



Order P24-03

## **GUILD YULE LLP**

David S. Adams  
Adjudicator

February 7, 2024

CanLII Cite: 2024 BCIPC 13  
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**Summary:** An applicant requested his personal information from Guild Yule LLP (GY), a law firm, under the *Personal Information Protection Act* (PIPA). GY had represented some of the defendants in a lawsuit in which the applicant was the plaintiff. GY disclosed some records to the applicant but withheld some of the records containing the applicant's personal information under s. 23(3)(a) of PIPA (solicitor-client privilege). The adjudicator found that GY was authorized to withhold the records because solicitor-client privilege applied to them.

**Statutes Considered:** *Personal Information Protection Act*, SBC 2003, c 63, s. 23(3)(a)

## **INTRODUCTION**

[1] Section 23(1) of the *Personal Information Protection Act* (PIPA) gives individuals the right to access their personal information under the control of an organization and the right to know how the organization has used and disclosed that information. These rights are subject to certain exceptions, one of which is the exception for solicitor-client privilege set out in s. 23(3)(a).

[2] An individual (the applicant) requested all of his personal information in the possession of Guild Yule LLP (GY) under s. 23(1) of PIPA. GY responded to the request by providing some records, but also advised the applicant that it was withholding other records under s. 23(3)(a) of PIPA.

[3] The applicant disagreed with the organization's decision and requested a review by the Office of the Information and Privacy Commissioner (OIPC). Mediation did not resolve the matter and it proceeded to inquiry.

## ISSUE AND BURDEN OF PROOF

[4] The only issue in this inquiry is whether GY may withhold certain records under s. 23(3)(a) of PIPA. Under s. 51 of PIPA, GY bears the burden of proving that the applicant has no right of access to the requested information.

### *Preliminary issue - additional matters in applicant's submissions*

[5] In his submissions, the applicant makes several references to matters outside the scope of this inquiry. Parties may not add new issues to an inquiry without the OIPC's consent. While I have read and considered all of the applicant's submissions, in this order I will refer only to the parts of them that are relevant to the issue in this inquiry.

## DISCUSSION

### Background

[6] This inquiry is the latest chapter in a very long dispute. In 2004, the applicant filed a lawsuit in the BC Supreme Court (the Action) against a medical professional who had previously provided medical services to him. GY is a law firm located in Vancouver; it represented the medical professional and the professional's insurer (together, the Clients).

[7] The Action was dismissed for want of prosecution many years later and the applicant's appeal of this dismissal was unsuccessful. GY says its file relating to the Action has been closed since 2019.<sup>1</sup>

[8] After his appeal was dismissed, the applicant requested that GY provide him with access to "all [his] information, and all records, all emails, and all correspondence, and [his] complete file with [GY]". GY says it has disclosed to the applicant all non-privileged records in its possession.<sup>2</sup> It withheld the records it says are subject to solicitor-client privilege.

### Records in dispute

[9] The records in dispute in this inquiry consist of GY's accounts and invoices, correspondence between GY lawyers and the Clients, GY's internal correspondence, and GY's internal memoranda. According to a supplementary list of records provided by GY (the List of Records), there are 629 disputed records in total.

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<sup>1</sup> GY's initial submission at paras 4-7.

<sup>2</sup> *Ibid* at paras 3 and 11.

**Solicitor-client privilege – s. 23(3)(a)**

[10] The sections of PIPA that are relevant to this inquiry say as follows:

**23** (1) Subject to subsections (2) to (5), on request of an individual, an organization must provide the individual with the following:

(a) the individual's personal information under the control of the organization;

(b) information about ways in which the personal information referred to in paragraph (a) has been and is being used by the organization;

(c) the names of the individuals and organizations to whom the personal information referred to in paragraph (a) has been disclosed by the organization.

...

(3) An organization is not required to disclose personal information and other information under subsection (1) or (2) in the following circumstances:

(a) the information is protected by solicitor-client privilege

[11] Previous orders have established that the exception for solicitor-client privilege in PIPA has the same meaning it has in s. 14 of the *Freedom of Information and Protection of Privacy Act*,<sup>3</sup> incorporating two heads of privilege: legal advice privilege (privilege protecting confidential communications between a legal advisor and their client) and litigation privilege (privilege protecting records created for the dominant purpose of preparing for litigation).<sup>4</sup>

*Production of records over which privilege is claimed*

[12] GY did not provide the records at issue for my review. Instead, it provided an affidavit from the GY lawyer (the Lawyer) who was responsible for the conduct of the Action over most of its existence. The affidavit includes a brief summary table of records. The applicant says I should review all the records over which privilege is claimed so I can decide which records are privileged.<sup>5</sup>

[13] Because of the importance of solicitor-client privilege to the legal system, the OIPC makes an exception to its usual practice of reviewing the records in

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<sup>3</sup> The *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, governs the access and use of information by public bodies in British Columbia whereas PIPA governs such access and use by non-public organizations.

<sup>4</sup> Order P06-01, 2006 CanLII 13537 (BC IPC) at para 53; Order P06-02, 2006 CanLII 32980 (BC IPC) at para 14.

<sup>5</sup> Applicant's response submission at para 6; applicant's further submission at para 3.

dispute in cases where an organization is making a claim of privilege.<sup>6</sup> The organization making a claim of privilege can choose to provide affidavit evidence instead of a copy of the disputed records. The BC Supreme Court has accepted this approach while noting that the use of affidavit evidence means that “some weight has to be given to the judgment of counsel when the [OIPC] is adjudicating claims of solicitor-client privilege”.<sup>7</sup>

[14] After reviewing GY’s initial submission and the Lawyer’s affidavit, I decided that GY had not provided sufficient information about the disputed records to allow me to make a finding on privilege. I wrote to GY to give it the opportunity to provide a more fulsome description of the records. GY responded with an additional submission and the List of Records mentioned above. The List of Records contains the date of each record, a brief description of each record, and the grounds on which GY asserts privilege over each record.

[15] I allowed the applicant to respond to this additional submission, which he did. However, except for a bare denial that the disputed records are privileged and a reiteration of his assertion that I should examine the disputed records myself,<sup>8</sup> he does not say anything relevant to GY’s claim of privilege.

[16] Having reviewed all of the parties’ submissions and evidence, I find that the List of Records, GY’s submissions, and the Lawyer’s affidavit are sufficient for me to decide whether the disputed records are privileged. I accord significant weight to the Lawyer’s affidavit evidence given that he was counsel in the Action from 2007 to 2019 and he says he has reviewed the records in dispute.<sup>9</sup> He is also a practicing lawyer, and as an officer of the court he has a professional duty to ensure privilege is properly claimed.<sup>10</sup> I therefore decline to order production of the disputed records.

### *Heads of privilege*

[17] It was not clear from GY’s initial submission which head of privilege it was relying on for each record.<sup>11</sup> However, GY says in its further submission that “solicitor-client privilege applies to each of the records”. The further submission goes on to say that each of the records “was created as part of the retainer of [GY] by the insurer to defend the insured and to provide legal advice throughout”.

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<sup>6</sup> Order P23-06, 2023 BCIPC 63 (CanLII) at para 33.

<sup>7</sup> *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 (CanLII) [*Finance*] at paras 85-86.

<sup>8</sup> At paras 1 and 3.

<sup>9</sup> Lawyer’s affidavit at para 8.

<sup>10</sup> See *Finance*, *supra* note 7 at para 86. See also Order F20-16, 2020 BCIPC 18 (CanLII) at para 10 and *Nelson and District Credit Union v. Fiserv Solutions of Canada, Inc.* (Master), 2017 BCSC 1139 at para 54.

<sup>11</sup> GY’s initial submission says at para 15 that “the records are subject to solicitor-client privilege and litigation privilege”.

Moreover, the Lawyer deposes in his affidavit that all of the records are confidential communications between GY and the Clients that were directly related to the seeking and giving of legal advice.<sup>12</sup>

[18] I infer from these statements that GY's position is that legal advice privilege applies to all of the disputed records, and that litigation privilege applies to some of them. Therefore, I will first consider whether legal advice privilege applies to all of the disputed records before turning to an analysis of litigation privilege, if necessary.

*Legal advice privilege*

[19] Legal advice privilege applies to communications between solicitor and client that entail the seeking or giving of legal advice and that are intended by the parties to be confidential.<sup>13</sup> Not all communications between a client and their lawyer are protected by legal advice privilege, but if the aforementioned elements are met, then the privilege will apply.<sup>14</sup>

[20] In addition, legal advice privilege has been held to extend beyond "the actual requesting or giving of legal advice" to include:

communications that are part of the continuum of information exchanged [between solicitors and clients], provided the object is the seeking or giving of legal advice. This continuum of communications includes information furnished by the client to the lawyer related to the advice sought, including purely factual information, and internal memoranda of the client related to the legal advice received and the implications of it...<sup>15</sup>

[21] The Supreme Court of Canada has described the purpose and importance of the privilege in these terms:

Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent...The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought...Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly

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<sup>12</sup> At para 10.

<sup>13</sup> *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at 837; *R v. B*, 1995 CanLII 2007 (BC SC) at para 22; Order P20-01, 2020 BCIPC 6 (CanLII) at para 15.

<sup>14</sup> *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 (CanLII) at para 82; *R. v. Campbell*, 1999 CanLII 676 (SCC) at para 50.

<sup>15</sup> *Ibid* at para 83.

advise their clients. It is an element that is both integral and extremely important to the functioning of the legal system.<sup>16</sup>

[22] Privilege, once established, belongs to the client and remains in place indefinitely unless it is waived by the client who possesses it.<sup>17</sup>

[23] As I mentioned above, I understand GY's submission to be saying that all the disputed records are subject to legal advice privilege.<sup>18</sup>

[24] The Lawyer deposes that he was counsel for the Clients in the Action between 2007 and 2019, and that he believes the records are:

- a. written communications between [GY and the Clients] made in [GY's] role as legal counsel;
- b. confidential in character; and
- c. directly related to seeking, information, or giving of legal advice pertaining to ongoing litigation.<sup>19</sup>

[25] The applicant denies that privilege applies to all the records and asserts that he has a right to all information about him in GY's possession.<sup>20</sup> In reply, GY says that the applicant has made no submissions on whether the disputed records are privileged and has not challenged its submission or the Lawyer's affidavit.

[26] GY divides the disputed records into several categories: accounts or invoices, correspondence with the Clients, internal correspondence, and legal memoranda. I will consider each category of records in turn.

#### Accounts or invoices

[27] The BC Court of Appeal has held that a lawyer's bills are "presumptively privileged because they are ordinarily descriptive; by recording the work done by the solicitor, they disclose the client's instructions, which the client cannot be compelled to divulge and the confidentiality of which the solicitor is obliged to protect".<sup>21</sup>

[28] GY says that its invoices are detailed and disclose information about strategy discussions between GY and the Clients, as well as the Clients' instructions.<sup>22</sup> The Lawyer deposes that the invoices describe steps taken by GY

<sup>16</sup> *Smith v. Jones*, 1999 CanLII 674 (SCC) at para 46.

<sup>17</sup> *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para 37.

<sup>18</sup> GY's initial submission at paras 15 and 22.

<sup>19</sup> Lawyer's affidavit at paras 8-10.

<sup>20</sup> Applicant's response submission at para 10; Applicant's further submission at paras 1-2.

<sup>21</sup> *Wong v. Luu*, 2015 BCCA 159 at para 38.

<sup>22</sup> GY's initial submission at paras 37-38.

and communications between GY and the Clients in relation to the defense of the Action.<sup>23</sup> I accept this evidence and am satisfied that the accounts or invoices at issue comprise privileged information, including the work done by GY and the Clients' instructions. I find that the presumption of privilege that attaches to lawyers' bills has not been rebutted both in light of the submission from GY, and because the applicant has not provided sufficient evidence or argument to rebut it.

#### Correspondence with Clients

[29] I am satisfied that the records that make up GY's correspondence with the Clients are privileged. They are, by their very nature, written communications between solicitor and client. I accept the Lawyer's evidence that they are confidential and directly related to the seeking and giving of legal advice.

#### Internal GY correspondence

[30] GY says that the internal correspondence was "done at the direction of the GY lawyers on the file" and that "such directions were given for the purposes of giving advice to the [Clients] and carrying out the [Clients'] instructions".<sup>24</sup>

[31] I am satisfied that this correspondence is privileged because it would reveal the substance of advice GY gave to the Clients, and there is no indication that the correspondence was shared with anyone outside of GY's law firm. As the adjudicator in Order P23-06 found, it is well-established that lawyers and staff in a firm who work together on a file can share privileged information among themselves without negating the confidentiality of the communications.<sup>25</sup>

#### Legal memoranda

[32] GY says that its internal memoranda are "communications of a confidential character and are related to formulating and providing legal advice".<sup>26</sup> In the List of Records, GY describes each memorandum as "Memoranda of legal research and meeting notes in relation to defense of the litigation, in compliance with the clients' instructions".

[33] I am satisfied that GY's memoranda fall within the continuum of communications related to GY's provision of legal advice to the Clients. As with the internal correspondence, there is no indication that any of the memoranda were shared with anyone outside the firm.

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<sup>23</sup> Lawyer's affidavit at para 7.

<sup>24</sup> GY's further submission.

<sup>25</sup> Order P23-06, *supra* note 6 at para 45, citing *Shuttleworth v. Eberts et al.*, 2011 ONSC 6106 at paras 67-71; *Weary v. Ramos*, 2005 ABQB 750 at para 9.

<sup>26</sup> GY's initial submission at para 22.

Conclusion on legal advice privilege

[34] To summarize, I am satisfied that all of the disputed records consist of confidential communications between solicitor and client that are related to the provision of legal advice. In coming to this conclusion, I give significant weight to the Lawyer's evidence, since he was counsel in the Action for over a decade. The disputed records are therefore subject to legal advice privilege, and GY may refuse to disclose them.

*Litigation privilege*

[35] GY additionally relies on the head of litigation privilege in withholding some of the disputed records.<sup>27</sup> However, since I have found that all the disputed records are subject to legal advice privilege, it is not necessary to consider whether some of them are also subject to litigation privilege, and I decline to do so.

*Conclusion on s. 23(3)(a)*

[36] I have found that all of the disputed records are subject to legal advice privilege under s. 23(3)(a). GY may therefore refuse to disclose them to the applicant.

**CONCLUSION**

[37] For the reasons given above, under s. 52 of PIPA, I confirm GY's decision to refuse to disclose the disputed records on the basis of s. 23(3)(a) of PIPA.

February 7, 2024

**ORIGINAL SIGNED BY**

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David S. Adams, Adjudicator

OIPC File No.: P21-87292

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<sup>27</sup> GY's submission at paras 3, 15, and 26.