OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F23-81

DISTRICT OF SUMMERLAND

Alexander R. Lonergan
Adjudicator

September 27, 2023

CanLII Cite: 2023 BCIPC 97
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 97

Summary: An applicant requested access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to information revealing the total legal fees incurred by The Corporation of the District of Summerland (the District) at an arbitration and appeal for an employment law matter. The District withheld all of the information pertaining to legal fees under ss. 14 (solicitor-client privilege) and 22(1) (protection of third-party personal privacy). The adjudicator determined that the aggregate sum of legal fees could not be withheld under s. 14 because there was no reasonable possibility that disclosure could reveal privileged communications. The adjudicator further found that the aggregated sum of fees was not personal information, so the District was not required or permitted to refuse disclosure under s. 22(1). Finally, the adjudicator required the District under s. 6(2) to create a record containing the aggregate sum because doing so would not unreasonably interfere with the District's operations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 6(2), 14, and 22(1).

INTRODUCTION

[1] An individual (applicant) asked The Corporation of the District of Summerland (the District) for access, under the Freedom of Information and Protection of Privacy Act (FIPPA), to the following information:

1. All costs to the District associated with dismissing a named employee.
2. The District's total legal fees for the arbitration and litigation that followed the District's decision to fire the employee, to the date of the request.
3. The cost of rehiring the employee, including the total compensation that the District paid to the employee during a specific period of time.[1]

[1] I have rephrased the applicant's request to anonymize the employee's name in this order.

[2] In response to the access request, the District identified some records relating to the costs of dismissing the employee and the total legal fees but refused to disclose the information in them under ss. 14 and 22(1). In addition, the District directed the applicant to publicly available sources regarding the costs of rehiring the employee.

[3] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the District's decision to refuse access to the information in the responsive records. Mediation did not resolve the issue in dispute and the matter proceeded to an inquiry.

[4] The District's evidence includes pre-approved *in-camera* materials (i.e., material that a party submits for the OIPC to see, but not the applicant). I have considered all of the *in-camera* materials before me but have taken care not to reveal their content in these reasons.

Preliminary Matters

Section 25 – Disclosure in the Public Interest

[5] In his response submission, the applicant raises a new issue that was not in the Notice of Inquiry. He submits that disclosure of the disputed information is in the public interest given that the relevant legal bills were paid from taxpayer funds.[2] I understand this to be an argument that the District has a duty to disclose the information under s. 25(1)(b), which requires that a public body disclose information that is clearly in the public interest.

[6] Past orders have said parties may only introduce new issues at the inquiry stage if they receive permission from the OIPC to do so.[3] Adding new issues at the inquiry stage tends to undermine the OIPC's mediation process and could deprive the parties of a meaningful opportunity to respond to the issues.

[7] In this case, the applicant did not request permission to add s. 25 or explain why he did not raise this issue at an earlier stage. I do not see any other circumstances in the materials or submissions which persuade me that it would be fair to add this issue now. Therefore, I will not add s. 25 as an issue in this inquiry.

ISSUES

[8] The issues I must decide in this inquiry are:

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[2] Applicant's submission at para 61.
[3] Order F07-03, 2007 CanLII 30393 (BC IPC) at paras 6-11; and Order F10-37, 2010 BCIPC 55 (CanLII), at para 10.

1. Is the District authorized to refuse to disclose the disputed information under s. 14 of FIPPA?
2. Is the District required to refuse to disclose the disputed information under s. 22(1) of FIPPA?

[9] If the answer to the first two questions is no, then is the District required to produce a record containing the disputed information under s. 6(2) of FIPPA?

[10] Section 57(1) places the burden on the District, which is a public body in this case, to prove that the applicant has no right of access to the records or parts thereof that were withheld pursuant to s. 14.

[11] Meanwhile, s. 57(2) places the burden on the applicant to prove that disclosing the information withheld pursuant to s. 22(1) would not unreasonably invade a third party's personal privacy. However, the District has the initial burden of proving the information at issue is personal information about a third party.[4]

DISCUSSION

Background [5]

[12] The District laid off an employee during the Covid-19 pandemic. That employee grieved the termination through their union which led to a labour arbitration and a decision by an arbitrator (the Arbitration). The District then appealed the arbitrator's decision to the BC Labour Relations Board (the Appeal).

[13] The District was unsuccessful at both the Arbitration and the Appeal. The District reinstated the employee and did not appeal the matter further. The applicant was not involved in the employee's termination, the Arbitration, or the Appeal.

Records and Information in Dispute

[14] The records at issue in this inquiry are invoices issued by the District's legal counsel. The District withheld the invoices from the applicant but produced them for my review in this inquiry.

[15] The parties' submissions do not address the fact that the applicant requested the total amount of legal fees, yet the records at issue are periodic invoices that do not contain the overall total. For reasons that are not clear, the

[4] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9-11.
[5] The information in this background section is not in dispute. It is based on paras 2-6 of the Applicant's submission and para 3 of the District's initial submission.

District provided these separate invoices instead of a one-page record that contains the aggregate sum.

[16] In his submission, the applicant says he only seeks the total aggregate sum of the legal fees and is not interested in a line-by-line accounting, full copies of billing records, or other information in the individual invoices.[6] The District's reply contains arguments which specifically respond to the disputed information as an aggregate sum.

[17] The parties clearly agree that the combined sum taken from the periodic invoices is the only information in dispute.[7] Therefore, I will proceed with my analysis on the basis that the information in dispute is the combined total of the legal fees. It is a matter of basic addition for me to calculate the total amount.

[18] If I determine that the total amount may or must not be withheld under ss. 14 or 22, then I will also discuss the applicability of s. 6(2) of FIPPA. Section 6(2) imposes a duty on public bodies to create a record for the applicant that contains the information in dispute, within certain limitations.

Section 14 - Solicitor-Client Privilege

Presumption of privilege over legal billing information

[19] Section 14 states that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege.

[20] Legal billing information is presumptively privileged because legal fees and disbursements arise out of the lawyer-client relationship and are capable of revealing privileged communications between a lawyer and their client. Past orders and court decisions recognize this presumption because an assiduous inquirer might use legal billing information to draw inferences about litigation strategy and privileged communications.[8] Both of the parties submit, and I agree, that solicitor-client privilege presumptively protects the requested total legal fee amount due to its nature as legal billing information.

[21] The applicant bears the onus of rebutting the presumption of privilege over the aggregate sum of legal fees. To do so, he must establish that there is no reasonable possibility, from the perspective of an assiduous inquirer, of directly or indirectly revealing privileged communications by disclosing that billing information.[9] The BC Court of Appeal stated that this burden is "appropriately

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[6] Applicant's submission at paras 1, 14, and 28.
[7] District's initial submission at para 3; and Applicant's submission at para 28.
[8] *Maranda v. Richer*, 2003 SCC 67 at paras 32-33; *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 at paras 60-61 [*CCF*].
[9] *CCF, supra* note #8 at paras 2, 61, and 83; Order F21-52, 2021 BCIPC 60 (CanLII), at para 11.

high".[10]

The parties' positions

[22] The applicant submits that the total sum charged to the District for legal services could not possibly reveal privileged communications. He says that disclosure would not allow the applicant to infer anything beyond what is already evident from the publicly available information.[11] The District submits that it is reasonably possible for the applicant or another assiduous inquirer to deduce or otherwise acquire privileged communications using the aggregate sum of legal fees.[12]

Analysis and findings

[23] Whether an applicant successfully rebuts the presumption depends on the facts and circumstances of each case. Previous orders have weighed the following non-exhaustive factors when considering this issue:[13]

- The stage of the underlying proceedings;
- The type of underlying proceedings;
- Whether the billing information is about one or more legal matters;
- The level of detail in the billing information;
- The applicant's involvement in the legal matter;
- The applicant's pre-existing knowledge about the legal matter; and
- The amount of publicly available information about the legal matter.

[24] The applicant argues that disclosure of the total sum of legal expenses for both the Arbitration and Appeal would not reveal the specific cost of either of them and that it is impossible to deduce the specific cost of each using the aggregate sum.[14] The District argues that the Arbitration and Appeal form a single distinct matter, being the dismissal of one employee.[15]

[25] Both of these arguments assume that knowing the cost of a single matter will more readily reveal privileged communications than knowledge of the cost of

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[10] *CCF, supra* note #8 at para 83.
[11] Applicant's submission at paras 30 and 58.
[12] District's reply submissions at paras 15 and 21.
[13] See for examples, Order F21-52, 2021 BCIPC 60 (CanLII) at paras 24-30 (and the further Orders cited therein); Order F19-47, 2019 BCIPC 53 at para 18; Order F22-23, 2022 BCIPC 25 (CanLII) at para 50; and Order PO-4285, *Ontario (Attorney General) (Re)*, 2022 CanLII 72099 (ON IPC) at para 80.
[14] Applicant's submission at para 31.
[15] District's reply submission at paras 17-19.

multiple matters combined. Past orders have followed this line of reasoning.[16]

[26] The key legal issue at both the Arbitration and the Appeal was an employee's dismissal. The union and the District were the litigants at both. Given that they involved the same parties and the same central issue, the underlying proceedings are more accurately viewed as one matter that involved multiple stages. However, this is only one characteristic of the underlying proceedings.

[27] Past orders and court decisions have often considered whether the underlying litigation was still ongoing.[17] The concern is that the sum of legal billings to the date of the request could reveal a party's trial preparedness, the use of experts, or the financial motivations to settle.

[28] The present matter is distinguishable from many of those past matters because these underlying proceedings are already complete. The parties do not dispute that the underlying legal proceedings completed in June of 2021 with the conclusion of the Appeal.[18] Nothing before me suggests that there are any further proceedings, actual or contemplated.

[29] The District argues that disclosing the total amount of legal fees it paid would reveal what it told its lawyer it was willing to spend to litigate the proceedings.[19] In support, the District cites the B.C. Supreme Court decision of *Richmond (City) v Campbell*, 2017 BCSC 331 (*Richmond*). The Court in *Richmond* stated that the concluded nature of the underlying proceedings was "an unimportant distinction" because the total sum could still reveal the public body's instructions to its legal counsel about how much it was willing to spend.[20]

[30] In my view, *Richmond* was decided on its own facts and, contrary to what the District implies, it does not create a general rule that the total cost to litigate a matter will always reveal what a public body was willing to spend on that litigation and what it communicated to its lawyer about that.

[31] The facts in this matter are distinguishable from those in *Richmond* because the underlying proceedings in *Richmond* ended by settlement. The present matter is also distinguishable from cases that found risk in the applicant's involvement in, or special knowledge of, the proceedings, or the fact that the proceedings were ongoing.[21] None of these elements are present here.

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[16] See for example, Order F20-30, 2021 BCIPC 60 (CanLII) at para 20; and Order F21-52, 2021 BCIPC 60 (CanLII) at paras 43-45.
[17] See for example, Order F22-23, 2022 BCIPC 25 (CanLII) at para 69; and *CCF, supra* note #8 at para 77.
[18] Applicant's submission at para 54.
[19] District's reply submission at para 7.
[20] *Richmond (City) v. Campbell*, 2017 BCSC 331 (CanLII), at paras 81-83.
[21] See for examples, *CCF*, *supra* note #8 at paras 70-71, 74 and 76; and Order F20-30, 2020 BCIPC 36 (CanLII), at para 20.

[32] I cannot see how disclosing the total amount spent by the District would reveal whether the District instructed their counsel to incur that expense or reveal any other privileged communication it had with its counsel. The amount a client pays their lawyer at the end of the day necessarily reflects the variability and unpredictability of legal proceedings and their outcomes.

[33] The District submits that litigants would benefit in future negotiations with the District by knowing what the District spent on legal fees in these proceedings.[22] In my view, whether disclosure might harm the District's position in future negotiations is not a relevant factor in the s. 14 analysis in this case. Other harmful effects of disclosure do not factor into the analysis because the breach of privilege by an assiduous inquirer is the harm that s. 14 seeks to prevent.[23] The analysis here is only concerned with determining whether there is any reasonable possibility that disclosing the total fee amount would reveal a privileged communication that took place between the District and its lawyer.

[34] I have carefully considered what disclosing the total fee amount might reveal given the nature of the proceedings, specifically the fact that they were about a single matter that is now concluded. The applicant's arguments persuade me that the nature of the proceedings is not a factor that creates or increases the possibility that disclosing the total fee amount would reveal privileged communications.

[35] Of course, the nature of the underlying proceedings is only one source of context in which to place legal billing information. Legal billing information can reveal privileged communications when combined with other available records or information, depending on the circumstances of each case. In light of this possibility, I must consider what the total amount of legal fees might reveal when combined with the other information available to the applicant and the public.

[36] The applicant was not a party to the underlying proceedings and there is nothing to suggest that he has any inside knowledge of them beyond that of a particularly well-informed member of the public. However, the public and the applicant alike have access to the written Arbitration and Appeal reasons, any information about the District's financial arrangements that it has already released, and several news articles about the matter. The applicant has also provided copies of relevant news articles that cite the Arbitration and Appeal decisions.

[37] These materials allow me to assess the extent of the other available

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[22] District's reply submission at para 7.

[23] Section 17(1)(f) of FIIPA says a public body may refuse access to information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia. The District did not choose to apply s. 17 to the information in dispute in this case.

information and the applicant's existing knowledge, as well as whether that information, in combination with the aggregate fee amount, might reveal the District's privileged communication with its lawyer.

[38] Regarding the news articles, these contain summaries of the Arbitration and Appeal decisions with a confirmation that the District complied with them. I do not see how even an assiduous inquirer could combine that limited information with the legal billing information to deduce the content of the District's privileged communications with its lawyer.

[39] The Arbitration and Appeal's written reasons already reveal the parties' arguments and evidence in the underlying proceedings as well as the identity of their lawyers and how much time the proceedings took. All of that information can already be used to draw inferences (correct or not) about the parties' privileged communications with their lawyers. In my view, knowing the fee amount in no way enhances or expands what is already revealed by the information that is already part of the public record.

[40] In the circumstances of this case, other records and information in addition to the aggregate fee amount would be needed to reveal privileged communications. This might include information about the timing of payments, a breakdown of the lawyer's time, retainer terms, or copies of complete invoices. None of those other records or information are available or at issue here. I also consider it unreasonably speculative to expect that such other information or records will be disclosed in the future given the concluded nature of the proceedings.

[41] I am satisfied that knowing the aggregate sum of legal fees, even in combination with the other publicly available information in this matter, would not directly or indirectly reveal privileged communications. Although the applicant's arguments on this point are succinct, I find them persuasive and well-supported with specific examples setting out the extent and nature of that other available information. In contrast, the District's arguments frequently assert that inferences of privileged communications could be drawn but do not explain how.

[42] For the reasons given above, I find that the applicant has rebutted the presumption of privilege by establishing that there is no reasonable possibility that disclosing the aggregate sum of the District's legal fees would reveal privileged communications. I conclude that the District may not refuse the applicant access to the aggregate sum of the District's legal fees under s. 14.

Section 22(1) - Unreasonable Invasion of Third-Party Personal Privacy

[43] The District also withheld the disputed information under s. 22(1). Section 22(1) requires a public body to refuse to disclose personal information if its

disclosure would be an unreasonable invasion of a third party's personal privacy.

[44] Section 22 only applies to personal information, so the first step in a s. 22 analysis is to determine whether the information in dispute is personal information.

Personal information

[45] FIPPA defines personal information as "recorded information about an identifiable individual other than contact information." Contact information is defined in FIPPA as information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, address, business email or business fax number of the individual.[24] The information in dispute is a monetary sum, which is clearly not contact information.

[46] Personal information is about an identifiable individual when it is reasonably capable of identifying an individual, either alone or when combined with other available sources of information.[25]

[47] The District submits that the applicant seeks the legal fee information that relates to the firing of an individual, so that information is related to that individual's personal privacy. However, I note that the District also acknowledges that the individual's personal information does not appear directly in the records.[26]

[48] I am not persuaded by the District's arguments about this. The information in dispute is a dollar figure and it reveals the amount of money a lawyer billed for providing legal services to the District. The dollar amount reflects choices the District and the lawyer made but it reveals nothing, directly or indirectly, about the individual who was in opposition to the District during the proceedings. For that reason, I find that the District has not met its burden of establishing that the information in dispute is a third party's personal information.

[49] Given that the information in dispute is not personal information, s. 22(1) cannot apply to it. Therefore, it is unnecessary for me to consider whether disclosure would constitute an unreasonable invasion of a third party's personal privacy.

[50] The District is not required or authorized to refuse to disclose the information in dispute under s. 22(1).

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[24] Schedule 1 of FIPPA contains the definitions of "personal information" and "contact information".
[25] Order F19-13, 2019 BCIPC 15 (CanLII) at para 16; Order F18-11, 2018 BCIPC 14 at para 32.
[26] District's initial submission at para 24.

Section 6(2) – Duty to Create a Record

[51] I have determined that ss. 14 and 22(1) do not permit or require the District to withhold the information in dispute, and as such the District must not refuse to disclose it. As mentioned at the outset, the District provided periodic invoices as the records that respond to the access request rather than providing a single record that contains the aggregate total amount.

[52] Therefore, the issue I must decide is whether the District must create a record containing that total amount pursuant to s. 6(2).

[53] Section 6(2) says that a public body must create a record for an applicant if the record can be created from a machine-readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, as long as creating the record would not unreasonably interfere with the operations of the public body.

[54] I have considered whether it is fair to decide this issue without seeking submissions from the parties, and decided that it is, for two reasons.

[55] First, the parties agree that the information requested by the applicant is the aggregate sum and not the periodic amounts. Second, based on everything I have read in their submissions, I find that the parties have an interest in receiving a decision on the issues they raised without unnecessary delay. Inviting further submissions about whether a record of the aggregate sum could be created in compliance with s. 6(2) would introduce a delay which is unnecessary given that the outcome of the s. 6(2) analysis is plain and obvious in these circumstances. The number of periodic invoices is not high, so creating a record of the aggregate sum is a matter of simple addition and recording that figure on a piece of paper. I cannot see how creating such a record could conceivably be characterized as unreasonably interfering with the District's operations.

[56] I conclude that s. 6(2) requires the District to create a record containing the aggregate amount of legal fees which is the information requested by the applicant.

CONCLUSION

[57] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. The District is required to create a record containing the information in dispute.

2. The District is not authorized under s. 14 to refuse to disclose the record

described at item 1 above.

3. The District is required to give the applicant access to the record described at item 1 above.

4. The District must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the record described at item 1 above.

[58] Pursuant to s. 59(1) of FIPPA, the District is required to comply with this order by November 9, 2023.

September 27, 2023

ORIGINAL SIGNED BY

Alexander R. Lonergan, Adjudicator

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