



Order F23-85

THOMPSON RIVERS UNIVERSITY

D. Hans Hwang
Adjudicator

October 4, 2023

CanLII Cite: 2023 BCIPC 101

Quicklaw Cite: [2023] B.C.I.P.C.D. No. 101

Summary: An applicant requested records and correspondence relating to the terms of reference given to an external investigator retained by Thompson Rivers University (TRU). TRU disclosed responsive records but withheld some information under ss. 13(1) (advice or recommendations) and 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator determined that TRU was authorized to withhold most, but not all, of the information it withheld under s. 14. TRU applied both ss. 13 and 14 to the same information. Given the finding that s. 14 did not apply to some of the information, the adjudicator ordered TRU, under s. 44(1)(b), to produce the records withheld under s. 13(1) for the purpose of deciding this issue on the merits.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 13(1), 14, 44(1)(b).

INTRODUCTION

[1] A faculty member (applicant) at Thompson Rivers University (TRU) asked TRU for access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records and correspondence relating to the terms of reference that was given to an external investigator. TRU had retained the external investigator to investigate a workplace complaint involving the applicant.

[2] TRU disclosed some of the responsive records but withheld other records under ss.13(1) (advice or recommendations) and 14 (solicitor-client privilege) of FIPPA. The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review TRU's decision. During the OIPC's mediation, TRU released additional information and records to the applicant. However, the mediation did not resolve the remaining issues and they proceeded to this inquiry.

[3] Some of the records in dispute in this inquiry overlap with some of the disputed records in Order F23-84 which is being issued concurrently with this order.

ISSUE(S)

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

1. Is TRU authorized to withhold the information at issue under s. 13(1)?
2. Is TRU authorized to withhold the information at issue under s. 14?

[5] Under s. 57(1) of FIPPA, TRU, which is a public body in this case,¹ has the burden of proving that the applicant has no right of access to all or parts of the disputed records under ss. 13(1) and 14.

DISCUSSION

Background²

[6] TRU is a post secondary institution that provides educational services to approximately 25,000 students. TRU employs around 2,000 faculty and staff.

[7] The applicant is a TRU faculty member and has filed requests for access to records relating to his employment and TRU's investigations.

Records in dispute

[8] The responsive records total 10 pages of email communications. TRU completely withheld four pages, and it redacted some information from the remaining six pages.

[9] TRU did not provide the disputed records for my review.

Solicitor-client privilege, s. 14

[10] TRU applied s. 14 to withhold the records in dispute.

[11] Section 14 states that a public body may refuse to disclose information that is subject to solicitor-client privilege. The term "solicitor-client privilege" in the

¹ Schedule 1 of FIPPA.

² The information in this background section is based on TRU's initial submission at paras 10-14.

context of s. 14 encompasses both legal advice privilege and litigation privilege.³ TRU is relying on legal advice privilege to withhold the records in dispute.⁴

[12] Legal advice privilege applies to confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.⁵ The essential elements of the test for legal advice privilege are that there must be a communication between solicitor and client (or their agent) that entails seeking or providing legal advice and that is intended by the solicitor and client to be confidential.⁶ Legal advice privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information (e.g., internal client communications that transmit or comment on privileged communications with lawyers).⁷

[13] Further, legal advice privilege extends to more than the individual document that communicates or proffers legal advice. It includes communications that are “part of the continuum of information exchanged” between the client and the lawyer in order to obtain or provide the legal advice.⁸ The “continuum of communications” involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as “history and background from a client” or communications to clarify or refine the issues or facts.⁹

[14] To summarize, legal advice privilege applies both to actual legal advice exchanged between a solicitor and client, and to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged communications between a lawyer and their client.¹⁰

Evidentiary basis for solicitor-client privilege

[15] TRU did not provide the information it withheld under s. 14 for my review. Instead, TRU provided affidavit evidence from an in-house lawyer at TRU (SDB) who says that he has personal knowledge of the records withheld under s. 14.

³ *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para 26.

⁴ TRU's initial submission at paras 39-48. TRU is also claiming litigation privilege in a few instances according to the Affidavit #1 of the Privacy and Access Officer at para 16(b)(i).

⁵ *College* at paras 26-31.

⁶ *Solosky v. The Queen*, [1980] 1 SCR 821 [Solosky] at p 837; *R. v. B.*, 1995 CanLII 2007 (BCSC) at para 22.

⁷ *Solosky* at p 834.

⁸ *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 [Huang] at para 83. See also *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [Camp Developments] at paras. 40-46.

⁹ *Camp Developments* at para 40.

¹⁰ See, for example Order F22-34, 2022 BCIPC 38 (CanLII), at para 41, Order F22-53, 2022 BCIPC 60 (CanLII), at para 13, and Order F23-07, 2023 BCIPC 8 (CanLII), at para 25.

[16] Section 44(1)(b) gives me, as the Commissioner's delegate, the power to order production of records to review them during the inquiry. However, given the importance of solicitor-client privilege, and in order to minimally infringe on that privilege, I would only order production of records being withheld under s. 14 when it is absolutely necessary to decide the issues in dispute.¹¹

[17] After conducting a preliminary review of TRU's submission, I determined that TRU did not sufficiently provide the evidentiary basis for me to make a decision about the claim of solicitor-client privilege. Therefore, I provided TRU an opportunity to submit additional evidence in support of its privilege claim.¹² TRU provided a further submission and an affidavit from its privacy and access officer who is also a legal counsel for TRU (Privacy and Access Officer). The applicant responded to TRU's additional submission and evidence.

[18] I accept that as a lawyer and officer of the court, both SDB and the Privacy and Access Officer have a professional duty to ensure that privilege is properly claimed. They both depose that they have reviewed all of the records at issue and have direct knowledge of the content and context of the communications. Importantly, the Privacy and Access Officer's sworn evidence identifies the dates, participants and description of the communications that were withheld. As a result, I am satisfied that with the addition of the Privacy and Access Officer's affidavit I have sufficient detail to make an informed decision and it is not necessary to exercise my discretion under s. 44 to order production of the records TRU withheld under s. 14.¹³

Analysis and findings

[19] Each record TRU withheld involves different dates, circumstances and parties. I make the findings about the information in dispute in each record.

In-house Lawyer JS's emails¹⁴

[20] TRU is completely withholding three emails under s. 14. The first two emails are between TRU's in-house lawyer (JS) and an associate director at TRU (Associate Director). The third email forwards the first two emails to the Privacy and Access Officer.

¹¹ Order F19-14, 2019 BCIPC 16 (CanLII) at para 10; *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 at para 68.

¹² OIPC letter dated June 20, 2023.

¹³ The applicant says, in his submissions, that there should be no weight on TRU's submissions and evidence because they are not credible; however, he does not show any connection between the credibility argument and specific content of TRU's submissions and evidence. I therefore find there is no sufficient ground to consider the applicant's arguments about credibility.

¹⁴ Emails dated May 18, May 19 and July 5, 2021 in the records in dispute.

[21] The Privacy and Access Officer deposes that these emails were completely withheld because they contain communications between solicitor and client for the purpose of seeking, formulating and providing legal advice regarding the applicant and his employment.¹⁵ Also, SDB deposes that these communications are confidential in nature and have the notation “privileged and confidential” on them.¹⁶

[22] The applicant says that there is a distinction between legal advice and business advice and there is also a distinction between level advice and legal information. He says neither business advice nor legal information are covered by solicitor-client privilege.¹⁷

[23] Solicitor client privilege extends to in-house counsel provided they are acting in a legal capacity and not a business or management capacity. The Supreme Court of Canada in *Pritchard v Ontario (Human Rights Commission)* said that “owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case base to determine if the circumstances were such that the privileges arose.”¹⁸

[24] I find TRU’s sworn evidence sufficiently explains that JS’s role, in relation to the subject matter of the records in dispute, was to provide legal advice about TRU’s investigation involving the applicant.¹⁹ I do not see any evidence, and the applicant does not sufficiently demonstrate, that JS was acting in a business or management capacity. Therefore, I am satisfied that JS was acting in a legal capacity in the circumstances relating to the records in dispute.

[25] Further, I accept the Privacy and Access Officer’s evidence that these email communications have the notation “privileged and confidential” and therefore they were intended to be confidential.²⁰

[26] As a result, I find that s. 14 applies to the information withheld in JS’s emails.

*In-house Lawyer SDB’s Emails*²¹

[27] TRU is withholding four emails between SDB, the Associate Director, an external service provider for TRU, and the vice president at TRU (Vice President). TRU says s. 14 applies to these emails because they consist of

¹⁵ Affidavit #1 of Privacy and Access Officer at para 13(a).

¹⁶ Affidavit #1 of SDB at para 24.

¹⁷ Applicant’s response submission at p 5.

¹⁸ *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 20.

¹⁹ Affidavit #1 of Privacy and Access Officer at para 14.

²⁰ Affidavit #1 of Privacy and Access Officer at para 15.

²¹ Emails dated May 26 and 27, 2021 in the records in dispute.

communications for the purpose of obtaining professional advice. TRU also says solicitor-client privilege applies to protect the entire “continuum of communications” in which the solicitor provides advice.²²

[28] The Privacy and Access Officer deposes that information withheld in these emails²³ is subject to legal advice privilege because disclosure of these communications would reveal confidential legal advice. She deposes that the content of SDB’s email²⁴ identifies the subject matter on which legal advice was provided.²⁵ The Privacy and Access Officer also deposes that two emails between the SDB and the Associate Director describe SDB’s legal opinion²⁶ and there are emails that describe legal advice received from an external lawyer for TRU (External Lawyer).²⁷

[29] Based on the sworn evidence, I can see that information withheld in SDB’s emails reveals communications about legal advice provided by SDB and the External Lawyer, and it also reveals the communications exchanged in the course of compiling information for the purpose of seeking, formulating and providing legal advice. I am satisfied that disclosing the information at issue would allow an accurate inference to be made about confidential legal advice provided by a solicitor. I am not persuaded that SDB was acting in a business or management capacity as the applicant asserts. As a result, I find s. 14 applies to the information at issue in SDB’s emails.

*Associate Director Emails*²⁸

[30] TRU is relying on s. 14 to withhold two emails from a three-email chain the Associate Director sent and received. The Privacy and Access Officer says that the third email in the chain does not contain any information that was withheld under s. 14.²⁹

[31] The Privacy and Access Officer deposes the first email was from the Associate Director to an interim president at TRU (Interim President) and this email was also forwarded to the Vice President. She deposes this email sets out legal advice from the External Lawyer and JS.³⁰ The Privacy and Access Officer says the second email was between the Interim President, Associate Director and Vice President and it describes the legal advice set out in the first email.

²² TRU’s letter dated June 30, 2023 at paras 21, 37 and 38.

²³ Emails dated May 26 and 27, 2021 in the records in dispute.

²⁴ Emails dated May 26, 2021 in the records in dispute.

²⁵ Affidavit #1 of Privacy and Access Officer at para 16(a)(i).

²⁶ Affidavit #1 of Privacy and Access Officer at paras 16(a)(ii) and (iii).

²⁷ Affidavit #1 of Privacy and Access Officer at para 16(a)(iv).

²⁸ Emails dated May 11, 2021 in the records in dispute. These emails are also records at issue in Order F23-84.

²⁹ Affidavit #1 of Privacy and Access Officer at para 16(b)(iii).

³⁰ Affidavit #1 of Privacy and Access Officer at para 16(b)(i).

[32] I can see that the withheld information reveals legal advice provided by the External Lawyer and JS about the investigation involving the applicant. I find that legal advice privilege applies to that information because it would reveal confidential communications between TRU and its lawyer about legal advice.³¹

Crime-fraud exception to privilege

[33] The applicant invokes the crime-fraud exception to privilege. That exception holds that communications between a client and their solicitor that are criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime or fraud cannot be privileged.³² The rationale for the exception is that facilitating wrongful conduct does not come within the scope of a lawyer's professional employment.³³ The client's intention to commit a crime or fraud is the pivotal consideration, and it is immaterial whether the lawyer was an unwilling dupe or a knowing participant.³⁴

[34] The applicant's submission about this exception is as follows:

I mentioned previously that I have come to believe that TRU's investigations of me were an attempt to discourage/threaten me not to pursue the OIPC inquiries into TRU's Deemed Refusals. Thus, the legal advice would be to facilitate that goal.

As OIPC inquiries are judicial proceedings, if TRU's legal communications were about getting me to withdraw my cases, the crime exception to privilege applies.³⁵

[35] TRU refutes the applicant's concerns in its reply.³⁶ TRU says its investigation of the applicant was based on its statutory obligation to prevent, investigate and address discrimination and harassment under the *Human Rights Code* and the *Workers Compensation Act*.³⁷

[36] In order to invoke the crime-fraud exception, the applicant must make out a *prima facie* case.³⁸ More than a mere assertion or allegation is required; there

³¹ TRU asserts the first emails are also subject to litigation privilege. Given I have found that legal advice privilege applies, I do not need to determine if litigation privilege also applies to these two emails.

³² *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC) at p. 27; *Solosky* at pp 835-836; *R. v. Campbell*, 1999 CanLII 676 (SCC) [*Campbell*] at paras 55-63.

³³ *Huang* at para 174.

³⁴ *Huang* at para 174, citing *Campbell* at paras 55-56.

³⁵ Applicant's response submission at p 5.

³⁶ TRU's reply submission at paras 20-24.

³⁷ TRU's reply submission at para 23.

³⁸ *Camp Development* at para. 24.

must be clear and convincing evidence and something to give colour to the charge, in light of all the evidence and the surrounding circumstances.³⁹

[37] I am not persuaded by what the applicant says about the crime-fraud exception. The applicant refers only broadly to TRU's submissions and evidence in several different inquiries which he believes were not credible. However, in my view, this is not sufficient to give colour to his allegations. What the applicant says about the crime-fraud exception to legal advice privilege, in my view, is mere allegation, unsupported by clear and convincing evidence. He has not established a *prima facie* case that the specific communications at issue in this case are themselves unlawful or seek to advance conduct which TRU or its lawyers knew or ought to have known was unlawful.

Summary, s. 14.

[38] I am satisfied that TRU's sworn evidence sufficiently demonstrates the nature of the disputed records and the context in which they were prepared in sufficient detail.

[39] I find that the test for legal advice privilege is met for all of the information TRU refused to disclose under s. 14. Disclosing that information would reveal the confidential communications TRU had with its lawyers about legal advice the lawyers provided. As a result, I conclude the information is protected by legal advice privilege, and it may be withheld under s. 14.

Information withheld under s. 13

[40] TRU says that in all the records in dispute, it applied both ss. 13 and 14 to the same information. This is not quite accurate because there is one record that TRU did not refuse to disclose under s. 14. It is the third email that the Privacy and Access Officer describes at paragraph 16(b)(iii) of her August 30, 2023 affidavit. Therefore, I must determine whether s. 13 applies.

[41] Given TRU did not provide that email for my review, I am unable to determine whether s. 13 applies. Deciding if s. 13 applies requires a detailed line-by-line analysis that I am unable to conduct without reviewing the disputed email. Therefore, I find it necessary in this case to order TRU to produce that email for my review so that I can make an independent and informed decision about whether s. 13 applies.

[42] As a result, I consider it necessary and appropriate to order TRU, under s. 44(1)(b), to produce for me the email the Privacy and Access Officer describes at paragraph 16(b)(iii) of her affidavit. Once I have access to that email, I will be

³⁹ Order F21-11, 2022 BCIPC 11 at para 47, citing *Huang* at para 180; *McDermott v. McDermott*, 2014 BCSC 534 (CanLII) at para 77.

able to decide if TRU is authorized to refuse the applicant access to it under s. 13.

CONCLUSION

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

[44] I confirm TRU's decision to refuse to disclose information to the applicant under s. 14.

[45] Pursuant to ss. 44(1)(b), I require TRU to produce for my review a copy of the email the Privacy and Access Officer describes at paragraph 16(b)(iii) of her August 30, 2023 affidavit so that I may determine whether TRU is authorized to withhold this information under s. 13. Pursuant to s. 44(3), TRU must produce that email for my review by October 19.

October 4, 2023

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File No.: F21-86667