



Order P23-07

INVESTAFLEX

D. Hans Hwang
Adjudicator

July 31, 2023

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Summary: An applicant requested access to her personal information under the control of Investaflex Financial Group Ltd. (Investaflex). In response, Investaflex provided access to some information but refused to disclose other information to the applicant under ss. 23(3)(a) (solicitor-client privilege) and 23(4)(c) (personal information about another individual) of the *Personal Information Protection Act* (PIPA). The adjudicator found Investaflex was authorized to withhold the information in dispute under s. 23(3)(a) since legal advice privilege applied to that information. The adjudicator found that Investaflex was required under s. 23(4)(c) to withhold most, but not all, of the information at issue as the disclosure would reveal personal information about another individual. The adjudicator also found that a small amount of the applicant's personal information could be provided to the applicant under s. 23(5).

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

INTRODUCTION

[1] Section 23(1) of the *Personal Information Protection Act* (PIPA) gives individuals a right to access their personal information under the control of an organization, subject to any exceptions under ss. 23(3) and 23(4). An individual (applicant) requested her personal information from Investaflex Financial Group Ltd. (Investaflex) for a nearly seven-year period.

[2] In response, Investaflex provided the applicant access to some of her personal information but refused access to the remaining information under ss. 23(3)(a) (solicitor-client privilege) and 23(4)(c) (personal information about another individual).

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review Investaflex's decision. Mediation by the OIPC did not resolve the issues and the matter proceeded to inquiry.

Preliminary matters

New Issue

[4] In her submissions, the applicant raises an issue that was not set out in the OIPC's notice of inquiry or OIPC investigator's fact report. The applicant says that Investaflex's response to her request was inadequate.¹

[5] The notice of inquiry clearly states that a party may not add new or additional issues without the OIPC's prior consent. The applicant did not seek permission to add the new issue to the inquiry or explain why she should be permitted to do so at this late stage. In addition, the OIPC has investigated the applicant's complaint of the inadequate search and the investigation concluded that Investaflex has complied with its obligation to assist the applicant under s. 28 of PIPA. For that reason, I will not address or consider the applicant's complainant that Investaflex's response to her access request was inadequate.

Inviting third parties

[6] In its submission, Investaflex says that the OIPC should consider formally involving third parties whose records are in Investaflex's control because Investaflex is not able to make representations on their behalf.²

[7] I do not see, and Investaflex has not satisfactorily explained, how it is necessary to invite the third parties to represent themselves in this inquiry. Having considered the submissions and records, I am satisfied that I can decide whether s. 23(4)(c) applies to the information at issue without hearing from the third parties. That is because s. 23(4)(c) involves deciding whether the information is the personal information of the applicant or another individual and it does not involve deciding whether disclosure would unreasonably invade another person's personal privacy.³

[8] For these reasons, in this inquiry, I will not address or consider the new issues that were not in the notice of inquiry.

¹ Applicant's submissions at paras 17-23.

² Investaflex's initial submission at para 25.

³ Order P06-02, 2006 CanLII 32980 (BCIPC) at para 53.

ISSUES AND BURDEN OF PROOF

[9] At this inquiry, I must decide the following issues:

1. Whether s. 23(3)(a) authorizes Investaflex to withhold the information at issue.
2. Whether s. 23(4)(c) requires Investaflex to withhold the information at issue.

[10] Section 51(a) of PIPA places the burden on Investaflex, as the organization, to prove that the applicant has no right of access to the information in dispute.

DISCUSSION

*Background*⁴

[11] Investaflex was a financial planning firm that ceased financial planning operations in 2017. It provided financial planning services to a client who is now deceased (the deceased). During the deceased's life, Investaflex often worked with the deceased's professional advisors, such as a professional trust company (Trust Company) and lawyers. When the deceased's lawyer advised him and the Trust Company, Investaflex was sometimes included in the communications for the purpose of obtaining information.

[12] The applicant was the deceased's power of attorney from 2013 to 2015.⁵ In 2015, the deceased revoked that power of attorney and appointed the Trust Company as his new power of attorney.

[13] After the deceased died, the Trust Company became an executor of the estate of the deceased and it continues to serve as the executor.

Information in dispute

[14] Investaflex has refused the applicant access to the following information:

- Emails about revocation of the power of attorney (Emails);⁶

⁴ The information summarized in this background section comes from Investaflex's initial submission at para 5-12 and the Applicant's response submission at paras 4, 8 and 9.

⁵ The applicant says that she was "holding" the deceased's Power of Attorney in case of a medical emergency so she could release the funds needed for the deceased's medical treatment, but she was not "acting or serving" in a role as a substitute decision maker for the deceased.

⁶ Pages 36-48 of the records.

- Complaints concerning accountants (Complaints);⁷
- A professional liability insurance application⁸ and a corporate liability insurance application;⁹
- A legal document;¹⁰ and
- Notes¹¹ and a summary.¹²

[15] I will discuss each document in more detail as it is relevant to each exception to disclosure.

[16] In their submissions, the applicant and Investaflex have confirmed that a document titled “Record 16” is no longer in dispute.¹³

Is the information in dispute the applicant’s personal information?

[17] Section 23(1)(a) states that on request, an organization¹⁴ must provide an individual with their own personal information that is under the control of the organization, subject to certain exceptions set out in s. 23(2) through s. 23(5). Therefore, the first question that must be answered is whether the information at issue is the applicant’s “personal information” as defined in PIPA.

[18] Section 1 of PIPA defines “personal information” as information about an identifiable individual and includes employee personal information but does not include “contact information” or “work product information.” Those terms are 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; and

“work product information” is defined as 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.

⁷ Pages 55-61 and 79-84 of the records.

⁸ Pages 62-78 of the records.

⁹ Pages 85-92 of the records.

¹⁰ Pages 116-117 of the records.

¹¹ Pages 118-121 of the records.

¹² Page 122 of the records.

¹³ Pages 101-115 of the records. See, the applicant’s submission at paras 24 and 32; Investaflex’s reply submission at para 8.

¹⁴ Section 1 “Definition” of PIPA.

[19] Furthermore, information is about an identifiable individual if it is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information, and is collected, used or disclosed for a purpose related to that individual.¹⁵

[20] I find that information in some of the responsive records is the applicant's personal information. It is clearly identifiable information about the applicant because it mentions the applicant by name and is about other details about her (e.g., a telephone number and her role as a legal representative for the deceased).¹⁶ This information is not "work product information" in this context, because it was not prepared or collected by the applicant. It is also not the applicant's "contact information" as defined in PIPA because it is not information to enable her to be contacted at her place of business.

[21] However, I find that the remainder of the records provided by Investaflex contain information that is not personal information about the applicant.¹⁷ Because this information does not qualify as the applicant's personal information, the applicant has no right of access to the information. Thus, I will not consider any of this information any further.

Solicitor-client privilege, s. 23(3)(a)

[22] Section 23(3)(a) states that an organization is not required to disclose personal information if the information is protected by solicitor-client privilege. The term "solicitor-client privilege" in the context of s. 23(3)(a) encompasses both legal advice privilege and litigation privilege.¹⁸ Only legal advice privilege is at issue in this inquiry.¹⁹

[23] Legal advice privilege applies to communications that are between solicitor and client, entail the seeking or giving of legal advice and are intended to be confidential by the parties.²⁰

[24] Legal advice privilege does not apply to all communications or documents that pass between a lawyer and their client.²¹ However, if the conditions set out above are satisfied, then legal advice privilege applies to the communications.²² Legal advice privilege also applies to communications that do not specifically

¹⁵ Order P12-01, 2012 BCIPC 25 (CanLII) at para. 85.

¹⁶ The applicant's personal information is on pages 117, 118, 120 and 122 of the records.

¹⁷ For added clarity, I have found the information withheld in pages 55-61, 62-78, 79-84 and 85-92 is not the applicant's personal information.

¹⁸ Order P20-01, 2020 BCIPC 6 (CanLII) at para 14.

¹⁹ Investaflex's initial submission at para 49.

²⁰ *Solosky v The Queen*, 1979 CanLII 9 (SCC) at p 837.

²¹ *Keefer Laundry Ltd v. Pellerin Milnor Corp et al*, 2006 BCSC 1180 at para 61.

²² *R. v. B.*, 1995 CanLII 2007 (BCSC) at para 22.

offer or request advice so long as they are on the continuum of communications in which the solicitor provides the advice.²³

Evidentiary basis for legal advice privilege

[25] Investaflex did not provide the information it withheld under s. 23(3)(a) for my review. Instead, it provided sworn affidavit evidence to support its claims that the information is protected by legal advice privilege.²⁴

[26] Section 38(1)(b) gives me the power to order production of records so I may review them during the inquiry. However, in order to minimally infringe on solicitor-client privilege, I would only order production of records being withheld under s. 38(1)(b) when absolutely necessary to adjudicate the issues and not before first providing the organization with an opportunity to provide additional information to support its privilege claim. That approach is warranted due to the importance of solicitor-client privilege to the proper functioning of the legal system.²⁵

[27] Having considered Investaflex's submissions and evidence, I determined that Investaflex did not sufficiently provide the evidentiary basis for me to make a decision about whether s. 23(3)(a) properly applied, so I provided Investaflex an opportunity to submit additional evidence.²⁶ Investaflex provided further submission and a sworn affidavit from a chief executive officer (CEO) of the Trust Company which is the executor of the estate of the deceased. Investaflex also provided a letter from the Trust Company's lawyer.²⁷

[28] After reviewing the further submission and evidence, I determined that I have enough information to decide whether s. 23(3)(a) applies to the information at issue. I find that the CEO's affidavit is acceptable evidence because it identifies the source of the information and belief that the testimony is based on.²⁸ While Investaflex did not provide the content of the information it withheld under s. 23(3)(a), the affidavit evidence identifies the title, date, participants, and description of the communications that were withheld. Based on this information, I am satisfied that I have sufficient detail to make an informed decision and it is not necessary to order production of the records.

²³ *Bank of Montreal v Tortora*, 2010 BCSC 1430 at para 10, citing *Samson Indian Nation and Band v Canada* 1995 CanLII 3602 (FCA).

²⁴ Investaflex's initial submission at para 50; Affidavit #1 of JL.

²⁵ *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 17; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII) at para 68.

²⁶ OIPC's letter dated June 26, 2023.

²⁷ Investaflex's letter dated July 4, 2023; Affidavit #1 of JB; Trust Company's letter dated June 29, 2023. The applicant received this additional material and provided a response.

²⁸ For similar reasoning, see *XY, LLC v. Canadian Topsisires Selection Inc.*, 2015 BCSC 988 at para 33, citing *Meier v. Canadian Broadcasting Corporation* (1981), 1981 CanLII 644 (BC SC), 28 B.C.L.R. 136 at 137-8.

[29] I turn now to the parties' arguments and evidence about whether the information at issue is subject to legal advice privilege.

Parties' submissions

[30] Investaflex submits that it correctly applied s. 23(3)(a) to withhold the information at issue.²⁹ It says that the applicant was included in some of the email correspondence while she was in her capacity as the deceased's power of attorney, but after revocation of the power of attorney, she is not privy to any privileged communications.

[31] The applicant says that Investaflex's application of s. 23(3)(a) to withhold the information is incorrect and the information is not privileged.³⁰

Analysis and findings

[32] I am satisfied that legal advice privilege applies to the information at issue for the reasons that follow.

[33] Based on Investaflex's affidavit evidence, which I accept, I am satisfied that some of the Emails³¹ contain communications that the Trust Company, as the deceased's power of attorney, had with several lawyers and professional advisors.³² I find the lawyers had these communications in their roles as legal counsel for the deceased. I also find the affidavit evidence sufficiently demonstrates that these communications were for the purpose of seeking and providing legal advice regarding the deceased's matters.

[34] Further, I accept Investaflex's affidavit evidence and the letter from the Trust Company's lawyer. They state that Investaflex and the Trust Company intend these communications to remain confidential. There is nothing to suggest otherwise.

[35] In conclusion, I find that all three parts of the test for legal advice privilege are met. Disclosing the withheld information would reveal the confidential communications between the Trust Company's and the deceased's lawyers about legal advice for the deceased.

[36] For the above reasons, I conclude that the information withheld under s. 23(3)(a) is protected by legal advice privilege, and it may be withheld on that basis.

²⁹ Investaflex's initial submission at para 45; Pages 44-48 of the records.

³⁰ Applicant's response submission at para 2.

³¹ Pages 44-48 of the records.

³² Affidavit #1 of JB at para 7.

Personal information about another individual, s. 23(4)(c)

[37] Section 23(4)(c) states that an organization is required to refuse to disclose information if the disclosure would reveal personal information about another individual. This section does not involve deciding whether or not disclosure would unreasonably invade another person's personal privacy. It is enough that the information is the personal information of another individual.³³

[38] In considering what information may be withheld under s. 23(4)(c), I note that the term "another individual" under this provision refers to an individual other than the applicant.³⁴ Therefore, the purpose of s. 23(4)(c) is to protect the personal information of people other than the applicant. As a result, the first step under s. 23(4)(c) is to determine if the information at issue is "about an identifiable individual" other than the applicant. The second step is to determine whether the information is excluded from the definition because it is contact information or work product information.³⁵ If the information at issue does not qualify as contact information or work product information, then it is personal information about another individual that the organization must refuse to disclose under s. 23(4)(c).

[39] There is information in the legal document³⁶, notes³⁷ and summary that is at issue under s. 23(4)(c).³⁸ I will address each of these documents in turn.

Legal document

[40] Investaflex withheld the entire contents of the legal document. It says the document was prepared by the deceased's lawyer in the course of providing legal service to the deceased during his life.³⁹

[41] First, I find that Investaflex withheld a small amount of information about two individuals (e.g., their names, job title, company name, mailing address and work phone numbers). It appears these individuals stamped their seals that contain this information on the signature block of the document.⁴⁰ I can see this information was so these two individuals can be contacted for business-related purposes in their professional capacity. I, therefore, find this qualifies as "contact information" as defined in PIPA, so it is not personal information. As a result, I conclude that the disclosure of this contact information of two individuals

³³ Order P06-02, 2006 CanLII 32980 (BCIPC) at para 53.

³⁴ Order P14-03, 2014 BCIPC 49 (CanLII) at para 13; Order P11-01, 2011 BCIPC 9 (CanLII) at para 17.

³⁵ Order P13-01, 2013 BCIPC 23 at para 16.

³⁶ Pages 116-117 of the records.

³⁷ Pages 118-121 of the records.

³⁸ Page 122 of the records.

³⁹ Investaflex's initial submission at para 33.

⁴⁰ Pages 117 of the records.

withheld from the signature block would not reveal “personal information” of these individuals and Investaflex cannot withhold it under s. 23(4)(c).

[42] However, I find that the rest of the information in the legal document is personal information. I find that almost all the information contained in this document is about the deceased. There are several instances where personal information of the deceased’s is simultaneously personal information of other individuals. In any case, this is information about individuals other than the applicant. There is no question that names and contents about those individuals contained in the document are identifiable information about them.

[43] I also find that the deceased’s and the other individuals’ personal information is not “work product information” as defined in PIPA. I am satisfied this information was not prepared or collected by the deceased or these individuals. I also find that this information is not contact information. While there is one individual’s name and address, it is not “contact information” because there is nothing to suggest that the purpose of that information is to allow one to contact that individual in their business capacity at their place of business. Therefore, I find that the information about the deceased and the other individuals in the legal document, is their personal information as defined in PIPA. As a result, I find s. 23(4)(c) prohibits disclosure of this information.

[44] There is an instance where the document states the applicant’s name and address.⁴¹ I find this is the applicant’s personal information and I will consider later whether it is severable under s. 23(5).

Notes and summary

[45] Investaflex withheld the entire contents of the notes and summary.⁴² It says that this is the deceased’s personal information prepared by several professional advisors for the deceased.⁴³

[46] I find the documents contain names and other identifying information about the deceased and individuals other than the applicant. I find this information is not “work product information” because it was clearly not prepared or collected by these people. It was prepared and collected by the deceased’s professional advisors. Also, I find the information is not “contact information” because it is clear that none of the information about these individuals is the type of information that would be included in order to allow them to be contacted at their place of work or in their business capacity.

⁴¹ Page 117 of the records.

⁴² Pages 118-121 and 122 of the records.

⁴³ Investaflex’s initial submission at paras 34-35.

[47] As a result, I find these names and other details of the notes and summary clearly qualify as personal information about the deceased and these individuals. Therefore, s. 23(4) prohibits disclosure of this personal information to the applicant.

[48] There are instances where a small amount of the information states the applicant's name and phone number.⁴⁴ I find this is the applicant's personal information and will consider later whether it is severable under s. 23(3)(5).

Can the information be severed under s. 23(5)?

[49] Section 23(5) requires Investaflex to provide the applicant with access to her personal information if it is able to remove the information to which ss. 23(3)(a) and 23(4)(c) apply. The section reads:

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.

[50] Section 4(2) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) provides that if information that is excepted from disclosure can reasonably be severed from a record, an applicant has a right of access to the remainder of the record [Emphasis added]. Unlike FIPPA, severing in the context of PIPA does not require "reasonableness." Therefore, an organization must provide the applicant's personal information to the applicant only if the information to which ss. 23(3)(a) and 23(4)(c) apply can be removed.

[51] Investaflex says that information it withheld is too intertwined to be reasonably severed. Therefore, severance is not possible.⁴⁵ The applicant says if any of her personal information is intertwined with other individuals' personal information, the solution is to sever that information.⁴⁶

[52] I have considered whether it is possible to sever the communications that are subject to legal advice privilege under s. 23(3)(a). The courts have emphasized that once solicitor-client privilege is established, it applies to all communications within the framework of the solicitor-client relationship and that severance of some of these communications can only occur when there is no risk

⁴⁴ Pages 118, 120 and 122 of the records.

⁴⁵ Investaflex's initial submission at paras 33-35.

⁴⁶ Applicant's response submission at para. 28.

of revealing legal advice provided by the lawyer to the client.⁴⁷ In this case, I find it is not possible to sever these documents in order to disclose the applicant's personal information to her without the risk of revealing such privileged information. Therefore, I conclude severance is not possible under s. 23(5).

[53] In terms of the information that Investaflex is required to withhold under s. 23(4)(c), I find there is a small amount of information that can be severed in accordance with s. 23(5). I have found the applicant's name, phone number and address qualify as her personal information contained in the legal document, notes and summary.⁴⁸ I find it is possible in this case to sever other individuals' personal information in order to disclose the applicant's personal information to her. As a result, under s. 23(4)(c), Investaflex must provide the applicant with access to her personal information in the documents.

[54] For clarity, in a copy of the records that is being given to Investaflex along with this order, I have highlighted in green the information that Investaflex is required to provide to the applicant.

CONCLUSION

[55] For the reasons given above under s. 52 of PIPA, I make the following order:

1. I confirm Investaflex's decision to withhold the information in dispute under s. 23(3)(a).
2. I confirm, in part, Investaflex's decision to withhold the information in dispute under s. 23(4)(c), subject to item 3 below.
3. Investaflex is not required under s. 23(4)(c) to withhold the information I have highlighted in a copy of pages 117, 118, 120 and 122 of the responsive records which are provided to Investaflex along with this order.
4. Investaflex must disclose to the applicant the highlighted information it is not required to withhold. Investaflex must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, along with a copy of the relevant document.

⁴⁷ *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para 51.

⁴⁸ Pages 117, 118, 120 and 122 of the records.

[56] Under s. 53 of PIPA, Investaflex is required to comply with this order by no later than **September 13, 2023**.

July 31, 2023

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File No.: P20-84315