Order P24-07

LULULEMON ATHLETICA CANADA INC

Elizabeth Vranjkovic
Adjudicator

May 6, 2024

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Summary: The applicant made two requests for his personal information under the *Personal Information Protection Act* (PIPA). Lululemon athletica canada inc. (Lululemon) provided some information to the applicant but withheld other information under several PIPA exceptions. The adjudicator found that Lululemon was authorized to refuse to disclose all of the information withheld under s. 23(3)(a) (solicitor-client privilege) and required to refuse to disclose some of the information withheld under s. 23(4)(c) (personal information about another individual). The adjudicator also found that s. 23(5) required Lululemon to disclose some portions of the information in dispute to the applicant.

Statutes Considered: *Personal Information Protection Act*, [SBC 2003], c. 63, ss. 1, 23(3)(a), 23(4)(c) and 23(5).

INTRODUCTION

[1] The applicant made two requests to lululemon athletica canada inc. (Lululemon) under the *Personal Information Protection Act* (PIPA) for access to his personal information.

[2] Lululemon provided some of the requested information to the applicant but withheld other information under several PIPA exceptions. The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review Lululemon's decisions to withhold information in relation to both access requests.

[3] Mediation did not settle the issues in dispute and the matters proceeded to inquiry. Prior to the inquiry, Lululemon released the information previously withheld under s. 23(3)(b) of PIPA and abandoned its reliance on s. 23(4)(d) of

PIPA.[1] During the inquiry, Lululemon disclosed some of the information withheld under s. 23(3)(a) to the applicant.[2] Therefore, I conclude that the newly released information and ss. 23(3)(b) and 23(4)(d) are no longer in dispute. Only the information withheld under ss. 23(3)(a) (solicitor-client privilege) and 23(4)(c) (personal information about another individual) remain in dispute.

PRELIMINARY MATTERS

Mediation materials

[4] Some of the applicant's inquiry submissions and evidence include details of communications with the OIPC investigator during mediation.[3] Mediation takes place on a without prejudice basis, which means that the parties understand that mediation material will not be used during any subsequent proceedings including this inquiry. It would be inappropriate for me to consider information from mediation without the consent of the opposing party. There is no evidence of any such consent in this case. As a result, I have not considered any mediation information when making my decision.

New issues

[5] The applicant raises a number of matters which are not set out as issues for the inquiry in either the notice of inquiry (notice) or the investigator's fact report (fact report). For example, the applicant says that Lululemon did not meet its duty to assist him and did not provide all of his personal information.[4] The applicant also says that Lululemon disclosed his personal information to external vendors without explanation.[5]

[6] As described in the notice, the fact report sets out the issues for the inquiry. The notice also clearly states that parties may not add new issues into the inquiry without the OIPC's prior consent.[6] Numerous previous orders have said that a party must request and receive permission from the OIPC to add a new inquiry issue.[7] To allow otherwise would undermine the effectiveness of the mediation process which exists, in part, to assist the parties in identifying, defining and crystallizing the issues prior to inquiry.[8]

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[1] From this point forward, unless otherwise specified, whenever I refer to section numbers I am referring to sections of PIPA.
[2] November 30, 2023 letter from the organization.
[3] For example, the applicant's response submission at paras C10, C19 and C21.
[4] Applicant's response submission at paras A3 and A5-A6.
[5] Applicant's second and third response submissions.
[6] Notice of Written Inquiry, February 10, 2023.
[7] For example, Order F12-07, 2012 BCIPC 10 at para 6 and Order F10-27, 2010 BCIPC 55 at para 10.
[8] Order F15-15, 2015 BCIPC 16 at para 10; Decision F08-02, 2008 CanLII 1647 (BC IPC) at paras 28-30.

[7] The applicant did not request permission to add any new issues or point to any exceptional circumstances that would justify doing so at this stage. I am not satisfied that it would be fair to add any of the issues raised by the applicant now. As a result, I decline to add any of the new issues raised by the applicant to this inquiry.

[8] Additionally, the applicant asks me to make a variety of orders. For example, he asks for:

- An order requiring Lululemon to export his personal information directly from a software system in PDF format; [9]
- An order requiring Lululemon to provide the responsive documents as PDF files with searchable text in accordance with the OIPC's Instructions for Written Inquiries;[10]
- Penalties for Lululemon providing false statements and information during the inquiry, not complying with PIPA, and not complying with the inquiry timelines; [11] and
- Disclosure of the documents Lululemon filed in this inquiry.[12]

[9] I will not make any of these orders because they fall outside the scope of this inquiry. To be clear, as the Commissioner's delegate, my role in this inquiry is to determine whether Lululemon is required or authorized to refuse access to the information at issue.

Should I exclude some evidence and submissions from the inquiry?

[10] Lululemon says that some of the applicant's evidence and submissions should be "struck from the evidence and disregarded by the Adjudicator."[13] Lululemon submits that some of this information is about new issues that the applicant is not entitled to raise and some of it is the applicant relitigating his adequate search complaint.

[11] Section 50(1) provides the Commissioner or their delegate the authority to decide all matters of fact and law during an inquiry, which would include matters regarding the admissibility of evidence.[14] As an administrative tribunal, the OIPC is generally not bound by the formal rules of evidence that govern judicial proceedings.[15]

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[9] Applicant's response submission at para F1.
[10] Applicant's response submission at para F3.
[11] Applicant's second response submission.
[12] Applicant's second response submission.
[13] Organization's reply submission at paras 13 and 25.
[14] See also Order F24-03, 2024 BCIPC 4 at para 9. While this order refers to s. 56(1) of FIPPA, s. 50(1) of PIPA gives the Commissioner or their delegate the same authority.
[15] *Cambie Hotel (Nanaimo) Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 119 at paras 28-36.

[12] The Commissioner or their delegate has the authority and discretion to admit evidence that they consider relevant or appropriate for the purposes of deciding the matters at issue in an inquiry, whether or not that evidence would be accepted in a court of law.[16]

[13] With the exception of the mediation materials addressed above, I am not persuaded that there is a justifiable reason to exclude any of the applicant's submissions or evidence from this inquiry. The applicant provided this information to support his position at the inquiry. The weight or attention that I give this information in terms of its reliability and relevance is a separate matter which is incorporated into my analysis and findings throughout this order. I also find there is no unfairness to Lululemon in admitting this information because Lululemon had an opportunity to respond to it in its reply submission. Therefore, I decline to strike any of the applicant's evidence and submissions, other than the mediation materials addressed above, from the evidentiary record.

ISSUES

[14] At this inquiry, I must decide:

1. Is Lululemon authorized to refuse access to the applicant's personal information under s. 23(3)(a)?

2. Is Lululemon required to refuse access to the applicant's personal information under s. 23(4)(c)?

[15] The burden is on Lululemon to prove that the applicant has no right of access to his personal information.[17]

DISCUSSION

Background[18]

[16] In September 2020, the applicant applied and interviewed for a position at Lululemon. During the interview, the applicant disclosed that he identifies as a person with a disability. At some point after the interview, the hiring manager conducted an unauthorized reference check on the applicant.[19]

[17] In October 2020, Lululemon told the applicant that he was not the successful candidate for the position. The applicant then expressed concern to

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[16] *British Columbia Lottery Corporation v Skelton*, 2013 BCSC 12 at para 64.
[17] Section 51.
[18] The information in this section is from the responsive documents.
[19] I am referring to this as an unauthorized reference check because Lululemon employees and the applicant refer to it as such in the responsive documents. In doing so, I make no findings about whether the reference check was authorized.

Lululemon about an interview question that he believes prompted him to disclose his disability.

[18] In December 2020, the applicant applied for another position at Lululemon and requested accommodation and individualized support for his application. The applicant was not the successful candidate and says that he was denied accommodation. The applicant and Lululemon then engaged in correspondence about the unauthorized reference check and the applicant's request for accommodation.

[19] In January 2021, the applicant said that he wished to file a complaint and suggested that Lululemon's legal team review the matter. In February 2021, discussions between Lululemon and the applicant to resolve the matter were unsuccessful.

Information at issue

[20] Lululemon is withholding 83 emails, email chains and briefing messages in their entirety. Lululemon is also withholding portions of several other emails, instant message conversations and internal documents.

Is the information at issue the applicant's personal information?

[21] PIPA only grants individuals a right of access to their own "personal information."[20] Therefore, the first question that must be answered is whether the information at issue is the applicant's personal information.

[22] PIPA defines "personal information" and related terms as follows:

> "personal information" means information about an identifiable individual and includes employee personal information but does not include
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> (a) contact information, or
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> (b) work product information;
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> "contact information" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;
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> "work product information" means information prepared or collected by an individual or group of individuals as a part of the individual's or group's responsibilities or activities related to the individual's or group's

[20] Sections 23(1)(a) and 27.

> employment or business but does not include personal information about an individual who did not prepare or collect the personal information.[21]

[23] Some of the information is clearly identifiable information about the applicant. It is not the applicant's contact information or work product information, so it is his personal information.[22]

[24] However, some of the information at issue is not about the applicant. This includes information about other job applicants and communications between other individuals that are not about the applicant.[23] There is also some information about groups of people who are not identified by name.[24] The applicant has no right to access this information because it is not his personal information.

Solicitor-client privilege, s. 23(3)(a)

[25] Section 23(3)(a) says that an organization is not required to disclose personal information if the information is protected by solicitor-client privilege. Section 23(3)(a) includes legal advice privilege and litigation privilege.[25]

[26] In some instances, Lululemon applied legal advice privilege and litigation privilege to the same information. In those cases, if I find that one privilege applies to that information, then it is not necessary to also consider whether the other privilege applies.

Sufficiency of evidence to substantiate the s. 23(3)(a) claim

[27] Lululemon did not provide me any of the information it withheld under s. 23(3)(a) for my review in this inquiry. Instead, Lululemon provided affidavit evidence from its external counsel and a table of records (the initial table of records).

[28] Section 38(1)(b) gives me, as the Commissioner's delegate, the power to order production of documents 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 documents being withheld under s. 23(3)(a) when it is absolutely necessary to decide the issues in dispute.

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[21] Section 1.
[22] For example, information on pages 12-13, 21, 24-25, 156, 164, 195, 199, 201, 205 and 258-259 of the responsive documents.
[23] Information on pages 156, 162-165, 176-177, 195, 199, 204-205, 207 and 257-262 of the responsive documents.
[24] Information on pages 257-258 of the responsive documents.
[25] Order P06-01, 2006 CanLII 13537 (BC IPC) at para 53.

[29] After reviewing Lululemon's submissions and evidence, I determined that I did not have enough information to decide if s. 23(3)(a) applies to the disputed documents. Given the importance of solicitor-client privilege, I offered Lululemon three opportunities to provide additional evidence in support of its privilege claim.[26]

[30] In response, Lululemon provided supplemental submissions, three affidavits from a lawyer at Lululemon (the lawyer), and a table of records appended to the lawyer's affidavits (the table). Lululemon also openly disclosed one piece of information it was previously withholding under s. 23(3)(a). I also provided the applicant opportunities, which he took, to respond to Lululemon's additional submissions and evidence.[27]

[31] The lawyer has a professional obligation to ensure that privilege is not improperly claimed.[28] I can see that the lawyer was involved in some of the communications at issue and therefore has knowledge of them and the context in which they were created. Additionally, the table provides dates and descriptions for each communication at issue. As a result, I am now satisfied that I have a sufficient evidentiary basis on which to make my s. 23(3)(a) decision.

Litigation privilege

[32] Lululemon withheld 16 communications under litigation privilege.[29] The communications are emails, email chains and briefing messages.

[33] The purpose of litigation privilege is to ensure an effective adversarial process by giving parties to the litigation a "zone of privacy" in which to prepare their case.[30]

[34] Litigation privilege applies to documents where:

1. Litigation was ongoing or was reasonably contemplated at the time the document was created; and

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[26] Letters to the organization dated October 25, 2023, November 23, 2023 and January 31, 2024.
[27] Lululemon also provided a letter for my consideration in reply to the applicant's third response submission. I decline to consider the letter. I did not request it, nor do I find it necessary in the interests of procedural fairness for Lululemon to have an opportunity to reply to the applicant's third response submission.
[28] *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para 86.
[29] Tabs 1, 3, 5, 22 and 72-83. I refer to these communications by "tab number" for consistency with the lawyer's affidavit and the table.
[30] *Blank v Canada (Minister of Justice)*, 2006 SCC 39 [*Blank*] at paras 27 and 34.

2. The dominant purpose of creating the document was to prepare for that litigation.[31]

[35] Litigation privilege ends when the litigation that gave rise to the privilege ends, unless there are closely related proceedings.[32] Litigation privilege applies to documents created for court proceedings, but it also extends to documents created for other types of litigious disputes. For the purposes of s. 23(3)(a), "litigation" encompasses human rights tribunal proceedings.[33]

Was litigation in reasonable prospect when the communications were created?

[36] The first question is whether litigation was in reasonable prospect when the communications at issue were created. Litigation is in "reasonable prospect" when a reasonable person, fully informed, would conclude it is unlikely that the claim for loss will be resolved without litigation.[34] Litigation need not be a certainty, but it must be more than mere speculation.[35]

[37] The communications withheld under litigation privilege date from October 26, 2020 to March 5, 2021.

[38] The lawyer says that at various times since October 2020, the applicant has threatened to bring litigation claims against Lululemon.[36]

[39] The applicant disputes that he has threatened to bring litigation claims against Lululemon since October 2020. He notes that the responsive documents show that he did not threaten litigation in October 2020.[37] Rather, he says that he communicated concerns about the interview on October 24, 2020.[38]

[40] The responsive documents include an October 24, 2020 email from the applicant to lululemon where he expresses his concerns about the interview.[39] Based on the contents of that email, I am not persuaded that that a reasonable person would conclude that the applicant was threatening litigation or that the matter would not likely be resolved without litigation. Additionally, I do not see any other basis on which a reasonable person would conclude that the matter

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[31] *Keefer Laundry Ltd v Pellerin Milnor Corp et al*, 2006 BCSC 1180 [*Keefer Laundry*] at para 96 citing *Dos Santos v Sun Life Assurance Co of Canada*, 2005 BCCA 4 at paras 43-44.
[32] *Blank*, *supra* note 30 at para 36.
[33] For example, see Order 22-52, 2022 BCIPC 59 at para 60.
[34] *Raj v Khosravi*, 2015 BCCA 49 [*Raj*] at paras 10-11, citing *Hamalainen (Committee of) v Sippola*, 1991 CanLII 440 (BC CA) at para 20 and *Sauve v ICBC*, 2010 BCSC 763 at para 30.
[35] *Ibid* at para 10.
[36] Lawyer's first affidavit at para 20.
[37] Applicant's second and third response submissions.
[38] Applicant's second response submission.
[39] Page 17 of the responsive documents.

would not likely be resolved without litigation at that point in time. As a result, I find that litigation was not in reasonable prospect in October 2020.

[41] Instead, I find that litigation was in reasonable prospect as of December 15, 2020. On that day, the applicant sent Lululemon a four-page letter via email in which he set out a timeline of events and explained the impact of the unauthorized reference check on his health and finances. The applicant also outlined his beliefs that the unauthorized check reference was a violation of PIPA and that he was treated differently after self-identifying as a person with a disability. The letter included the following:

> I view it as lululemon's responsibility to provide a remedy for the actions that occurred.
>
> **Moving Forward**
>
> … In the spirit of the lululemon's commitment to Inclusion, Diversity, Equity and Action within the company, I am inviting lululemon to provide a proposal that helps rectify this particular situation to the mutual satisfaction of both our interests…

[42] In my view, the applicant uses the letter to outline the basis for potential claims against Lululemon by referring to the applicable law and setting out the harms he attributes to Lululemon. I also find that the portions of the letter replicated above show that the applicant was seeking compensation from Lululemon.

[43] All these factors lead me to conclude that litigation was in reasonable prospect as of December 15, 2020. Most of the communications withheld on the basis of litigation privilege were created after that date (the 2021 emails).[40] As a result, I find that litigation was reasonably contemplated at the time the 2021 emails were created. However, some of the communications withheld on the basis of litigation privilege were created prior to that date, so litigation was not in reasonable prospect when they were created and litigation privilege does not apply to those communications.[41]

> *Was the dominant purpose of creating the 2021 emails to prepare for that litigation?*

[44] The second part of the litigation privilege test is more challenging to meet.[42] It requires the party claiming privilege to prove that the dominant purpose of the document, when it was produced, was to obtain legal advice or to conduct

[40] Tabs 22 and 72-83.
[41] Tabs 1, 3 and 5.
[42] *Raj*, *supra* note 34 at para 12.

or aid in the conduct of litigation.[43] Litigation privilege may apply to a document created for more than one purpose, but only if the dominant purpose is litigation.[44]

[45] The lawyer says that the 2021 emails are communications between Lululemon employees which were created following and in anticipation of the litigation threatened by the applicant.[45] I can see from the dates of the 2021 emails that they were created after the applicant suggested that the Lululemon legal team review the matter. I can also see from the relevant descriptions in the table that the 2021 emails relate to legal matters. Finally, nothing in the relevant descriptions in the table indicates that there was any other competing purpose for the creation of the 2021 emails.

[46] Considering all of the above and, in particular, the lawyer's evidence that the 2021 emails were created in anticipation of litigation, I find that it is more likely than not that the dominant purpose of the 2021 emails was preparing for litigation. I conclude that litigation privilege applies to the 2021 emails.

Has the litigation privilege expired?

[47] As noted above, litigation privilege ends when the litigation that gave rise to the privilege ends, unless there are closely related proceedings.[46]

[48] The lawyer says that the applicant filed a human rights complaint against Lululemon in August 2023, and served Lululemon "additional information" relating to his complaint in November 2023.[47] The applicant does not dispute that the human rights proceeding is ongoing and there is no evidence before me that the human rights proceeding has ended since November 2023. As a result, I conclude that the human rights proceeding is ongoing and litigation privilege continues to apply to the 2021 emails.

Legal advice privilege

[49] I found above that some of the communications at issue are appropriately withheld under litigation privilege, so I do not need to consider them here. As a result, 70 entire communications and two partial communications remain at issue under legal advice privilege.

[50] Legal advice privilege applies to communications that:

i) are between solicitor and client;

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[43] *Ibid*.
[44] *Ibid* at para 17.
[45] Lawyer's first affidavit at para 22 and lawyer's third affidavit.
[46] *Blank*, *supra* note 30 at para 36.
[47] Lawyer's first affidavit at para 23.

ii) entail the seeking or giving of legal advice; and

iii) are intended to be confidential by the parties.[48]

[51] In addition, legal advice privilege applies to other kinds of documents and communications that do not strictly meet the above test. For example, legal advice privilege applies to the "continuum of communications" between lawyer and client that do not specifically request or offer advice but are "part of the necessary exchange of information between solicitor and client for the purpose of providing advice."[49] Legal advice privilege also extends to internal client communications that discuss legal advice and its implications.[50]

[52] The lawyer says that the communications withheld under legal advice privilege are communications with Lululemon's internal or external legal counsel for the purposes of obtaining legal advice about the applicant's complaint.[51]

[53] The applicant says that Lululemon used an expansive interpretation of s. 23(3)(a).[52] He also says that Lululemon has not shown that the communications withheld under s. 23(3)(a) include lawyers.[53]

Analysis and findings, legal advice privilege

[54] For the purpose of this analysis, I have categorized the communications that remain at issue as follows:

1. Communications between Lululemon employees and in-house counsel;
2. Communications between Lululemon employees;
3. Communications within Lululemon's legal department;
4. Communications with Lululemon's external legal counsel;
5. Partial e-mail subject line; and
6. Partial instant messaging exchange

<u>Communications between Lululemon employees and in-house counsel</u>

[48] *Solosky v the Queen*, 1979 CanLII 9 (SCC) at p 837.
[49] *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para 42.
[50] See for example Order F22-34, 2022 BCIPC 38 at para 41; Order F22-53, 2022 BCIPC 60 at para 13; and Order F23-07, 2023 BCIPC 8 at para 25.
[51] Lululemon and the lawyer describe the subject matter of the legal advice as the applicant's complaint(s). The lawyer also generally refers to "this matter". Based on the responsive documents and the parties' submissions and evidence, I interpret "the applicant's complaint(s)" and "this matter" to include several communications from the applicant to Lululemon, starting with the applicant expressing concern about an interview question in October 2020.
[52] Applicant's response submission at para A8.
[53] Applicant's response submission at para B21.

[55] Lululemon withheld several emails, email chains, and a briefing message between Lululemon employees and one or more of its in-house counsel.[54]

[56] Solicitor-client privilege extends to communications with in-house counsel provided the lawyer is acting in a legal capacity and not as a business or policy advisor.[55] The lawyer says, and I accept, that the lawyers in Lululemon's legal department who provided legal advice on this matter were, at all material times, acting in their capacity as legal counsel.[56]

[57] The lawyer's evidence and the table of records establish that the communications between its employees and in-house counsel relate to legal advice Lululemon sought, and its lawyers provided, related to the applicant's complaints.[57]

[58] Lululemon does not say that these communications were intended to be confidential. However, I can see from the description that no one outside of the solicitor-client relationship was included in these communications, so I am satisfied that they were intended to be confidential.

[59] For these reasons, I find that legal advice privilege applies to the communications between Lululemon employees and in-house counsel.

Communications between Lululemon employees

[60] With respect to communications between Lululemon employees, one email and one email chain remain at issue under legal advice privilege.[58]

[61] The lawyer says that some of the communications are Lululemon employees transmitting or commenting on legal advice received from in-house counsel with other Lululemon employees who needed to know the advice.[59]

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[54] It is not clear who the sender is in one of the communications at issue (tab 5), which is described as "briefing notes" to internal counsel. However, the lawyer provided sworn evidence that the communication at that tab is one in which one or more Lululemon employees sought or received legal advice from legal counsel. As a result, I am satisfied that the briefing notes are from one or more Lululemon employees to in-house counsel.
[55] *Keefer Laundry*, *supra* note 31 at para 63.
[56] Lawyer's first affidavit at para 11.
[57] Tabs 2, 4-6, 8-10, 12, 15, 17-21, 23-24, 26-30, 34-35, 38-42, 44, 51-55, 60, 62-63 and 67. The table does not describe the content of the one email from one employee to another employee and in-house counsel (tab 35). However, the lawyer provides sworn evidence that the communication at that tab is one in which one or more Lululemon employees sought or received legal advice. As a result, I accept that this communication entails the seeking of legal advice.
[58] Tabs 1 and 7.
[59] Lawyer's first affidavit at para 19.

[62] Legal advice privilege includes communications between employees which transmit or comment on privileged communications with lawyers.[60] Considering the lawyer's evidence and the descriptions of the relevant communications in the table, I find that legal advice privilege applies to the communications between Lululemon employees.

Communications within Lululemon's legal department

[63] Lululemon also withheld emails and a briefing message between employees in its legal department and legal counsel.[61]

[64] It is well established that lawyers, their staff, and other firm members working together on a file may share privileged information amongst themselves without vitiating confidentiality.[62] Previous orders have also determined that communications between lawyers who were working together to give legal advice to a client fall within the scope of a communication between a legal advisor and a client.[63]

[65] Applying these principles and based on the description of these communications in the table, I find that legal advice privilege applies to the communications within Lululemon's legal department.

Communications with Lululemon's external legal counsel

[66] Lululemon withheld several emails and email chains between Lululemon's in-house counsel and external legal counsel.[64]

[67] The lawyer says that these are communications in which one or more of Lululemon's in-house counsel sought or received legal advice with respect to this matter from external legal counsel.[65] Considering this evidence and based on the descriptions in the table, I am satisfied that these communications relate to legal advice Lululemon sought, and its external lawyers provided, related to the applicant's complaints.

[68] Lululemon does not say that these communications were intended to be confidential. However, I can see from the descriptions in the table that no one outside of the solicitor-client relationship was included in these communications, so I am satisfied that they were intended to be confidential.

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[60] *Bank of Montreal v Tortora*, 2010 BCSC 1430 at para 12.
[61] Tabs 3, 11, 13, 14, 16, 25, 31-33, 36, 43, 45, 47, 58, 64-66 and 71.
[62] Order P23-06, 2023 BCIPC 63 at para 45, citing *Shuttlework v Eberts et al*, 2011 ONSC 6106 at paras 67 and 70-71 and *Weary v Ramos*, 2005 ABQB 750 at para 9.
[63] Order F20-16, 2020 BCIPC 18 at para 65; Order F20-01, 2020 BCIPC 01; Order F15-41, 2015 BCIPC 44.
[64] Tabs 37, 46, 48-50, 56-57, 59, 61 and 68-70.
[65] Lawyer's first affidavit at para 19.

[69] For these reasons, I find that legal advice privilege applies to the communications with Lululemon's external legal counsel.

Partial e-mail subject line

[70] Lululemon also withheld a partial subject line of an out-of-office email.[66] The lawyer says that the email was received in the course of privileged correspondence and that disclosing the partial subject line would reveal the subject matter for which legal advice was sought.[67]

[71] From what I can see in the table and the openly disclosed portions of the email, I am satisfied that the email that prompted the out-of-office email is one of the emails to which I have already found legal advice privilege applies. As a result, I find that the partial e-mail subject line at issue is the same as the subject line of that privileged email. I find that legal advice privilege applies to the partial e-mail subject line because it cannot be disclosed without revealing information I have already found is privileged.

Partial instant messaging exchange

[72] Finally, Lululemon withheld part of an October 26, 2020 instant messaging exchange between a talent manager and hiring manager.[68]

[73] The lawyer says that the withheld information consists of those managers discussing information to be gathered for the purposes of obtaining legal advice and in anticipation of a threat of a litigation claim by the applicant.[69]

[74] The applicant says that this information may be his personal information that Lululemon gathered when it conducted an unauthorized reference check on him. He also says that there was no threat of litigation at the time of the instant messaging conversation.[70]

[75] The courts have held that preliminary discussions between employees about seeking legal advice could be privileged if the content of those discussions might reveal the legal advice they later sought or obtained.[71] For example, where an employee does go on to seek or obtain legal advice, privilege applies to discussions between employees directed at "the formulation of questions or facts to convey to counsel in order to obtain legal advice."[72]

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[66] Information on page 148 of the responsive documents.
[67] Lawyer's second affidavit at para 6
[68] Information on page 263 of the responsive documents.
[69] Lawyer's second affidavit at para 7.
[70] Applicant's second response submission.
[71] *Canadian Flight Academy Ltd v Oshawa (City)*, 2023 ONSC 1906 at para 150 citing *Whitty v Wells*, 2016 ONSC 7716 at para 37.
[72] *Ibid* at paras 173 and 177 citing *Whitty v Wells*, 2016 ONSC 7716 at para 37.

[76] Based on the lawyer's description of the messaging exchange, I am satisfied that the instant messages at issue were for the purpose of obtaining legal advice about the applicant's complaints. I am also satisfied that the managers subsequently sought that legal advice because I can see from the table that the managers sought legal advice from in-house counsel on the day of the messages. As a result, I find that the content of the messaging exchange would reveal or allow for accurate inferences about the legal advice the managers sought about the applicant's complaints. I conclude that legal advice privilege applies to the partial instant messaging exchange.

Personal information about another individual, s. 23(4)(c)

[77] Section 23(4)(c) requires an organization to withhold information that would reveal personal information about another individual. Another individual refers to an individual other than the applicant.[73] This section does not involve deciding whether or not disclosure would unreasonably invade another person's personal privacy. It is enough that the information is the personal information of another individual.[74]

[78] Lululemon says that the documents contain personal information about other job applicants and the employees who interviewed the applicant.[75]

[79] The applicant says that Lululemon applied an expansive interpretation of s. 23(4)(c).[76] The applicant specifically raises concerns about the application of s. 23(4)(c) to information that appears on his personal profile in one of Lululemon's platforms.[77]

[80] As previously noted, s. 1 says that personal information means information about an identifiable individual and includes employee personal information but does not include contact information or work product information.

[81] Therefore, the first step is to determine whether any of the applicant's personal information is also about an identifiable individual other than the applicant. If it is, then I must decide whether that information is personal information about that individual, or whether it is excluded because it is contact information or work product information. [78]

Is the information about an identifiable individual other than the applicant?

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[73] Order P14-03, 2014 BCIPC 49 (CanLII) at para 13; Order P11-01, 2011 BCIPC 9 (CanLII) at para 17.
[74] Order P06-02, 2006 CanLII 32980 (BC IPC) at para 53.
[75] Organization's initial submission at paras 21 and 31.
[76] Applicant's response submission at paras 7-8.
[77] Applicant's response submission at para C22.
[78] Order P13-01, 2013 BCIPC 23 at para 16.

[82] I find that some of the information at issue is not about any identifiable individuals other than the applicant. For example, some of the information is the applicant's name and the status of his employment application.[79] There is also some template information in a form and information about actions taken by the applicant.[80] I do not see, and Lululemon does not adequately explain, how any of this information reveals anything about any identifiable individuals other than the applicant. As a result, I find that some of the information at issue is not about any identifiable individuals other than the applicant and s. 23(4)(c) does not apply.

[83] However, I find that the balance of the information withheld under s. 23(4)(c) is about identifiable individuals other than the applicant. For example, some of the information is about the actions certain Lululemon employees took or considered taking in relation to the applicant's job application.[81] Additionally, some of the information at issue is employees' opinions about the applicant.[82] Even where employees are not identified by name, I am satisfied that the applicant would be able to identify them because he knows who he interacted with during the hiring process. Therefore, I find that this information is about identifiable individuals other than the applicant.

> Is the information about identifiable individuals other than the applicant the personal information of those individuals?

[84] Under the definitions set out in PIPA, information about other individuals is their personal information unless it is contact information or work product information.

[85] Contact information means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number or business fax number of the individual.[83]

[86] Work product information means information prepared or collected by individual(s) as part of their responsibilities or activities related to their employment or business but does not include personal information about an individual who did not prepare or collect the personal information.[84]

[87] It is clear that none of the information about other individuals is contact information. I also find that none of the information about other individuals is their work product information. For example, some of the information is employees' personal opinions that they shared in informal conversations. I am not persuaded

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[79] Information on pages 156, 164, 199, 205 and 258 of the responsive documents.
[80] Information on pages 13 and 24-25 of the responsive documents.
[81] Information on pages 201 and 259 of the responsive documents.
[82] Information on pages 12, 13, 21, 25, 156, 164, 195, 205, 258 and 259 of the responsive documents.
[83] Section 1.
[84] Section 1.

that this information was prepared by those employees as part of their employment responsibilities or activities.

[88] For these reasons, I find that all of the information about individuals other than the applicant is the personal information of those individuals. I find that s. 23(4)(c) applies to that information.

Severance, s. 23(5)

[89] Section 23(5) requires Lululemon to provide the applicant with access to his personal information if it is able to remove the information to which ss. 23(3)(a) and 23(4)(c) apply.

[90] The applicant says that Lululemon could redact the names of third parties and disclose more information.[85]

[91] Lululemon says that it has appropriately severed information in accordance with PIPA.[86]

[92] With respect to the information to which s. 23(3)(a) applies, the courts have emphasized that once solicitor-client privilege is established, it applies to all communications within the framework of the solicitor-client relationship and that severance of those communications can only occur when there is no risk of revealing legal advice provided by the lawyer to the client.[87] In this case, I find that none of the information to which s. 23(3)(a) applies can be provided to the applicant without a risk of revealing privileged information.

[93] Turning to the information that Lululemon is required to withhold under s. 23(4)(c), I find that a small amount of this information can be disclosed to the applicant. This information is part of a sentence and the applicant's name.[88] However, the rest of the information to which I have found s. 23(4)(c) applies cannot be disclosed without revealing personal information about other individuals.

[94] I conclude that Lululemon must provide the applicant with a small amount of his personal information under s. 23(5).

CONCLUSION

[95] For the reasons given above, under s. 52 of PIPA, I make the following order:

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[85] Applicant's response submission at para B23.
[86] Organization's initial submission at para 50.
[87] *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 at para 51.
[88] Information on pages 195, 201 and 259 of the responsive documents.

1. I confirm Lululemon's decision to refuse to disclose the information withheld under s. 23(3)(a) of PIPA.
2. I confirm in part, subject to item 3 below, Lululemon's decision to refuse to disclose the information withheld under s. 23(4)(c) of PIPA.
3. I require Lululemon to give the applicant access to the information that I have found it is not required to withhold under s. 23(4)(c) and the information that can be severed under s. 23(5). I have highlighted this information in yellow on pages 13, 24-25, 156, 164, 195, 199, 201, 205 and 258-259 of the copy of the responsive documents that will be provided to Lululemon with this order.
4. Lululemon must copy the registrar of inquiries on its response to the applicant, together with a copy of the pages set out at item 3, above.

Under s. 53 of PIPA, Lululemon is required to comply with this order by no later than June 18, 2024.

May 6, 2024

ORIGINAL SIGNED BY

Elizabeth Vranjkovic, Adjudicator

OIPC File Nos.: P21-85595 & P21-86002