



Order F23-69

## MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

Carol Pakkala  
Adjudicator

August 31, 2023

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Quicklaw Cite: [2023] B.C.I.P.C.D. No. 80

**Summary:** An applicant requested the Ministry of Children and Family Development (Ministry) provide access to records about birth alerts. The Ministry initially withheld information in the records under several provisions of the *Freedom of Information and Protection of Privacy Act* (FIPPA). Most of the issues were resolved at the outset of the inquiry, so the adjudicator only had to decide if s. 14 (solicitor-client privilege) applied to the records. The adjudicator found the Ministry was authorized to refuse access under s. 14.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, s.14.

### INTRODUCTION

[1] This inquiry concerns a request by a digital news platform, IndigiNews, to the Ministry of Children and Family Development (Ministry), for access to records about birth alerts. The request covered information about the amount of birth alerts and whether those alerts were followed by child apprehension at any time, for a nine-year period.<sup>1</sup>

[2] The Ministry disclosed some information in the responsive records but withheld some information in them under ss. 13 (policy advice or recommendations), 14 (solicitor-client privilege), and 22 (unreasonable invasion of third party's personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision.

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<sup>1</sup>IndigiNews' access request dated December 17, 2020.

[4] The Ministry subsequently released some additional information in the records but continued to rely on ss. 14 and 22 to withhold information.

[5] Mediation by the OIPC did not resolve the matter and it proceeded to this inquiry.

[6] After the OIPC issued the Notice of Inquiry, the Ministry further reconsidered its decision to withhold information in the responsive records. Specifically, it is no longer withholding any information under s. 22.<sup>2</sup> Therefore, I will not consider that issue any further. Only s. 14 remains at issue.

[7] The Ministry provided written submissions and evidence in the inquiry.

[8] IndigiNews did not provide evidence or submissions in the inquiry.

## **ISSUE**

[9] At this inquiry, I must decide whether s. 14 authorizes the Ministry to refuse to disclose the information it withheld.

[10] Section 57(1) of FIPPA says the Ministry has the burden of proving that s.14 applies.

## **DISCUSSION**

### **Background**

[11] Prior to September 16, 2019, the Ministry used an alert system for hospitals to notify them when certain expectant parents entered a hospital to give birth. These parents were those under investigation of their ability to provide adequate care to their child once born. The alerts typically triggered the attendance of a social worker to assess the risk to the child once born.<sup>3</sup> The alerts were called by different names, including birth alerts and hospital alerts.

[12] IndigiNews requested access to the Ministry's records of birth alerts for the period of January 1, 2010 to December 1, 2019. Specifically, IndigiNews asked for statistics on the amount of birth alerts and whether those alerts were followed by child apprehension at anytime. Further, IndigiNews requested that, if possible, the Ministry specify the amount of alerts issued for Indigenous families.<sup>4</sup>

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<sup>2</sup> Ministry's initial submissions at para 7.

<sup>3</sup> Ministry's initial submissions at paras 15-18.

<sup>4</sup> IndigiNews' access request dated December 17, 2020.

## Information in dispute

[13] This inquiry is concerned only with one portion of a record which is a paragraph in a meeting note prepared for the Ministry's Deputy Minister dated September 18, 2019.<sup>5</sup> For ease of reference and clarity, I will refer to this paragraph as the Disputed Information.

[14] The meeting note was prepared by a member of the Ministry's operational child welfare policy team for a teleconference meeting with the Provincial and Territorial Deputy Ministers. The note describes the issue to be discussed at the meeting as the Ministry's decision to end the use of hospital alerts. The Disputed Information appears in the meeting note below the heading "Key Messages".<sup>6</sup>

## Section 14 - Solicitor-client privilege

[15] Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.<sup>7</sup> The Ministry is claiming legal advice privilege.<sup>8</sup>

[16] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.<sup>9</sup> In order for information to be protected by legal advice privilege it must be:

- a communication between solicitor and client (or their agent);
- that entails the seeking or providing of legal advice; and
- that is intended by the solicitor and client to be confidential.<sup>10</sup>

[17] Not every communication between a solicitor and their client is privileged. If the conditions above are satisfied however, then privilege applies.<sup>11</sup>

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<sup>5</sup> Records at p. 3.

<sup>6</sup> Records at p. 3.

<sup>7</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para 26.

<sup>8</sup> Ministry's initial submissions at para 45.

<sup>9</sup> *College*, *supra* note 7 at para 31.

<sup>10</sup> *Solosky v. The Queen*, [1980] 1 SCR 821 at p. 837.

<sup>11</sup> *Ibid*, at p. 829.

[18] The courts have established certain principles for deciding if privilege applies:

- Lawyers, their staff and other firm members working together on a file may share privileged information amongst themselves so long as those discussions remain confidential relative to the rest of the world.<sup>12</sup>
- Privilege extends beyond the actual requesting or giving of legal advice to the “continuum of communications” between a lawyer and client, which includes the necessary exchange of information for the purpose of providing legal advice.<sup>13</sup>
- Privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information. For instance, legal advice privilege applies to internal client communications that relate to the legal advice received and discuss its implications.<sup>14</sup>
- Lawyers, as officers of the court, have a professional duty to ensure that privilege is properly claimed.<sup>15</sup>
- Some deference is owed to a lawyer who claims privilege because a lawyer’s conduct is subject to the standards set by the Law Society.<sup>16</sup>

[19] I adopt these same principles in making my decision.

*Evidentiary basis for solicitor-client privilege*

[20] The Ministry did not provide me with a copy of the Disputed Information for my review. It initially provided an affidavit from one lawyer wherein she affirmed the Disputed Information was a summary of her legal advice and that of another lawyer and asserted solicitor-client privilege.<sup>17</sup>

[21] Section 44(1) gives me, as the commissioner’s delegate, the power to order production of records in order to review them during the inquiry. However, due to the importance of solicitor-client privilege to the proper functioning of the legal system, I would only order production of records being withheld under s. 14 when absolutely necessary to adjudicate the issues.

[22] Based on my review of the Ministry’s initial submissions and evidence, I decided there was an insufficient evidentiary basis for me to properly assess the

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<sup>12</sup> *Shuttleworth v. Eberts et. al.*, 2011 ONSC 6106 at paras 67 and 70-71.

<sup>13</sup> *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 at para 83; *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para 42.

<sup>14</sup> *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District*, 2013 BCSC 1893 at para 24.

<sup>15</sup> *Nelson and District Credit Union v Fiserv Solutions of Canada, Inc.*, 2017 BCSC 1139 at para 54.

<sup>16</sup> *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para 86.

<sup>17</sup> Lawyer’s affidavit attached to Ministry’s initial submissions.

privilege claim. Given the importance of solicitor-client privilege, I provided the Ministry with an opportunity to submit additional evidence and submissions in support of its s. 14 claim. In response, the Ministry made submissions, including two more affidavits, one affirmed by the Deputy Minister and the other by a second Ministry lawyer.<sup>18</sup>

[23] I find that I now have sufficient evidence to decide if s. 14 applies. First, I have the sworn affidavit evidence from two Ministry lawyers. These affidavits establish that they are practicing lawyers and officers of the court with a professional duty to ensure that privilege is properly claimed. I am satisfied that they reviewed the specific records at issue and were directly involved in the communications.

[24] The lawyers' evidence is supplemented by the evidence of the Deputy Minister who reviewed the Disputed Information and has direct knowledge of the content and context of those communications.

[25] On the basis of the evidence provided, I conclude it is not necessary to exercise my discretion under s. 44 to order production of the records.

#### *Parties' positions*

[26] The Ministry says the evidence it provided shows the Disputed Information is subject to solicitor-client privilege.

[27] The Ministry's lawyers say the Disputed Information summarizes their legal advice to their client, the Ministry. They each further say they always intended their advice to be confidential and that they have no reason to believe that the Ministry and its employees treated the legal advice as anything other than confidential.<sup>19</sup>

[28] The Deputy Minister says that she attended the meeting for which the meeting note was prepared and that she did not disclose or discuss the legal advice that the Ministry withheld at that meeting. She said she treats legal advice as privileged and confidential and did so in that instance.<sup>20</sup>

[29] IndigiNews made no submissions.

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<sup>18</sup> After reviewing the Ministry's supplementary submissions and affidavits, I found it unnecessary to provide IndigiNews with the opportunity to reply further. IndigiNews already had the opportunity to provide evidence relevant to s. 14 based on the record in this inquiry. The supplementary submissions and evidence merely provided the clarification of that record, and no further response was required.

<sup>19</sup> Lawyer's affidavit attached to Ministry's initial submissions at paras 6-7 and second lawyer's affidavit attached to the Ministry's supplementary submissions at paras 5-6.

<sup>20</sup> Deputy Minister's affidavit at paras 4-6.

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*Analysis and findings – solicitor-client privilege*

[30] Based on the evidence of the Ministry’s lawyers, I am satisfied they each gave legal advice to their client, the Ministry, and that their advice is summarized in the Disputed Information. I am further satisfied, based on the evidence of the Deputy Minister, that this legal advice was treated as confidential.

[31] I find solicitor-client privilege applies to the Disputed Information.

*Waiver of Privilege*

[32] Having found that solicitor-client privilege applies to the Disputed Information, a further question arises from the evidence before me relating to waiver of privilege.

[33] Solicitor-client privilege belongs to and can only be waived by the client.<sup>21</sup> Once privilege is established, the party seeking to displace it has the onus of showing it has been waived.<sup>22</sup>

[34] The disclosure of privileged information to individuals outside of the solicitor-client relationship may amount to a waiver of privilege.<sup>23</sup> Waiver of privilege is ordinarily established where it is shown that the privilege holder knows of the existence of the privilege and voluntarily shows an intention to waive that privilege.<sup>24</sup> Waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.<sup>25</sup>

[35] The Disputed Information appears below the heading “Key Messages” in the meeting note. The meeting note was for a meeting of all of the Provincial and Territorial Deputy Ministers. If the Disputed Information was shared at that meeting, waiver might apply.

[36] On the basis of the affidavit evidence from the Deputy Minister, I find that she did not share the Disputed Information with the attendees at the meeting as a key message.<sup>26</sup> Further, the affidavit evidence from the Ministry’s lawyer adds “To the best of my knowledge, there has been no intentional or unintentional

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<sup>21</sup> *Canada (National Revenue) v Thompson*, 2016 SCC 21 at para 39; *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61 at para 39.

<sup>22</sup> *Le Soleil Hotel & Suites Ltd. v Le Soleil Management Inc.*, 2007 BCSC 1420 at para 22; *Maximum Ventures Inc v De Graaf*, 2007 BCSC 1215 at para 40.

<sup>23</sup> *S&K Processors Ltd. v Campbell Ave Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at para 6.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> Deputy Minister’s affidavit at para 5.

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waiver of privilege with respect to any of the information in the Records that is subject to solicitor-client privilege.”<sup>27</sup>

[37] For the reasons set out above, I find there was no waiver of privilege.

*Summary – s.14*

[38] As I explained above, I find that the requirements of solicitor-client privilege are met, and that the privilege was not waived. I am satisfied that s. 14 applies to the Disputed Information.

**CONCLUSION**

[39] For the reasons given above, under s. 58 of FIPPA, I confirm the Ministry’s decision that it is authorized under s. 14 to refuse to disclose the Disputed Information.

August 31, 2023

**ORIGINAL SIGNED BY**

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Carol Pakkala, Adjudicator

OIPC File No.: F21-86106

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<sup>27</sup> Second lawyer’s affidavit attached to Ministry’s supplementary submissions at para 7.