reveal information protected by solicitor-client privilege. Based on the content of the complaint, I am satisfied that, if disclosed, the documents relating to this complaint would reveal information about the litigation, including communications between the Client and lawyers at DLA Piper. For this reason, I find these documents are protected by legal advice privilege.

#### External Communications

[52] The remaining communications at issue in this inquiry involve parties other than the Client or lawyers at DLA Piper. DLA Piper has provided the names and relationships of some of the parties, but in some cases only refers to an “external party.”

[53] Communications with or that include third parties generally do not meet the requirement that communications be confidential between a lawyer and client; however, legal advice privilege extends to cover those communications in certain circumstances.

[54] In *Greater Vancouver Water District v. Bilfinger Berger AG [Bilfinger]*, the BC Supreme Court set out the following principles about third party communications:

- a) Communications with a third party are not protected by solicitor-client privilege merely because they assist the solicitor in formulating legal advice to the client.
- b) Where the third party serves as a line of communication between the solicitor and client the communications will be protected by solicitor-client privilege; that is, either:
  - i. where the third party is simply carrying the information between the solicitor and client, or acting as “agent of transmission”, or

<sup>36</sup> DLA Piper’s initial submissions at para 41.

<sup>37</sup> Applicant’s response submissions, Appendix B, items 6 and 19.

- ii. where the third party's expertise is required to interpret the information provided by the client so that the solicitor can understand it;
- c) There are other situations where the function of the third party is "essential to" or "integral to" the solicitor-client relationship, such that privilege attaches to the communications with the third party. For example:
- i. if the third party is authorized by the client to seek legal advice from the solicitor on behalf of the client, standing in the shoes of the client, then the third party's function is essential to the solicitor-client relationship and the communications will be privileged; but
  - ii. if the third party is simply authorized to gather information from outside sources and pass it to the solicitor so that the solicitor might advise the client, then the third party's function is not essential but is merely incidental to the giving of legal advice, and will not be protected from privilege. Arguably this is just an example of category (a) above.<sup>38</sup>

[55] As I explained earlier, some of the communications containing the applicant's personal information involve named individuals who are not lawyers at DLA Piper. DLA Piper explains that these individuals are the Client's caregivers, medical representatives, and employees of the Trust Corporation, including an employee that acted under the Client's power of attorney.<sup>39</sup> DLA Piper says that the named third parties acted as agents of transmission.<sup>40</sup>

[56] I have broken the email communications into three categories and will discuss each in turn.

#### 1. Communications with LH

[57] In its revised table of records, DLA Piper describes the communications involving LH as:

- Email to a named lawyer at DLA Piper "from [the Client] (sent by [LH]) requesting copy of correspondence."
- Email from a named lawyer at DLA Piper to LH with DLA Piper's advice on how to respond to a matter addressed in another document; and
- Acknowledgement from LH for advice received.<sup>41</sup>

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<sup>38</sup> 2015 BCSC 532 (CanLII) [*Bilfinger*] at para 27.

<sup>39</sup> DLA Piper's initial submissions at paras 9 – 15; Partner's affidavit at paras 8 – 13.

<sup>40</sup> DLA Piper's February 3, 2023 letter, page 7.

<sup>41</sup> DLA Piper's revised table of records numbered 25694280, 28077303, 28077596.

[58] The Partner says that LH was one of the Client’s caregivers.<sup>42</sup> The Partner deposes that the Client was not capable of communicating without assistance from his carers.<sup>43</sup>

[59] In its submissions, DLA Piper describes instances where LH sent emails on the Client’s behalf.<sup>44</sup> DLA Piper also says that LH arranged meetings between its lawyers and the Client.<sup>45</sup>

[60] The applicant also indicates that LH was one of the Client’s personal care workers and provided documents showing that LH was paid to fulfil that role.<sup>46</sup> However, the applicant questions whether a person who is a paid caregiver can be part of a confidential communication between a lawyer and client for the purpose of giving and seeking legal advice.<sup>47</sup> Specifically, the applicant says that communicating in the presence of a paid caregiver goes against the most basic purpose of privilege, which is to allow for free and open communication between a lawyer and client. She says that, because LH “orchestrated” the Client’s communications, the Client was denied an opportunity to communicate privately with his lawyers.<sup>48</sup>

[61] The applicant also says that a person who provides personal care services for pay is in an inherent conflict of interest. She points to other circumstances where a paid caregiver is excluded from certain roles (for example, under the *Representation Agreement Act*).<sup>49</sup>

[62] The applicant provided many documents about the Client, including medical assessments of his capacity. These documents also indicate that the Client required assistance with his personal and financial affairs.

[63] In response, DLA Piper says that there is no statutory provision that prevents a personal care provider from being an agent for the purpose of solicitor-client privilege. DLA Piper says that the fact that the Client needed assistance communicating with his lawyers cannot deprive him of his right to solicitor-client privilege.<sup>50</sup>

[64] I find that LH was acting as an “agent of transmission” between the Client and lawyers at DLA Piper. That the Client required assistance communicating

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<sup>42</sup> DLA Piper’s initial submissions, para 24.

<sup>43</sup> Partner’s affidavit, para 23.

<sup>44</sup> DLA Piper’s initial submissions, paras 27 and 30.

<sup>45</sup> DLA Piper’s initial submissions, para 30.

<sup>46</sup> Applicant’s response submissions, Appendix C, page 17.

<sup>47</sup> Applicant’s response submissions, “Analysis Narrative” page 1.

<sup>48</sup> Applicant’s response submissions, “Analysis Narrative” page 2.

<sup>49</sup> RSBC 1996 ch 405. See note on page 3 of the applicant’s response submissions, “Analysis Narrative”.

<sup>50</sup> DLA Piper’s reply submissions, para 5.

about his personal and legal matters is not in dispute between the parties and I accept it as fact. Further, I am satisfied that the communications contained legal advice and were intended to be confidential.

[65] Based on DLA Piper’s submissions and its description of the emails at issue, I am satisfied that LH’s function was to send and receive communications on the Client’s behalf. For example, the table of records indicates that one email was “from” the Client but “sent by” LH<sup>51</sup> which indicates to me that LH’s function was to assist the Client in sending the email. I find that, in another instance, the emails at issue are about legal advice that was developed for the Client and received by LH.<sup>52</sup>

[66] I am not persuaded that the fact that LH was a paid caregiver excludes her from acting as an agent of transmission. The statutory exclusions that the applicant identified do not apply. I am also not persuaded that an inherent conflict of interest arises in a situation where a paid caregiver assists a client in communicating with their lawyer.

[67] In summary, I find that communications between LH and lawyers at DLA Piper are privileged because LH functioned as an agent of transmission between the Client and his lawyers.

## 2. Communications with employees of the Trust Corporation

[68] There are several communications that include two named individuals who were employees of the Trust Corporation. The Partner says that one of them replaced the applicant as the Client’s attorney.<sup>53</sup>

[69] On its table of records, DLA Piper indicates that the two employees of the Trust Corporation:

- requested advice from the Partner and other lawyers at DLA Piper;
- received advice from the Partner;
- provided the Partner with an update on the Client;
- communicated to the Partner about the Client’s condition;
- communicated with the Partner about how to respond to communication from the applicant; and
- communicated about “an issue raised by an external party.”<sup>54</sup>

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<sup>51</sup> DLA Piper’s revised table of records, document number 25694280.

<sup>52</sup> DLA Piper’s revised table of records, document numbers 28072093, 28074818, 28077303, and 28077596, when read together.

<sup>53</sup> Partner’s affidavit, para 20.

<sup>54</sup> DLA Piper’s revised table of records, document numbers 26250415, 27553455, 27584786, 28661695, 29052390, 29067318, 29109706, 29171721.

[70] The Partner explains that the Client could not explain all of the details of his personal and business affairs, and that these were looked after by his advisors, who acted as his agents and communicated with DLA Piper on his behalf.<sup>55</sup> The Partner says that he considers their communications with DLA Piper privileged just as much as if the Client personally sent and received the communications. I note that DLA Piper describes the employees of the Trust Corporation as the Client's "agents."<sup>56</sup>

[71] The applicant does not specifically comment on whether the communications with the Trust Corporation employees are privileged.

[72] I accept that one of the individuals acted for the Client under a power of attorney. However, a power of attorney can range in terms of the scope of power it confers. In this case, DLA Piper did not provide any information about the scope or duration of the power of attorney that the Client granted to one of the employees of the Trust Company. The applicant says it was in a "more limited capacity."<sup>57</sup> So, in this case, I find that the fact that the employee acted under a power of attorney to be helpful only in terms of the broader context. In other words, I do not find that, on its own, the fact that one of the employees acted as the Client's attorney to be determinative of the nature of their communications with Lawyers at DLA Piper.

[73] For the reasons that follow, I find that communications between lawyers at DLA Piper and the two employees of the Trust Company are privileged.

[74] First, I find that, when the Partner refers to the Client's "advisors," this includes the employees of the Trust Company.

[75] The description of records indicates that the two individuals requested and received legal advice from the Partner and other lawyers from DLA Piper. Considering that, as I found above, the Client required assistance communicating about his business and personal matters, I am persuaded by the Partner's evidence that he considers his communications with the Client's advisors privileged just as much as if the Client had personally sent and received the communications. In these circumstances, I am satisfied that the employees of the Trust Company were authorized to seek advice from the Client's lawyers on his behalf, and therefore were standing in the shoes of the Client.

[76] As a result, I find that the above communications between lawyers at DLA Piper and these two individuals are privileged because they performed a function essential to the operation of the solicitor-client relationship.

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<sup>55</sup> Partner's affidavit, para 23.

<sup>56</sup> DLA Piper's initial submissions, para 84.

<sup>57</sup> Applicant's response submissions, Appendix B, item 7, page 2, point 5.

### 3. Communications with unnamed “external parties”

[77] There are two sets of email communications that involve unnamed “external parties.” On its revised table of records, DLA Piper describes these communications as:

- “Email to [named lawyer at DLA Piper] from an external party”<sup>58</sup> and;
- “External party to [the Partner], [named individuals] concerning issue raised in [another document].”<sup>59</sup>

[78] I understand from DLA Piper’s submissions that it asserts the identity of the unnamed external parties is privileged. I wrote to DLA Piper to give it an opportunity to provide an explanation about the function of the unnamed external parties.<sup>60</sup>

[79] In response, DLA Piper says the communication between its lawyers and “third parties”<sup>61</sup> were “for the purposes of giving legal advice, and considering potential legal steps...” It says there was “no other logical reason for DLA Piper to have received such information under these particular circumstances.”<sup>62</sup>

[80] DLA Piper is not asserting that the two unnamed external parties were acting as a channel of communications or stood in the shoes of the Client. Rather, it submits that, while the BC Supreme Court in *Bilfinger* says these are functions that are “essential” or “integral” to the solicitor-client relationship, it was not attempting to be exhaustive. DLA Piper says that:

Another example of protected communications would necessarily be third party communication of information or evidence to the lawyer about the very matter for which the lawyer was engaged to provide legal analysis and advice.<sup>63</sup>

[81] Respectfully, I do not think the prevailing authorities support this contention. Doherty JA in *General Accident Assurance Company v Chrusz*, rejected the notion that legal advice privilege should extend “to all information relevant to a legal problem which is conveyed at a client’s request by a third party to the lawyer.”<sup>64</sup> And, as I set out above, the BC Supreme Court in *Bilfinger* said that “[c]ommunications with a third party are not protected by solicitor-

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<sup>58</sup> Document number 23454370.

<sup>59</sup> Document number 29717119. The two named individuals are one of the individuals from the Trust Corporation and another individual who was the Client’s medical representative under the *Representation Agreement Act*.

<sup>60</sup> The applicant also got an opportunity to respond, which she did.

<sup>61</sup> I gather that this includes the unnamed external parties.

<sup>62</sup> DLA Piper’s February 3, 2023 submissions, page 2.

<sup>63</sup> DLA Piper’s February 3, 2023 submissions, page 3.

<sup>64</sup> 1999 CanLII 7320 (ON CA).

client privilege merely because they assist the solicitor in formulating legal advice to the client.”<sup>65</sup> Similarly, the BC Court of Appeal in *College of Physicians*, found that third party experts, whose opinions were “relevant, and even essential, to the legal problem confronting the College” did not perform a function that was integral to the relationship between the solicitor and client.<sup>66</sup>

[82] Based on the information before me, I cannot conclude that the unnamed third parties performed a function that was essential to the operation of the solicitor-client relationship. DLA Piper’s submissions and evidence indicate only that the unnamed third parties provided information that its lawyers then used to formulate their legal advice. Following *College*, even if the information provided by the unnamed third parties was essential to formulating the legal advice, this does not mean that the unnamed parties performed a function essential to the operation of the relationship between DLA Piper lawyers and the Client.

[83] Consequently, I am not satisfied that legal advice privilege applies to the two sets of email communications that involve the unnamed “external parties.”

[84] I will consider whether any other privileges apply to these communications, starting with lawyer’s brief privilege.

#### *Lawyer’s Brief Privilege*

[85] As I mentioned above, DLA Piper relied on “lawyer’s brief privilege” to withhold the documents containing the applicant’s personal information that are in dispute in this inquiry. Specifically, DLA Piper relies on *Keefer Laundry* where Justice Gray explains the privilege as follows:

Lawyer’s Brief Privilege protects the lawyer’s work product, including any notes and information or reports collected to prepare for litigation or to give legal advice. If a group of unprivileged documents is collected, the collection itself becomes privileged. (*Piercy v. Piercy* (1990), 1990 CanLII 808 (BC CA), 75 D.L.R. (4th) 299, 48 B.C.L.R. (2d) 145 (C.A.); *Hodgkinson v. Simms*, supra.)

This privilege is based on the theory that no one should be permitted to “look into the mind” of the lawyer as he or she is preparing a case. The purpose of Lawyer’s Brief Privilege is to ensure that the lawyer can make all necessary inquiries so that he or she is able to give the client complete advice and to properly prepare for litigation. (*Hodgkinson v. Simms*, supra.) In order for Lawyer’s Brief Privilege to attach, there must be an exercise of the lawyer’s skill and judgment in assembling the allegedly privileged information. (*Hunt v. T&N plc* (1993), 1993 CanLII 1424 (BC CA), 15 C.P.C. (3d) 134, 77 B.C.L.R. (2d) 391 (C.A.).)

<sup>65</sup> *Bilfinger supra* note 38 at para 27.

<sup>66</sup> *College of Physicians supra* note 27, para 51.

Some documents may on their face show that they are the subject of Lawyer's Brief Privilege. One example is a lawyer's note detailing legal analysis. Other documents, such as those privileged because they were collected by the lawyer when preparing the case, may not be obviously privileged from looking at the documents themselves.<sup>67</sup>

[86] DLA Piper says that lawyer's brief privilege applies to any information or documents forwarded to its lawyers for the purposes of giving legal advice.<sup>68</sup>

[87] Although Justice Gray considers it to be a distinct privilege, and some court decisions have followed suit,<sup>69</sup> many decisions treat "lawyer's brief privilege" as part of litigation privilege. For example, Justice Steeves of the BC Supreme Court said that litigation privilege is sometimes called a "lawyer's brief" or "solicitor's brief" rule.<sup>70</sup> DLA Piper itself describes lawyer's brief privilege as a "close cousin" to litigation privilege and acknowledges that they often overlap.<sup>71</sup>

[88] Further, *Hodgkinson v Simms*, which Justice Gray refers to in the above quote is more often cited in the context of litigation privilege. For example, in *College of Physicians*, the BC Court of Appeal refers to *Hodgkinson v Simms* to describe "the privilege that attached to documents gathered and prepared by a solicitor for the dominant purpose of litigation."<sup>72</sup> The Supreme Court of Canada also discussed *Hodgkinson v Simms* in the context of litigation privilege in *Blank v Canada (Minister of Justice)*.<sup>73</sup> While the Supreme Court of Canada noted some differences in how the BC Court of Appeal expressed and applied the privilege, it did not appear to interpret *Hodgkinson v Simms* as creating a distinct kind of privilege.<sup>74</sup>

[89] In addition, to the extent that Justice Gray's comments in *Keefer Laundry* apply to a lawyer's notes (or similar) prepared for the purpose of giving legal advice outside the litigation context, this kind of material would be captured under the "continuum of communications" as I explained above.<sup>75</sup>

[90] All of this is to say that the status of "lawyer's brief privilege" as a standalone privilege is somewhat unclear. However, it seems to me that, most often, courts treat it conceptually and practically analogous to litigation privilege.

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<sup>67</sup> *Keefer Laundry supra* note 19 at paras 103-106.

<sup>68</sup> DLA Piper's February 3, 2023 letter, page 2.

<sup>69</sup> For example, *Ross River Dena Council v the Attorney General of Canada*, 2009 YKSC 4 (CanLII) at paras 31-33.

<sup>70</sup> *Minnie v ICBC*, 2013 BCSC 1528 (CanLII) at para 33.

<sup>71</sup> DLA Piper's February 3, 2023 submissions, pages 2 and 3.

<sup>72</sup> *College of Physicians supra* note 27 at para 26.

<sup>73</sup> 2006 SCC 39 (CanLII) [*Blank*] at paras 29 and 62-64.

<sup>74</sup> *Ibid* at para 29.

<sup>75</sup> See Adam Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis, 2014) at paras 5.78-5.79.

[91] For these reasons, I am not persuaded that “solicitor-client privilege” in the context of s. 23(3)(a) of PIPA includes “lawyer’s brief privilege” as a distinct type of privilege. However, even if it is, I am not satisfied that “lawyer’s brief privilege” applies.

[92] Primarily, I am not persuaded that that there was skill or judgment in assembling the allegedly privileged information. From the description of the documents, it does not appear that DLA Piper asked for the information. Rather, it seems to me that the unnamed third parties sent the communications for the purpose of providing information to the lawyers at DLA Piper. Although it may have informed the legal advice developed by the lawyers, without more, it is not clear to me how that information from a third party would permit someone to “look into the mind” of the lawyer. For example, the materials in this inquiry do not adequately indicate that the communications with the unnamed third parties would reveal the lawyer’s legal analysis.

[93] In conclusion, DLA Piper is not authorized to refuse to disclose the communications with the unnamed external parties on the basis of “lawyer’s brief privilege.”

#### *Litigation Privilege*

[94] The purpose of litigation privilege is to ensure an effective adversarial process by giving parties to the litigation a “zone of privacy” in which to prepare their case.<sup>76</sup>

[95] Unlike legal advice privilege, litigation privilege applies even where there is no solicitor-client relationship; it applies to all litigants, whether or not they are represented by counsel.<sup>77</sup> Litigation privilege also attaches to communications with third parties, such as experts or witnesses.<sup>78</sup>

[96] Litigation privilege applies to documents where:

1. Litigation was ongoing or was reasonably contemplated at the time the document was created; and
2. The dominant purpose of creating the document was to prepare for that litigation.<sup>79</sup>

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<sup>76</sup> *Blank supra* note 73 at paras 27 and 34.

<sup>77</sup> *Ibid* at para 32 citing *Alberta (Treasury Branches) v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407.

<sup>78</sup> *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 (CanLII) at para 19.

<sup>79</sup> *Keefer Laundry supra* note 19 at para 96 citing *Dos Santos v Sun Life Assurance Co. of Canada*, 2005 BCCA 4 (CanLII) at paras 43-44.

[97] Litigation privilege ends when the litigation that gave rise to the privilege ends, unless there are closely related proceedings.<sup>80</sup>

[98] It is unclear if litigation privilege is at issue in this inquiry. When I wrote back to clarify which privileges were at issue, DLA Piper did not claim litigation privilege.<sup>81</sup> However, in response to a further request for information, DLA Piper said:

[T]he nature of the documents being collected and received by DLA Piper from various third parties comprises a “*Lawyer’s Brief*” and/or is impressed with “*Litigation Privilege*” regardless of the source of the documents or information because of the adversity between the [Client] and [the applicant] at the time, and DLA Piper’s engagement to advise and represent [the Client] in respect of that adverse and potentially litigious situation.<sup>82</sup>

[99] Based on these submissions, it seems like DLA Piper is asserting that litigation privilege applies. Because litigation privilege overlaps with “lawyer’s brief privilege,” I have decided to consider whether it applies to the email communications that involve unnamed external parties.

[100] As I mentioned above, litigation privilege ends when the litigation ends. For the reasons that follow, I am not satisfied that there is any ongoing litigation to which litigation privilege could apply. DLA Piper references litigation in several different contexts and I will address each of them in turn.

[101] First, DLA Piper explains that some of the communications came into existence for the dominant purpose of litigation against the applicant, that, at the time was in reasonable prospect. However, DLA Piper says that litigation against the applicant “turned out to be unnecessary.”<sup>83</sup> Based on this, I conclude that there is no ongoing litigation involving the applicant. Therefore, litigation privilege would no longer apply to any communications prepared for the dominant purpose of this dispute.

[102] DLA Piper also says that some “[d]ocuments in our file also deal with litigation against other parties, not including the applicant.”<sup>84</sup> DLA Piper did not indicate who these other parties might be. Without more, there is nothing to connect the two sets of email communications involving unnamed external parties to this litigation. So, I cannot conclude that the emails involving unnamed third parties were created for the dominant purpose of this litigation. Further, DLA

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<sup>80</sup> *Blank supra* note 73 at para 36.

<sup>81</sup> On its table of records, it specified which privilege applied to which documents. It did not claim litigation privilege over any documents.

<sup>82</sup> DLA Piper’s February 3, 2023 submissions, page 7.

<sup>83</sup> DLA Piper’s February 3, 2023 submissions, page 6.

<sup>84</sup> DLA Piper’s February 3, 2023 submissions, page 6.

Piper has not established that this litigation is ongoing. As a result, I am not satisfied that litigation privilege applies to the two sets of email communications including unnamed parties on this basis.

[103] Finally, I note that the Partner references pending litigation brought by the Client's corporation.<sup>85</sup> The Partner says that, as the applicant was acting for the Client under a power of attorney at that time, she provided information to assist with this litigation.<sup>86</sup> As the Partner only mentions communications with the applicant, I am not satisfied that the two sets of email communications that include unnamed third parties relate at all to this litigation.

[104] I am unable to conclude that litigation privilege applies to the information in the two sets of email communications involving unnamed third parties.

*Conclusion – s. 23(3)(a) solicitor-client privilege*

[105] In summary, I find that all but the two sets of documents involving communications with the unnamed external parties are protected by solicitor-client privilege.

**Section 23(5) – severance**

[106] Section 23(5) requires an organization to provide an applicant with access to their personal information if it can remove the information in certain subsections, including s. 23(3)(a). This section reads:

23(5) If an organization is able to remove the information referred to in subsection (3) (a), (b) or (c) or (4) from a document that contains personal information about the individual who requested it, the organization must provide the individual with access to the personal information after the information referred to in subsection (3) (a), (b) or (c) or (4) is removed.

[107] Since I have found that s. 23(3)(a) applies to some of the applicant's personal information, s. 23(5) requires that I decide whether DLA Piper is able to remove any of the privileged information and provide the applicant access to her personal information.

[108] In considering whether it is possible for DLA Piper to provide the applicant access to any of her personal information, I am mindful that Courts have advocated a cautious approach to severing when it comes to privileged information. For example, in *British Columbia (Attorney General) v Lee*, the BC Court of Appeal said that "severance should only be considered when it can be

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<sup>85</sup> Partner's affidavit, para 18.

<sup>86</sup> The applicant says that she was not acting as the Client's attorney at this time, but rather as his friend, see page 2 of the applicant's response submission, "Analysis Narrative".

accomplished without any risk that the privileged legal advice will be revealed or capable of ascertainment.”<sup>87</sup>

[109] In this case, I am unable to conclude that DLA Piper is able to remove any information without any risk of revealing privileged information. As a result, I find that s. 23(5) does not require DLA Piper to provide the applicant access to any of her personal information in the documents to which I found that s. 23(3)(a) applies.

### **Section 23(4)**

[110] DLA Piper also applied ss. 23(4)(c) and (d) to the applicant’s personal information in dispute. These provisions state:

(4) An organization must not disclose personal information and other information under subsection (1) or (2) in the following circumstances:

(c) the disclosure would reveal personal information about another individual;

(d) the disclosure would reveal the identity of an individual who has provided personal information about another individual and the individual providing the personal information does not consent to disclosure of his or her identity.

[111] Since I found that two sets of emails were not protected by solicitor-client privilege, I need to consider whether ss. 23(4)(c) and (d) apply to them. However, since DLA Piper has not provided me with a copy of these documents, I am unable to review this information.

[112] Section 38(1)(b) allows the commissioner to order a person to produce for the commissioner a document in the custody or under the control of the person, including a document containing personal information.

[113] I have decided to order DLA Piper to produce these two sets of emails under s. 38(1)(b) so I can decide whether the remaining exceptions apply. Previous OIPC adjudicators have adopted this approach with respect to decisions under the *Freedom of Information and Protection of Privacy Act*.<sup>88</sup> In my view, this is also the appropriate approach to take when deciding if the remaining PIPA exceptions apply.

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<sup>87</sup> 2017 BCCA 219 at para 40. See also *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para 46.

<sup>88</sup> Order F22-04, 2022 BCIPC 4 (CanLII) at paras 61-67; Order F10-18, 2010 BCIPC 29; F11-32, 2011 BCIPC 38 at para 15.

[114] I do not think it is appropriate for me to decide whether ss. 23(4)(c) or (d) apply in the absence of the information in dispute. As I explained above, the commissioner makes an exception to its practice of reviewing the information in dispute when deciding whether solicitor-client privilege applies. There is no similar rationale for deciding s. 23(4)(c) or (d) in the absence of the information in dispute.

## **CONCLUSION**

[115] For the reasons above, I make the following orders:

1. Under s. 52(2)(b), I confirm the decision of DLA Piper to refuse the applicant access to her personal information in all of the documents at issue in this inquiry except the documents numbered 23452428 and 29717119.
2. Under s. 38(1)(b), I order DLA Piper to produce to me the two sets of documents numbered 23452428 and 29717119 so that I can decide whether ss. 23(4)(c) or 23(4)(d) applies to the applicant's personal information in them.
3. Under s. 38(5)(b) I specify that DLA Piper must produce the above documents by August 4, 2023.

July 14, 2023

## **ORIGINAL SIGNED BY**

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Erika Syrotuck, Adjudicator

OIPC File No.: P20-82745