



Order F23-89

COLLEGE OF PHYSICIANS AND SURGEONS

Rene Kimmett
Adjudicator

October 25, 2023

CanLII Cite: 2023 BCIPC 105
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Summary: Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), the applicant requested information from the College of Physicians and Surgeons of British Columbia (College) regarding complaints made about the applicant and the College's response to the applicant's concerns about her medical corporation. The College disclosed most of the information to the applicant but withheld some information under ss. 13(1) (advice and recommendations) and 14 (solicitor-client privilege). The adjudicator determined the College was not authorized to withhold any of the information in dispute under s. 13(1) but was authorized to withhold all the information in dispute under s. 14. The adjudicator ordered the College to provide the applicant with access to the information it was not authorized to refuse to disclose.

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

INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the College of Physicians and Surgeons of British Columbia (College) for access to information related to:

1. complaints about the applicant made by two College employees to one of the College's Deputy Registrars and the Deputy Registrar's records on this matter; and
2. the College's investigation into the applicant's concerns about her medical corporate entity.

[2] In response to this request, the College provided the applicant with a 457-page package. It partially redacted 13 pages of this package, withholding

information under ss. 13(1) (advice and recommendations) and 14 (solicitor-client privilege).

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

PRELIMINARY MATTER

[4] The applicant did not file submissions in this inquiry but did file a detailed initial request for review.

[5] In her initial request, the applicant raises several issues that I do not address in this order. For example, the applicant raises s. 25 (public interest disclosure). The OIPC has opened another file to address these concerns. The applicant also asserts that many of the statements made in the responsive records are false and alleges the College responded inappropriately to her concerns about her medical corporation. I have no authority to make findings on these issues and, therefore, do not address them in this order.

[6] Some of the applicant's arguments relate directly to the issues dealt with in this order. However, I find it is not appropriate for me to rely on these arguments. The written submission process is intended to give each party the opportunity to present their case *de novo* to the Commissioner, or his delegate, as they see fit. A request for review initiates an OIPC review and may not reflect an applicant's position on the facts and law in dispute following the mediation and investigation stages of the OIPC's process.

ISSUES

[7] I must decide the following issues:

- 1) Is the College authorized to withhold the information in dispute under s. 13(1)?
- 2) Is the College authorized to withhold the information in dispute under s. 14?

[8] Under s. 57(1), the College has the burden of proving it is authorized to withhold the information in dispute under these sections.

DISCUSSION

Background

[9] The College regulates the practice of medicine in the province. The applicant is a physician and a registrant of the College.

[10] The applicant regularly contacted the College in the year preceding her access request, alleging third parties were engaged in illegal activities using her medical corporation and properties.¹ According to the College, the applicant's communications lacked coherence and, as a result, the Deputy Registrar made a referral about the applicant to the College's Health Monitoring Department.²

[11] In this order, I refer to the key College employees mentioned in the records as follows:

- Deputy Registrar (responsible for health monitoring)
- Chief Legal Counsel
- Legal Counsel
- Senior Health Monitor
- Employee AK

Records at issue

[12] The records in dispute are 13 partially withheld pages. The withheld information is contained in a note to file and emails between College employees. I will describe the records in more detail throughout this order.

Advice and recommendations – s. 13

[13] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister.

[14] “Recommendations” include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.³ “Advice” has a broader meaning than the term “recommendations”⁴ and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.⁵

¹ College's submission at para 5 and records at 152, 236, 237, 282-286, and 311.

² College's submission at para 5 and records at 298-299, 302, and 304.

³ *John Doe v Ontario (Finance)*, 2014 SCC 36 at para 23.

⁴ *Ibid.* at para 24.

⁵ *College of Physicians of B.C. v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College of Physicians*] at para 113.

[15] A public body is authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.⁶

[16] If I find s. 13(1) applies, I will then consider if any of the categories listed in ss. 13(2) or (3) apply. Subsections 13(2) and (3) identify certain types of records and information that may not be withheld under s. 13(1), such as factual material under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

[17] The College describes the information it withheld under s. 13 as:

“a comment made by a College employee to College Legal Counsel [... during] a dialogue with respect to how to respond to the concerns raised by the Applicant. The portion of the email withheld is such that if disclosed, would provide insight into the College employee’s recommendation on how that process is occurring and should occur going forward.”⁷

[18] I have reviewed the withheld information and note that it is a statement of fact in an email.⁸ I find it is not a recommendation because it does not contain a suggested course of action that the College’s Legal Counsel, or any other College employee, has the discretion to accept or reject. I also find that the comment is not advice because Employee AK does not provide an opinion that involves exercising judgment and skill in relation to the statement of fact.

[19] The College has not explained how this comment will “provide insight into the College employee’s recommendation” and I cannot conclude, based on the information available to me, that disclosure of this comment would enable an individual to draw accurate inferences about any advice or recommendations developed by or for the College.

[20] Given my conclusion that s. 13(1) does not apply, I do not need to consider whether ss. 13(2) or 13(3) apply. Similarly, I do not need to consider whether the College properly exercised discretion under s. 13.

Solicitor-client privilege – s. 14

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

⁶ Order 02-38, 2002 CanLII 42472 (BC IPC) at para 135; Order F17-19, 2017 BCIPC 20 at para 19; Order F20-29, 2020 BCIPC 35 at para 56.

⁷ College’s submission at para 10.

⁸ Records at 123, 127, and 130. The same email is duplicated on these three pages.

Sufficiency of evidence to substantiate the s. 14 claim

[22] The College provided me with the records in dispute under s. 14 in a password-protected document but asked that I determine whether I can adjudicate the s. 14 issue without examining them. As the Commissioner's delegate, I have the power to order production of records for the purposes of conducting an inquiry.⁹ However, I will only order production of records, over which a party claims solicitor-client privilege, when it is absolutely necessary to fairly decide the issues in dispute.¹⁰

[23] To support its claim of privilege, the College provided an affidavit from the College's Chief Legal Counsel who states he reviewed the records and confirms that the descriptions of the withheld information in the College's submission and its table of records are accurate.¹¹

[24] After reviewing the Chief Legal Counsel's affidavit, the College's descriptions of the records, and the context provided by the disclosed portions of the records package, I determined there was sufficient information to assess the College's claim of privilege over all but page 381 of the records. I asked the College to provide more information about page 381 and gave the applicant the opportunity to respond. The College provided a supplemental submission that contained a clearer description of page 381.¹² The applicant's response did not address my request or the College's supplementary submission.¹³

[25] I am satisfied, based on the College's submissions and evidence, and the disclosed portions of the records package, that the College has provided sufficient information for me to assess its privilege claims. As a result, I find it is not necessary for me to review the records in the password-protected document.

Solicitor-client privilege

[26] Solicitor-client privilege applies to confidential communications between a solicitor and client for the purposes of obtaining and giving legal advice.¹⁴ The courts and previous OIPC orders accept the following criteria for determining whether solicitor-client privilege applies:

1. There must be a communication, whether oral or written;
2. The communication must be of a confidential character;

⁹ See FIPPA s. 44(1)(b).

¹⁰ Order F22-23, 2022 BCIPC 25 at para 13.

¹¹ Chief Legal Counsel's affidavit at paras 3 and 4.

¹² College's supplementary submission at para 6.

¹³ Applicant's submission dated October 2, 2023.

¹⁴ *College of Physicians*, *supra* note 5 at paras 30-31.

3. The communication must be between a client (or his agent) and a legal advisor; and
4. The communication must be directly related to the seeking, formulating, or giving of legal advice.¹⁵

[27] Not every communication between a solicitor and client is privileged; however, if the above conditions are satisfied, then solicitor-client privilege applies.¹⁶

[28] In addition, courts have found that solicitor-client 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 seeking or giving legal advice.¹⁷

[29] Solicitor-client privilege also extends to internal client communications that would reveal, or allow accurate inferences to be made about, privileged information.¹⁸

[30] Further, solicitor-client privilege applies to a client’s communications with in-house counsel but only where counsel is acting in a legal capacity and not a business or management capacity.¹⁹

College's submissions

[31] The College submits that the information it withheld under s. 14 is part of written communications between the College's employees and one of the College's lawyers or between its Legal Counsel and Chief Legal Counsel.²⁰ The College submits that the content of the information itself makes it clear that the information was exchanged in confidence²¹ and that the communications “clearly fall within the continuum of communications relating to the seeking, receiving, or providing of legal advice.”²²

¹⁵ *R v B*, 1995 CanLII 2007 (BCSC) at para 22 and *British Columbia (Securities Commission) v CWM*, 2003 BCCA 244 at para 46; Order F17-43, 2017 BCIPC 47 at paras 38-39.

¹⁶ *Solosky v The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at 837; *R. v B.*, 1995 CanLII 2007 (BC SC) at para 22.

¹⁷ *Balabel v. Air India* [1988] 2 W.L.R. 1036 (Eng. C.A.) at 1046; *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 paras 40-46.

¹⁸ *Bank of Montreal v Tortora*, 2010 BCSC 1430 at para 12; *Bilfinger Berger (Canada) Inc v Greater Vancouver Water District*, 2013 BCSC 1893 at para 24.

¹⁹ *Keefer Laundry Ltd. v Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 at para 63.

²⁰ College's submission at para 25.

²¹ *Ibid.*

²² *Ibid.*

[32] The College states that the information severed at the top of page 381 is an internal note to file made by the Senior Health Monitor on March 9, 2021 that relates to the remainder of the information in dispute on page 381.²³ The remainder of page 381 is the content of two March 8, 2021 emails between the Senior Health Monitor, the Chief Legal Counsel and the Deputy Registrar that the College has withheld under s. 14. The College submits this information is internal written communication of a confidential nature related to the College obtaining legal advice from its lawyer, the Chief Legal Counsel.²⁴

[33] The College submits that the Legal Counsel and the Chief Legal Counsel were, at all times during the course of the communications, acting in a legal capacity and not a business or managerial capacity. It explains that they were providing legal services to the College “given the nature of the issues raised by the Applicant”.²⁵

Information in dispute

[34] I find that the information in dispute under s. 14 is contained in the following records:

- a March 23, 2020 email from the Legal Counsel to Employee AK;²⁶
- a June 15, 2020 email chain between the Chief Legal Counsel and the Deputy Registrar;²⁷
- a June 26, 2020 email from the Chief Legal Counsel to the Legal Counsel;²⁸
- a March 8, 2021 email chain between the Chief Legal Counsel, the Deputy Registrar and the Senior Health Monitor;²⁹
- a March 8-9, 2021 email chain between the Chief Legal Counsel and the Legal Counsel;³⁰ and
- a March 9, 2021 note to file made by the Senior Health Monitor.³¹

²³ College's supplemental submission at para 6.

²⁴ *Ibid* at para 7.

²⁵ College's submission at para. 24.

²⁶ Records at 126 and 129. The same email is duplicated on these pages.

²⁷ Records at 422 and 424. One email in this chain is duplicated on these pages.

²⁸ Records at 385 and 433. The same email is duplicated on these pages.

²⁹ Records at 381, 456, and 457. One email in this chain is duplicated on these pages.

³⁰ Records at 421 and 456.

³¹ Records at 381.

[35] Below, I assess whether this information is subject to solicitor-client privilege.

March 23, 2020 email from the Legal Counsel to Employee AK

[36] I gather, from the disclosed portions of the records package,³² that the withheld information is the contents of an email in which the Legal Counsel replies to Employee AK's request for advice on how to respond to an email from the applicant. The Legal Counsel copied another person with a College email address on this reply.

[37] I find that this email is a written communication between a client (Employee AK acting as agent for the College) and its legal counsel directly related to the seeking, formulating, or giving of legal advice. I am satisfied that the email was intended to be confidential. It was sent from the Legal Counsel to Employee AK and copied to another person with a College email address. While the College has not provided information about the copied person's role within the public body, I am satisfied that in this instance the inclusion of another person that is internal to the College does not change the confidential character of the communication.

[38] To determine whether the lawyer is acting in a legal capacity at the relevant time, I must consider general evidence of the nature of the relationship, the subject matter of the advice, and the circumstances in which it was sought or rendered.³³ I am satisfied, based on the context provided by the disclosed portions of the records package and the College's submissions, that during this communication the Legal Counsel provided legal advice to Employee AK and was, therefore, acting in a legal capacity. I am satisfied she was not, for example, providing business, financial, or policy advice.

June 15, 2020 email chain between the Chief Legal Counsel and the Deputy Registrar

[39] Based on the disclosed portions of the records package,³⁴ the withheld information appears to be the contents of an email chain between the Chief Legal Counsel and the Deputy Registrar in which the Chief Legal Counsel obtains information from the Deputy Registrar before replying to an email from the applicant.

[40] I find this email chain is a written communication between a client (the Deputy Registrar acting as agent for the College) and its legal counsel. I find that these emails form part of the continuum of communications necessary for the Chief Legal Counsel to obtain instructions from, or provide legal advice to, the College.

³² See records at 129-132.

³³ *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para 20.

³⁴ See records at 298, 299, 302, 307, 311, 426, and 428.

The communications were only between the Chief Legal Counsel and the Deputy Registrar and I conclude they were intended to be confidential. I am satisfied, based on the context provided by the undisclosed portions of the records package and the College's submissions, that the Chief Legal Counsel was acting in a legal capacity during these communications.

June 26, 2020 email from the Chief Legal Counsel to the Legal Counsel

[41] It appears that on June 26, 2020, the Chief Legal Counsel forwarded an email he received from the applicant to the Legal Counsel.³⁵ The College has withheld the body of the Chief Legal Counsel's email under s. 14.

[42] Based on the College's submissions and the disclosed portions of the records package, I find this email is an internal, confidential written communication between the Chief Legal Counsel and the Legal Counsel and I am satisfied that if disclosed, it would reveal, or allow accurate inferences to be made about, privileged information.

March 8, 2021 email chain between the Chief Legal Counsel, the Deputy Registrar and the Senior Health Monitor

[43] The subject line of this withheld email chain indicates these emails contain information about the applicant. Further, a disclosed email from the Deputy Registrar to the Senior Health Monitor dated March 9, 2021 states that he discussed the applicant's file with the Chief Legal Counsel and provides more details about this discussion.³⁶

[44] I find these March 8, 2021 emails are written communications between a client (the Deputy Registrar and the Senior Health Monitor on behalf of the College) and its legal counsel that form part of the continuum of communications necessary for the Chief Legal Counsel to provide legal advice to the College. I conclude they were intended to be confidential as they involve only the relevant parties and that the Chief Legal Counsel was acting in a legal capacity during these communications.

March 8-9, 2021 email chain between the Chief Legal Counsel and the Legal Counsel

[45] The subject line of this withheld email chain indicates these emails contain information about the applicant. Based on the College's evidence, I find these emails are internal, confidential written communications between in-house counsel about legal advice or the implications of legal advice.

³⁵ Records at 433.

³⁶ Records at 382.

March 9, 2021 note to file made by the Senior Health Monitor

[46] The College submits that the information withheld at the top of page 381 is an internal note to file made by the Senior Health Monitor on March 9, 2021 that relates to the information contained in the withheld March 8, 2021 emails between the Chief Legal Counsel, the Deputy Registrar, and the Senior Health Monitor.³⁷

[47] I found, above, that the information in the withheld March 8, 2021 email chain is protected by solicitor-client privilege. I find that this note is an internal client communication that, if disclosed, would reveal, or allow others to make accurate inferences about, information protected by solicitor-client privilege.

[48] In summary, I find that the College has established, on a balance of probabilities, that all the information at issue under s. 14 is protected by legal advice privilege.

CONCLUSION

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

1. I confirm the College's decision to refuse to disclose the information in dispute under s. 14.
2. The College is not authorized to withhold the information in dispute under s. 13(1) and is required to give the applicant access to this information. I have highlighted this information in a copy of the records provided to the College with this order.
3. The College must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant together with a copy of the records described in item 2 above.

[50] Pursuant to s. 59(1) of FIPPA, the College is required to comply with this order by **December 7, 2023**.

October 25, 2023

ORIGINAL SIGNED BY

Rene Kimmitt, Adjudicator

OIPC File No.: F21-86736

³⁷ College's supplementary submission at para 6.