



OFFICE OF THE  
INFORMATION &  
PRIVACY COMMISSIONER  
FOR BRITISH COLUMBIA

Order F23-107

## MINISTRY OF ATTORNEY GENERAL

Alexander Corley  
Adjudicator

December 18, 2023

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**Summary:** An applicant requested access to all records held by the Ministry of Attorney General related to a certain company and created within a specific time frame. The Ministry identified responsive records but withheld them in their entirety under s. 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator confirmed the Ministry's decision to withhold most, but not all, of the responsive records under s. 14. The adjudicator ordered the Ministry to release the records that were not covered by s. 14 to the applicant.

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

### INTRODUCTION

[1] An applicant requested access to all information in the custody and control of the Ministry of Attorney General (Ministry) regarding: a licensing application for a cannabis company (company); any complaints made against the company; and, any assessments or investigations of the company or its directors undertaken by the Ministry of Public Safety and Solicitor General (PSSG).<sup>1</sup> The time frame for the request was from September 1, 2019 to October 16, 2021.<sup>2</sup>

[2] In response, the Ministry advised the applicant that it was withholding all responsive records pursuant to s. 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC). Mediation did not resolve the matter and the applicant requested that it proceed to an inquiry.

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<sup>1</sup> Investigator's Amended Fact Report (amended November 21, 2023) at para. 1; Applicant's Submission at para. 2.

<sup>2</sup> Investigator's Amended Fact Report at para. 1; Applicant's Access Request.

## ***Preliminary Matters***

### *Scope of inquiry and appropriate public body*

[4] The applicant submitted their access request to both PSSG and the Ministry and received separate responses from each, including receiving some responsive records from PSSG.<sup>3</sup> During the submissions period of this inquiry, it became apparent that there was confusion between the parties concerning which public body was the subject of this inquiry and which records were appropriately in scope.<sup>4</sup> Some of this confusion was created by the OIPC's own administrative error in listing PSSG and not the Ministry as a party to this inquiry on the investigator's fact report and notice of inquiry originally issued to the parties.

[5] After the parties' submissions were received, the OIPC wrote to the parties to clarify that the only decision that is under review in this inquiry is the Ministry's November 17, 2021 decision to refuse access to its records under s. 14 of FIPPA.<sup>5</sup> The OIPC also amended the fact report and notice of inquiry to name the Ministry, not PSSG, as the public body.

[6] Based on the communication between the OIPC and the parties, I consider any issues regarding which public body is a proper party to this inquiry and which records are in scope for this inquiry to be settled. I move forward in this order on the basis that the Ministry is the appropriate public body and only the documents withheld by the Ministry under s. 14 in response to the applicant's access request are properly in issue before me. To the extent that the parties' submissions address matters outside the scope of this inquiry, I will not consider or refer to them in this order.

### *Applicant's submission – ongoing disclosure obligation*

[7] The applicant argues that upon receiving the access request, the Ministry took on an ongoing obligation to continue to provide the applicant with records created after the date the access request was received.<sup>6</sup>

[8] The applicant's access request clearly indicated that they were only requesting records created between September 1, 2019 and October 16, 2021.<sup>7</sup> I am not aware of any authority for the proposition that receipt of a FIPPA access request for records created within a certain date range places an ongoing obligation on a public body to disclose records created outside of that range.

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<sup>3</sup> Applicant's Access Request; Public Body's Reply Submission at paras. 3-7.

<sup>4</sup> Applicant's Submission at paras. 4-10; Public Body's Reply Submission at paras. 3-7.

<sup>5</sup> Director of Adjudication's November 21, 2023 letter to the parties, which was accompanied by the amended Fact Report and Notice of Inquiry.

<sup>6</sup> Applicant's Submission at para. 12.

<sup>7</sup> Investigator's Amended Fact Report at para. 1; Applicant's Access Request.

[9] Given this, I find that any records created after October 16, 2021 are not responsive to the applicant's access request and are therefore not in issue in this inquiry. If the applicant wishes to request records created after October 16, 2021 they are free to submit a further access request to the Ministry.

## **ISSUE**

[10] In this inquiry I must decide whether s. 14 authorizes the Ministry to withhold the information in dispute.

[11] Under s. 57(1) of FIPPA, the Ministry bears the burden of proving that the applicant has no right of access to the information the Ministry has withheld under s. 14.

## **DISCUSSION**

### ***Background***

[12] The applicant is one of the company's directors.<sup>8</sup> The company is a cannabis "licensee" subject to the *Cannabis Control and Licensing Act*.<sup>9</sup> As such, the company and any persons affiliated with the company, including the applicant and the other directors, were at all times required to maintain the status of "fit and proper" holders of the cannabis license issued to the company by the Liquor and Cannabis Regulation Branch (LCRB), a division of PSSG.<sup>10</sup>

[13] In June 2021, information came before the LCRB regarding conduct by one of the company's directors which called into question the status of the company as a "fit and proper" cannabis licensee.<sup>11</sup> As a result of receiving this information, the LCRB initiated a "fit and proper" investigation into the company (investigation).<sup>12</sup> As part of the investigation, the LCRB communicated with other branches of PSSG and contacted the Ministry.<sup>13</sup> The parties' submissions do not address the outcome or current status of the investigation.

### ***Records in dispute***

[14] As I explain below, the Ministry did not provide the records in dispute for my review. Instead, the Ministry provided affidavit evidence from a lawyer

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<sup>8</sup> Applicant's Submission at para. 3.

<sup>9</sup> SBC 2018, c. 29. See s. 1, definition of "licensee" and division 1.1 – Fit and Proper Determinations.

<sup>10</sup> Lawyer's Affidavit at para. 7.

<sup>11</sup> Lawyer's Affidavit at para. 8.

<sup>12</sup> *Ibid.*

<sup>13</sup> Lawyer's Affidavit at paras. 8-9.

(Lawyer) employed by the Ministry's Legal Services Branch (LSB) who deposes that they worked with PSSG and the LCRB both before and during the investigation.<sup>14</sup> The Lawyer's affidavit includes a table of records setting out, for each record in dispute, the number of pages in the record, the date range across which the record was created, and a description of the record (table).<sup>15</sup> Where the record at issue is an e-mail chain, the table also includes a description of the parties included on the e-mail chain and states whether any of the e-mails in the chain includes attachments.

[15] The table also indicates that there are two packs of records in dispute. An initial pack containing 11 separate records totalling 245 pages (initial records), and an additional pack containing four separate records totalling 34 pages (additional records).

[16] The Ministry, relying on the Lawyer's evidence, submits that the records at issue are a combination of:

1. E-mail chains, some with attachments, between PSSG and LSB legal counsel (external e-mails);<sup>16</sup>
2. E-mail chains without attachments internal to LSB (internal e-mails);<sup>17</sup>
3. Handwritten notes taken by a LSB lawyer (handwritten notes);<sup>18</sup>
4. Two documents titled "LCRB Review" and "LCRB Report" (LCRB documents) which were contained in LSB lawyers' working files;<sup>19</sup> and,
5. A draft letter containing LSB lawyers' notes, comments, and edits (draft letter).<sup>20</sup>

[17] The applicant does not address the Ministry's description of the records in their submission.

[18] Based on the evidence before me, including the Lawyer's evidence that they reviewed the records when preparing their affidavit, and the details in the table, I accept the Ministry's description of the records.<sup>21</sup> I find there are 15

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<sup>14</sup> Lawyer's Affidavit at paras. 1-2 and 9.

<sup>15</sup> Table of Records, Exhibit "A" to Lawyer's Affidavit.

<sup>16</sup> Public Body's Initial Submission at para. 34(a)-(d) and (g)-(h); Initial Records 1-3 and 6-10; Additional Record 3.

<sup>17</sup> Public Body's Initial Submission at para. 34(e)-(f); Initial Records 4-5.

<sup>18</sup> Public Body's Initial Submission at para. 34(i); Initial Record 11.

<sup>19</sup> Public Body's Initial Submission at para. 34(j); Additional Records 1-2; See also, Public Body's Reply Submission at paras. 23-24.

<sup>20</sup> Public Body's Initial Submission at para. 34(k); Additional Record 4.

<sup>21</sup> Lawyer's Affidavit at para. 4.

distinct records in dispute totalling 279 pages and that each of the 15 records falls within one of the five categories set out above.

### **Solicitor-Client Privilege – s. 14**

[19] The Ministry has applied s. 14 to withhold all the information in dispute. 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 context of s. 14 encompasses both legal advice privilege and litigation privilege.<sup>22</sup> The Ministry is only claiming legal advice privilege.<sup>23</sup>

### **Evidentiary basis for solicitor-client privilege**

[20] The Ministry did not provide the records in dispute for my review. Instead, the Ministry provided the Lawyer’s affidavit, attaching the table as an exhibit. Based on the information in the affidavit and the table, as supplemented by the Ministry’s submissions, the Ministry submits that it has provided sufficient evidence to prove its claim of privilege and it is not obligated to disclose privileged records to the OIPC for inspection.<sup>24</sup>

[21] The applicant is clearly concerned with how the Ministry has applied s. 14 to the records but does not argue that the Ministry needs to provide the records for my review.

[22] The Commissioner has the power, under s. 44 of FIPPA, to order production of records over which solicitor-client privilege is claimed.<sup>25</sup> However, given the importance of solicitor-client privilege, the Commissioner will only order production of records being withheld under s. 14 when it is necessary to decide the issues in dispute.<sup>26</sup>

[23] For the reasons that follow, I determined that I have enough information to decide whether s. 14 applies to the records.

[24] I am satisfied that the Lawyer reviewed the records before swearing their affidavit and therefore has direct knowledge of the content and context of the records.<sup>27</sup> The Lawyer’s affidavit evidence also provides an explanation regarding the records and the foundation for the Ministry’s assertion that each

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<sup>22</sup> *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.

<sup>23</sup> Public Body’s Initial Submission at para. 15.

<sup>24</sup> Public Body’s Initial Submission at paras. 29 and 31-32.

<sup>25</sup> Section 44(1)(b) of FIPPA states the Commissioner may order the production of records, and s. 44(2.1) reinforces that such a production order may apply to a record that is subject to solicitor-client privilege.

<sup>26</sup> Order F19-21, 2019 BCIPC 23 at para. 61.

<sup>27</sup> Lawyer’s Affidavit at para. 4.

record is privileged.<sup>28</sup> Further, I am also able to rely on the information in the table which provides additional detail about the records. Finally, I note the Lawyer's evidence is that they are a practicing lawyer and therefore an officer of the court.<sup>29</sup> As such, the Lawyer has a professional duty to ensure that privilege is properly claimed.<sup>30</sup>

[25] Based on the above, I find that the Ministry's evidence is sufficient for me to decide whether s. 14 applies to the records and it is not necessary to order production of the records for my review. I turn next to the question of whether, on the evidence before me, the Ministry has made out its claim of privilege under s. 14.

### **Legal advice privilege**

[26] As noted above, the Ministry is withholding all the records at issue under legal advice privilege.<sup>31</sup> Legal advice privilege applies to communications that:

1. Are between solicitor and client;
2. Entail the seeking or giving of legal advice; and
3. Are intended by the parties to be confidential.<sup>32</sup>

[27] Not every communication between a solicitor and their client is privileged; however, if the conditions above are satisfied, then legal advice privilege applies.<sup>33</sup>

[28] Furthermore, it is not only the direct communication of advice between solicitor and client that may be privileged. The "continuum of communications" related to the advice, that would reveal the substance of the advice, attracts the privilege.<sup>34</sup> The "continuum of communications" has been held to include the necessary exchange of information between solicitor and client for the purpose of obtaining legal advice, such as where a client furnishes information to their solicitor to assist the solicitor in providing informed legal advice.<sup>35</sup>

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<sup>28</sup> Lawyer's Affidavit at paras. 10 and 12-15.

<sup>29</sup> Lawyer's Affidavit at para. 1.

<sup>30</sup> See *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 [*Finance*] at para. 86. See also Order F20-16, 2020 BCIPC 18 at para. 10 and *Nelson and District Credit Union v. Fiserv Solutions of Canada, Inc.* (Master), 2017 BCSC 1139 [*Nelson*] at para. 54.

<sup>31</sup> The Ministry's submission also includes an alternative argument that two of the records are subject to "solicitor's brief privilege". I consider this argument below when discussing those specific records.

<sup>32</sup> *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 [*Solosky*] at 837; Order F22-36, 2022 BCIPC 40 at para. 22.

<sup>33</sup> *Solosky*, *ibid* at 829 and 837.

<sup>34</sup> *Bilfinger Berger (Canada) Inc v. Greater Vancouver Water District*, 2013 BCSC 1893 [*Bilfinger*] at paras. 22-24. See also *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 [*Lee*] at paras. 32-33.

<sup>35</sup> See *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp*] at para. 40 where the court found that "[i]t is [the] chain of

[29] Legal advice privilege applies equally to in-house counsel working on behalf of government where the elements of the test set out above are met. However, not everything done by a government lawyer is protected by solicitor-client privilege, as a government lawyer may also have work duties outside of providing legal advice.<sup>36</sup>

[30] Concerning attachments to e-mails, solicitor-client privilege does not necessarily apply to all attachments.<sup>37</sup> However, attachments may, depending on their content, be privileged on their own, independent of being attached to an e-mail which is itself privileged. Further, an attachment may be privileged if it constitutes an integral part of the communication to which it is attached and disclosure of the attachment would reveal, or allow accurate inferences to be drawn about, privileged information contained in that communication.<sup>38</sup> The party claiming privilege over an attachment must provide some basis for that claim.<sup>39</sup>

*The Ministry's position on legal advice privilege*

[31] The Ministry submits that the records are all confidential communications between PSSG as client and LSB lawyers for the purposes of seeking, formulating, or providing legal advice, or the records fall within the continuum of privileged communications between the same parties and would reveal legal advice if disclosed.<sup>40</sup>

[32] The Ministry makes the following submissions about the records:

**External e-mails** – The Ministry says that these e-mail chains are between LSB lawyers and PSSG as client and discuss client requests for legal advice, legal guidance, and legal opinions. The Ministry's evidence is that where these e-mails contain attachments, those attachments in each case either: relate to the matters discussed in the e-mails and were required to inform the advice that PSSG sought from LSB lawyers;<sup>41</sup> or, were themselves the subject of the legal advice sought.<sup>42</sup>

**Internal e-mails** – The Ministry says that these records are e-mail chains among LSB lawyers and either relate to organizing a meeting to discuss legal issues and advice or directly discuss legal advice to be provided to PSSG as client.<sup>43</sup>

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exchanges or communications [between lawyer and client] and not just the culmination of the lawyer's product or opinion that is privileged".

<sup>36</sup> Order F17-23, 2017 BCIPC 24 at para. 40 and note 38, citing *R v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565 at para. 49.

<sup>37</sup> *Finance*, *supra* note 30 at para 110.

<sup>38</sup> Order F20-08, 2020 BCIPC 9 at para. 27 and Order F18-19, 2018 BCIPC 22 at paras. 36-40.

<sup>39</sup> *Finance*, *supra* note 30 at para. 111.

<sup>40</sup> Public Body's Initial Submission at paras. 36 and 38-40.

<sup>41</sup> See Table of Records, *supra* note 15 at Initial Records 1-3, 6-8, and 10; Additional Record 3.

<sup>42</sup> Lawyer's Affidavit at para. 13.

<sup>43</sup> Lawyer's Affidavit at paras. 10(e) and (f).

**Handwritten notes** – The Ministry says that this document consists of a LSB lawyer’s handwritten notes documenting a phone call between that lawyer and PSSG as client.<sup>44</sup>

**LCRB documents** – The Ministry says that the LCRB documents were “stored in LSB lawyers’ files [and] relied on in providing legal advice to [the client]”.<sup>45</sup> The Ministry submits that the LCRB documents form part of the continuum of communications between LSB lawyers and PSSG within the framework of an ongoing solicitor-client relationship.<sup>46</sup> In the alternative, the Ministry submits that the LCRB documents are subject to “solicitor’s brief privilege” as that concept is explained in the BC Supreme Court decision of *Keefer Laundry Ltd v Pellerin Milnor Corp [Keefer Laundry]*.<sup>47</sup>

**Draft letter** – The Ministry says the draft letter contains notes, edits, and comments made by LSB lawyers.<sup>48</sup>

[33] The Lawyer also specifically attests their belief, based on their involvement in the file and understanding of the relationship between LSB lawyers and PSSG as client, that all parties who received or were involved in creating the information in the records would have treated that information as confidential.<sup>49</sup>

#### *The applicant’s position on legal advice privilege*

[34] For reasons which will become apparent below, I do not find that the applicant’s arguments assist me in determining whether the Ministry has properly applied s. 14 to the records at issue. As such, I take the opportunity in this section to both summarize and dispose of those arguments before moving on.

[35] The applicant’s arguments regarding solicitor-client privilege can be grouped into two categories: broad or “general” arguments related to rights breaches which will occur if the Ministry is allowed to withhold the information in dispute under s. 14;<sup>50</sup> and, a specific argument regarding the privileged status of the LCRB documents.<sup>51</sup> I deal with each category in turn.

#### Applicant’s broad arguments

[36] At their core, the applicant’s broad arguments centre on the same principle. Namely, that it is inappropriate for the Ministry to rely on a claim of

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<sup>44</sup> Lawyer’s Affidavit at para. 10(i).

<sup>45</sup> Lawyer’s Affidavit at para. 10(j).

<sup>46</sup> Public Body’s Initial Submission at para. 40; Public Body’s Reply Submission at paras. 24-25.

<sup>47</sup> Public Body’s Initial Submission at paras. 23 (bullet point four, citing *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, [2006] BCJ No. 1761, [2006 BCSC 1180] at para. 103) and 34(j).

<sup>48</sup> Lawyer’s Affidavit at para. 10(k).

<sup>49</sup> Lawyer’s Affidavit at para. 15.

<sup>50</sup> See Applicant’s Submission at paras. 13-14 and 22.

<sup>51</sup> See Applicant’s Submission at para. 21. The applicant did not specifically address any of the other records in dispute.

solicitor-client privilege to deny the applicant access to records where the applicant's rights under FIPPA will be impinged if the applicant is not granted access to the information contained in the records.<sup>52</sup>

[37] I am alive to the applicant's concern that overbroad applications of solicitor-client privilege can erode the public's right of access under FIPPA. However, the law on this point is clear that solicitor-client privilege is a categorical or class privilege that does not require or allow for a case-by-case balancing of competing interests or a weighing of the harm that might result from privileged records being withheld.<sup>53</sup>

[38] On this basis, I find that the applicant's arguments regarding the effect which the Ministry withholding the records may have on the applicant's rights under FIPPA are not relevant to my decision whether s. 14 authorizes the Ministry to withhold the records in dispute.

#### Applicant's specific argument

[39] Regarding the LCRB documents, the applicant submits that,

[The Lawyer] makes no reference to the documents utilized to underpin the development of [the LCRB documents] and therefore, there can be no substantive claim of client-solicitor privilege and the underpinning documents should therefore be surrendered as they [are responsive to the access request].<sup>54</sup>

[40] I do not know what the applicant is referring to when they reference "the documents utilized to underpin the development of [the LCRB documents]". The applicant appears to be arguing that these "underpinning" documents should be released, not the LCRB documents themselves. However, there is no evidence before me that these "underpinning" documents exist and, in any event, they are not in dispute in this inquiry.

[41] Therefore, I find that the applicant's submissions regarding the LCRB documents do not assist me in deciding whether s. 14 applies to those documents.

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<sup>52</sup> The applicant also makes a broad reference to infringement of rights granted by the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11. However, the applicant does not provide sufficient information regarding which rights they allege will be infringed or how those rights will be infringed to enable me to seriously engage with their submission on this point: see Applicant's Submission at para. 22.

<sup>53</sup> See Order F13-15, 2013 BCIPC 18 at para. 18, citing *R v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263 at para. 26. See also Order F20-01, 2020 BCIPC 1 at paras. 80-81, citing *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 at para. 35. I note that Order F20-01 was the subject of a judicial review. However, the adjudicator's analysis on s. 14, which I rely on in this order, was not challenged: See petition filed in BC Supreme Court Feb. 19, 2020, VIC-S-S-200745.

<sup>54</sup> Applicant's Submission at para. 21.

*Analysis – solicitor-client privilege*

[42] I now move on to assessing the Ministry's claim of solicitor-client privilege under s. 14 in light of the parties' submissions.

[43] I note that the Lawyer's unchallenged evidence is that all parties who created, received, or shared the records would have understood them to be confidential. I accept this evidence and find that the records were intended to be kept confidential.

[44] Therefore, I consider below the other two steps in the legal advice privilege test.<sup>55</sup> Namely, whether the communications in question were between solicitor and client, and whether those communications entailed the seeking or giving of legal advice.

**Who is the client?**

[45] To determine whether the records are communications between a solicitor and their client, I must first determine who qualifies as the client.

[46] The Ministry submits that the "client" should not be defined restrictively, nor technically, nor as a term of art; rather, that the client is simply the person or entity who receives legal services from counsel.<sup>56</sup> The Ministry further submits that the client for purposes of this inquiry was, at all times, His Majesty the King in right of British Columbia, also known as the government of British Columbia.<sup>57</sup>

[47] Prior orders question and reject the reasoning employed by the Ministry in asserting that the client for purposes of this inquiry is the government of British Columbia as a whole.<sup>58</sup> However, based on the evidence before me, for the reasons that follow, it is not necessary that I make a finding regarding the Ministry's broad pronouncements on the identity of the "client" in order to resolve the matters in issue.

[48] It is clear from the Ministry's submissions and evidence that LSB lawyers communicated with PSSG both before and during the investigation.<sup>59</sup> Furthermore, the Lawyer deposes that: they have personally been in a solicitor-client relationship with PSSG since 2017;<sup>60</sup> they specifically advised PSSG

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<sup>55</sup> I also consider below the Ministry's alternative argument that the LCRB documents are subject to "solicitor's brief privilege".

<sup>56</sup> Public Body's Initial Submission at para. 35, citing *Baker v. Commercial Union Assurance Co of Canada*, 1995 NSCA 32.

<sup>57</sup> Public Body's Initial Submission at para. 36, citing s. 29 of the *Interpretation Act*, RSBC 1996, c. 238 for the proposition that the King in right of BC is the same as the government of BC.

<sup>58</sup> See, for example, Order F23-51, 2023 BCIPC 59 at paras. 27-28 and 41-45.

<sup>59</sup> Public Body's Initial Submission at paras. 10-14; see also Initial Records 8 and 10 which are dated prior to commencement of the investigation but explained by the Lawyer as containing requests for legal advice sent to LSB by PSSG: Lawyer's Affidavit at para. 10.

<sup>60</sup> Lawyer's Affidavit at para. 6.

regarding the investigation;<sup>61</sup> and other lawyers within LSB also advised PSSG, communicated with the Lawyer regarding that advice, and sought advice from the Lawyer regarding their representation of PSSG.<sup>62</sup>

[49] Based on the background information provided by the Ministry and the Lawyer's evidence, which I accept, I find that the Lawyer and their LSB colleagues were in a solicitor-client relationship with PSSG at all relevant times.

### **Seeking or giving of legal advice?**

[50] I will now consider whether each of the records constitutes a communication between LSB and PSSG which entails the seeking or giving of legal advice.

#### External e-mails<sup>63</sup>

[51] The Ministry's evidence is that these e-mail chains contain messages between LSB lawyers and PSSG representatives and all either: contain requests from PSSG to LSB lawyers for legal advice or legal opinions; provide legal advice to PSSG; or provide documents and information to LSB lawyers which were required to inform the legal advice requested by PSSG.<sup>64</sup> Further, where these e-mail chains contain attachments, the Lawyer deposes that in each case the "attachments were either required to inform the advice that PSSG had sought from LSB legal counsel or were themselves the subject of the legal advice sought by PSSG".<sup>65</sup>

[52] I accept the Lawyer's evidence that the external e-mails were sent and received between PSSG and LSB lawyers for purposes related to the seeking and giving of legal advice. I also accept the Lawyer's evidence that any attachments to the external e-mails are integral parts of the solicitor-client communications represented by those e-mails.

[53] Based on the above, I find that the external e-mails, including attachments, are protected by legal advice privilege and the Ministry may withhold them on that basis.

#### Internal e-mails<sup>66</sup>

[54] The Ministry's evidence is that these e-mail chains contain messages between LSB legal counsel and are discussions regarding legal advice to be provided to PSSG and coordination of an internal meeting to discuss legal issues and advice relevant to PSSG.<sup>67</sup>

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<sup>61</sup> Lawyer's Affidavit at para. 9.

<sup>62</sup> *Ibid.*

<sup>63</sup> Initial Records 1-3, 6-10; Additional Record 3.

<sup>64</sup> Lawyer's Affidavit at para. 10(a)-(d) and (g)-(h).

<sup>65</sup> Lawyer's Affidavit at para. 13.

<sup>66</sup> Initial Records 4 and 5.

<sup>67</sup> Public Body's Initial Submission at paras. 34(e) and (f).

[55] It is well established that communications between lawyers who are working together to give legal advice to a client fall within the scope of a communication between a legal advisor and client.<sup>68</sup> I see no reason to deviate from this principle here.

[56] Based on the Lawyer's evidence that LSB and PSSG were in a solicitor-client relationship at the time the internal e-mails were sent and received and that the internal e-mails concern discussions relevant to the legal advice which LSB provided to PSSG, I find that the internal e-mails are properly covered by legal advice privilege and the Ministry may withhold them on that basis.

Handwritten notes<sup>69</sup>

[57] The Ministry's evidence is that these notes were composed by a LSB lawyer during or immediately following a phone call between that lawyer and PSSG for the purpose of documenting the content of that phone call.<sup>70</sup>

[58] Recently, in Order F23-91,<sup>71</sup> the adjudicator considered under what circumstances a lawyer's handwritten notes may be subject to legal advice privilege. The adjudicator found one such circumstance to be "where the handwritten notes are related to ... privileged communications between the lawyer and the client".<sup>72</sup> Without finding it necessary to reproduce the full analysis undertaken by the adjudicator or the thrust of the authorities which they relied on, I accept the adjudicator's conclusion on this point and adopt the reasoning underlying it.

[59] Here, the evidence before me demonstrates that PSSG and the LSB lawyer who composed the handwritten notes were in a solicitor-client relationship at the time the phone call took place. Therefore, I find that the phone call was a communication between solicitor and client. Considering whether the information exchanged during the phone call entailed the seeking or giving of legal advice, I do not have evidence before me regarding the specific content or character of the phone call.

[60] However, the Lawyer deposes that: they reviewed all of the records, including the handwritten notes, when composing their affidavit; that it is their professional opinion that disclosing the records would reveal privileged information; and, that they cannot be more specific about the nature of the records without risking inadvertent disclosure of the legal advice at issue.<sup>73</sup> Considering all of this, I find that the phone call was a privileged communication.

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<sup>68</sup> Order F20-16, *supra* note 30 at para. 65, citing Order F15-41, 2015 BCIPC 44 and Order F20-01, *supra* note 53.

<sup>69</sup> Initial Record 11.

<sup>70</sup> Lawyer's Affidavit at para. 10(i).

<sup>71</sup> 2023 BCIPC 107.

<sup>72</sup> *Ibid* at para. 91, citing Order F18-46, 2018 BCIPC 49 at paras. 22-23 and Order F23-78, 2023 BCIPC 94 at paras. 27 and 38.

<sup>73</sup> Lawyer's Affidavit at paras. 4, 12, and 14.

[61] Based on the above, I find that the handwritten notes would reveal the substance of “[a] privileged communication[] between [a] lawyer and [a] client” and are appropriately covered by legal advice privilege on that basis.

Draft letter<sup>74</sup>

[62] The Ministry submits that this record is a draft of a letter which contains comments and edits made by LSB lawyers.<sup>75</sup> Legal advice privilege clearly applies to draft documents authored or edited by lawyers as part of providing legal advice to clients.<sup>76</sup>

[63] As with the handwritten notes considered above, I have the Lawyer’s evidence that they reviewed the draft letter and the comments it contains, that releasing the draft letter would allow accurate inferences to be drawn about legal advice which LSB provided to PSSG, and that the lack of further information regarding the draft letter was an intentional choice by the Lawyer to avoid inadvertently disclosing privileged information. I can also see from the table that the draft letter is dated around the time that e-mails I found above were privileged were sent between PSSG and LSB.<sup>77</sup>

[64] Further information regarding the draft letter, particularly a clear statement that it was prepared for and/or edited on behalf of PSSG as client would have been preferable in this case and allowed for an easier determination as to the privileged status of this record. However, on a balance of probabilities, I find that the Ministry has established that the draft letter and the edits and comments it contains are covered by legal advice privilege.

LCRB documents<sup>78</sup>

[65] The Ministry makes two distinct arguments regarding the LCRB documents. First, the Ministry submits that the LCRB documents form part of the continuum of privileged communications between PSSG and LSB and are subject to legal advice privilege on that basis.<sup>79</sup> Second, the Ministry submits that the LCRB documents are subject to “solicitor’s brief privilege” which the Ministry asserts is a distinct sub-category of solicitor-client privilege protected by s. 14.<sup>80</sup>

[66] Below, I first consider whether the Ministry’s evidence demonstrates that the LCRB documents fall within the continuum of privileged communications between PSSG and LSB. Finding that it does not, I then consider the Ministry’s submissions related to solicitor’s brief privilege.

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<sup>74</sup> Additional Record 4.

<sup>75</sup> Public Body’s Initial Submission at para. 34(k).

<sup>76</sup> See Order F20-01, *supra* note 53 at para. 50 and the authorities cited therein.

<sup>77</sup> See Table of Records, *supra* note 15 at Initial Records 2 and 6

<sup>78</sup> Additional Records 1 and 2.

<sup>79</sup> Public Body’s Initial Submission at para. 40; Public Body’s Reply Submission at para. 25.

<sup>80</sup> Public Body’s Initial Submission at para. 23, fourth bullet.

### Continuum of communications

[67] The Ministry submits that the LCRB documents are part of the “continuum of communications” within the solicitor-client relationship between PSSG and LSB lawyers and are privileged on that basis.<sup>81</sup>

[68] The concept of the “continuum of communications” protects information exchanged between lawyer and client that would reveal the substance of the legal advice sought.<sup>82</sup> The “continuum of communications” also includes the necessary exchange of information between solicitor and client for the purpose of obtaining legal advice, such as where a client furnishes information to their solicitor to assist the solicitor in providing informed legal advice, whether or not this information would itself reveal legal advice if disclosed.<sup>83</sup>

[69] The Ministry does not provide clear evidence regarding how the LCRB documents came to be located within the LSB lawyers’ files, but submits that,

- LSB would not have been able to obtain the LCRB documents unless PSSG provided them to LSB; and,
- The Lawyer’s evidence is that the LCRB documents were, in fact, relied on by LSB lawyers in providing legal advice to PSSG.<sup>84</sup>

[70] In Order F20-01, the adjudicator considered how to resolve a similar situation where records were related to a client’s operations, found within lawyers’ files, and ostensibly relied on in providing legal advice to the client, but the public body did not provide clear evidence regarding how the documents came into the lawyers’ possession.<sup>85</sup> Ultimately, the adjudicator found that the documents in question were not covered by legal advice privilege.<sup>86</sup> Explaining their reasoning, the adjudicator stated, in part:

I cannot tell from the evidence before me ... whether these documents got into the [lawyers’] files as a result of actual solicitor client communications. Nor can I determine who provided, obtained or created each specific document or whether each document was ‘created for the purpose of giving or receiving legal advice’ [citations omitted].<sup>87</sup>

[71] Here, the Ministry invites me to find that the LCRB documents must have been provided to LSB by PSSG given that LSB would not otherwise have been able to obtain them. However, I decline to make such a finding based only on a probabilistic inference supported by no evidence. Therefore, I find myself in the

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<sup>81</sup> Public Body’s Initial Submission at para. 40; Public Body’s Reply Submission at para. 25.

<sup>82</sup> *Bilfinger*, *supra* note 34 at paras. 22-24. See also *Lee*, *supra* note 34 at paras. 32-33.

<sup>83</sup> See *Camp*, *supra* note 35 at para. 40.

<sup>84</sup> Public Body’s Reply Submission at para. 24.

<sup>85</sup> Order F20-01, *supra* note 53 at paras. 68-76.

<sup>86</sup> *Ibid* at para. 76.

<sup>87</sup> *Ibid* at para. 74.

same position as the adjudicator in Order F20-01 and I see no reason to reach a different conclusion in this case than was reached in that order.

[72] I find that the Ministry has not met their burden of proving that the LCRB documents are subject to legal advice privilege because they fall within the “continuum of communications” exchanged between PSSG and LSB.

#### Solicitor’s brief privilege

[73] Relying on *Keefer Laundry*, the Ministry asserts that the LCRB documents are protected by “solicitor’s brief privilege” which the Ministry submits is a distinct sub-category of solicitor-client privilege under s. 14. The Ministry submits that solicitor’s brief privilege applies to a lawyer’s “[w]ork product, [and] notes, communications and documents collected by lawyers from third parties for the purpose and formulating of [sic] giving legal advice to clients[.]”<sup>88</sup>

[74] In further support of this submission, the Ministry says the LCRB documents are “[d]ocuments stored in LSB lawyers’ files which were relied on in providing legal advice to clients”.<sup>89</sup> The Ministry relies on the Lawyer’s evidence that, in the Lawyer’s experience, “most of what is saved in a lawyer’s file is subject to solicitor-client privilege”.<sup>90</sup>

[75] There is some question whether solicitor’s brief privilege as explained in *Keefer Laundry* and relied on by the Ministry applies where a public body is not relying on the litigation privilege branch of s. 14. Recently, in Order P23-06, which dealt with solicitor-client privilege under s. 23(3)(a) of the *Personal Information Protection Act* (PIPA), the adjudicator charted the development of “solicitor’s brief” or “lawyer’s brief” privilege in British Columbia and distilled the following general principles, which I adopt in full [citations omitted]:<sup>91</sup>

- Although *Keefer Laundry* posits it as a distinct class of privilege, many decisions, including some relied on in *Keefer Laundry*, consider solicitor’s brief privilege to be a branch of, or simply another name for, litigation privilege;<sup>92</sup>
- The comments in *Keefer Laundry* related to a lawyer’s notes or similar materials prepared for the purpose of giving legal advice outside the litigation context do not need to be interpreted as creating a new class of privilege given that, if they are appropriately

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<sup>88</sup> Public Body’s Initial Submission at para. 23, fourth bullet.

<sup>89</sup> Public Body’s Initial Submission at para. 34(j).

<sup>90</sup> Lawyer’s Affidavit at para. 5.

<sup>91</sup> 2023 BCIPC 63 at paras. 85-91.

<sup>92</sup> *Ibid* at paras. 87-88 and 90.

privileged, these documents will fall within the continuum of communications protected by legal advice privilege;<sup>93</sup> and,

- If solicitor’s brief privilege is a distinct class of privilege, it will only apply where there is an exercise of judgment and skill on the part of the lawyer or lawyers who assembled the allegedly privileged information.<sup>94</sup>

[76] The adjudicator concluded that “solicitor-client privilege” in the context of s. 23(3)(a) of PIPA does not include “lawyer’s brief privilege” as a distinct type of privilege. I agree and find the same conclusion applies in the context of s. 14 of FIPPA. The term “solicitor-client privilege” in s. 14 does not include solicitor’s brief privilege as a distinct class of privilege. Rather, s. 14 recognizes solicitor’s brief privilege solely under the litigation privilege branch of solicitor-client privilege. As the Ministry has not led any evidence that the records are subject to litigation privilege, I do not find solicitor’s brief privilege to be applicable in this case.

[77] However, if I am wrong and solicitor’s brief privilege is a distinct class of privilege under s. 14, I still would not find it applicable here. As noted above, *Keefe Laundry* is clear that the privilege will only apply where the allegedly privileged information was assembled based on an exercise of judgment and skill by a lawyer.

[78] Here, as I explained above when considering the LCRB documents’ place within the “continuum of communications”, the Ministry has not led any clear evidence demonstrating how the LCRB documents came to be in LSB’s possession or located within LSB lawyers’ files. Given this, I am unable to conclude that any lawyer exercised judgment or skill in collecting the LCRB documents and placing them within their file.

[79] In all of the circumstances, I find that solicitor’s brief privilege does not apply to the LCRB documents.

#### Conclusion – LCRB documents

[80] I conclude that the Ministry has not established that the LCRB documents fall within the “continuum of communications” exchanged between PSSG and LSB. I further conclude that the Ministry has not established that the LCRB documents are subject to “solicitor’s brief privilege”. The Ministry did not make any other arguments regarding how s. 14 applies to the LCRB documents or their contents. Based on all of the above, I find that solicitor-client privilege does not apply to the LCRB documents and the Ministry must release them to the applicant.

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<sup>93</sup> *Ibid* at para. 89.

<sup>94</sup> *Ibid* at paras. 85 and 92.

*Conclusion – solicitor-client privilege*

[81] I have found above that the Ministry’s evidence demonstrates that the external e-mails, internal e-mails, handwritten notes, and draft letter are subject to legal advice privilege and the Ministry may withhold those records on that basis. I have further found that the LCRB documents are not subject to solicitor-client privilege and the Ministry must release them to the applicant on that basis.

**CONCLUSION**

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

1. Subject to item 2 below, I confirm, in part, the Ministry’s decision to withhold the records in dispute pursuant to s. 14 of FIPPA.
2. The Ministry must provide the applicant with the LCRB documents, which are listed in the Table of Records as entries 1 and 2 of the Additional Records Package.
3. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described at item 2 above.

[83] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by February 1, 2024.

December 18, 2023

**ORIGINAL SIGNED BY**

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Alexander Corley, Adjudicator

OIPC File No.: F21-88168