Order F06-02

MINISTRY OF LABOUR AND CITIZENS' SERVICES

David Loukidelis, Information and Privacy Commissioner
February 3, 2006

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Summary: Applicant sought records relating to an Employment Standards Tribunal matter in which it was involved. Ministry is authorized to withhold information under s. 14, no waiver of privilege having occurred. Because its response to the applicant's request was outside the s. 7 time limit, the Ministry failed to discharge its s. 6(1) duty to assist the applicant. Consistent with past decisions, no order is necessary in that respect.

Key Words: duty to assist—respond without delay—solicitor-client privilege—waiver of privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 7(1) & 14.

Authorities Considered: B.C.: Order 00-07, [2000] B.C.I.P.C.D. No. 7; Order 01-10, [2001] B.C.I.P.C.D. No. 11; Order 02-01, [2002] B.C.I.P.C.D. No. 1.

Cases Considered: *British Columbia (Ministry of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner* (1995), 16 B.C.L.R. (3d) 64 (S.C.); *British Columbia (Ministry of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner*, (1995), 16 B.C.L.R. (3d) 64 (S.C.);.*S & K Processors Ltd*. v. *Campbell Ave. Herring Processors Ltd.* (1983), 35 C.P.C. 146 (B.C.S.C.).

1.0 INTRODUCTION

[1] A delegate of the Employment Standards Director ("Director") issued determinations for unpaid wages against Super Save Disposal ("Super Save") and Actton Transport Ltd. ("Actton"), the applicants in this case. Human Resources Development Canada ("HRDC") also issued orders for unpaid wages against Super Save and Actton. The applicants decided to appeal the provincial determinations to British Columbia's Employment Standards Tribunal ("EST"). Among the issues in the appeal was that the Director does not have "jurisdiction for unpaid wages" against the applicants and that the proper jurisdiction is under the *Canada Labour Code*[1]. The applicants therefore made the following request for records, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the public body (at that time, the Ministry of Skills Training and Labour, now the Ministry of Labour and Citizens' Services) ("Ministry"):

> 1. All documents including correspondence, letters, e-mails, faxes, memoranda, notes concerning:
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> (a) whether the HRDC or the Director have jurisdiction for unpaid wages owed employees of Actton or Super Save;
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> (b) the transfer between HRDC and the Director, of files or complaints against Actton or Super Save.
>
> 2. All documents including correspondence, letters, e-mails, faxes memoranda, and notes concerning or related to complaints for unpaid wages by [four named individuals] either to the Director or to HRDC;

[2] The Ministry responded in two phases, disclosing some records, withholding 63 pages of records under s. 14 and withholding still other information under s. 22 of the Act. It also said it was not providing some information in the records as it did not fall within the scope of the applicants' request.

[3] The applicants requested a review of the Ministry's decision to deny access to information and also said that an e-mail of February 11, 2003 between two named individuals was missing. During mediation, the applicants agreed not to pursue the severing of information under s. 22 and it is not an issue in this case. Mediation was otherwise unsuccessful and the matter was set down for inquiry.

[4] The Office issued a notice of written inquiry to the applicants and the Ministry in April 2004. In the weeks that followed, this Office granted a number of adjournments of the dates for making submissions, at the request of one or the other party. After the exchange of initial submissions had taken place, the Office granted the applicants' request that this inquiry be adjourned for an indefinite period to allow appeal or judicial review proceedings connected with the employment standards matters to take place, in the hopes that the applicants would receive the requested records through those processes. The inquiry adjourned in July 2004 and resumed in early 2005 at the

[1] Letter of May 27, 2003.

applicants' request. During this period, the Ministry disclosed more records, leaving 12 records withheld under s. 14.

2.0 ISSUES

[5] The issues before me in this case are:

1. Did the Ministry fulfil its duty under s. 6(1) towards the applicants?

2. Does s. 14 authorize the Ministry to withhold information?

[6] After the Office issued the notice for this inquiry, the Ministry wrote requesting clarification of the s. 6 issues. It pointed out that the portfolio officer's fact report said in one place that, under s. 6, the adequacy of the Ministry's search was in issue but that elsewhere it stated generally that the issue was whether the Ministry had fulfilled its duties under s. 6. It said that, while various aspects of the Ministry's fulfillment of its s. 6 duties had arisen in mediation, it understood that only the search issue would proceed to inquiry. It therefore asked that this Office issue an amended notice and fact report to specify which of the s. 6 duties were in issue in the inquiry.

[7] This Office gave the applicants an opportunity to comment on the Ministry's letter and they responded that all of the duties under s. 6 were in issue, in their view, and that they also did not believe the Ministry had produced all of the responsive records. Further correspondence from the Office to the applicants[2] set out this Office's understanding of the s. 6 issues that the applicants wanted to see addressed in the inquiry as "the failure of the Ministry to fulfil its duty":

> a) to make every reasonable effort to assist by not:
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> i) providing a list of documents;
>
> ii) complying with an agreement between yourself and [a named Ministry employee] following an inadvertent disclosure of records;
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> iii) having adequate handling and processing procedures to respond to your request; and
>
> iv) completing an adequate search for the responsive records.
>
> b) to respond without delay by not responding to the request for records within the statutory time frame; and
>
> c) to respond openly and completely by not providing all the responsive records.

[8] The applicants acknowledged that this letter "generally captured the broad nature" of the s. 6 matters. They said, however, that they were "not prepared to tie down or limit the scope of the inquiry" and gave some examples of why they took this position.

[2] Letter of May 12, 2004.

The Ministry agreed to proceed on the basis of these letters, noting that there was still, in its view, a lack of clarity and agreement over the s. 6 issues. I have therefore dealt with the s. 6 issues as described above.

3.0 DISCUSSION

[9] **3.1 Preliminary Matters**—I will deal first with some preliminary matters that arose during the inquiry.

Applicants' request for oral inquiry

[10] Throughout the inquiry process, the applicants made repeated requests for an oral inquiry into the way in which the Ministry handled their request. Among other reasons, the applicants requested an oral hearing so that Ministry employees could be cross-examined about their processing of the access request.[3] The applicants also asked for full disclosure of all records related to the Ministry's handling of the request, whether or not I decided to hold an oral hearing.[4]

[11] The Ministry objected to this request, saying, among other things, that the issues were straightforward, there was no need to cross-examine Ministry staff, and it was thus not necessary to hold an oral inquiry. The Ministry also said it was concerned that, if there were an oral inquiry, the applicants would take the opportunity to expand the inquiry to matters which were not properly before me and "to address at unnecessary length various issues" that actually are before me.[5]

[12] I wrote to the parties saying I had done a preliminary review of the issues and submissions and was inclined to the view that an oral inquiry is not necessary in this case. I said I would personally handle the inquiry, review the submissions in due course and determine at that time if an oral inquiry, including cross-examination, was necessary. Having carefully reviewed the material before me, it is my view that an oral inquiry is not necessary to dispose of the issues in dispute and I decline the applicants' request for an oral inquiry. Nor do I think, given the extensive documentation of the Ministry regarding its handling of the access request, that it is necessary for the applicants to have more documents.

Applicants' request for costs

[13] The applicants also asked that I order the Ministry to pay the applicants' legal and other expenses with respect to this matter "on a solicitor and own-client basis" pursuant to my powers under the Act, including s. 16 of the *Inquiry Act*.[6]

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[3] See, for example, pp. 1-2, initial submission; p. 1, letter of December 12, 2003; pp. 1 & 2, reply.
[4] p. 3, initial submission.
[5] Letter of March 14, 2005.
[6] pp. 2 & 5, initial submission.

[14] The Act contains no express power to award an amount for legal fees and expenses as the applicants ask. Nor is there, in my view, any implied power to make such an award. Section 16 of the *Inquiry Act* reads as follows:

> **Power to enforce summons and punish for contempt**
>
> 16(1) The commissioners have the same powers, to be exercised in the same way, as judges of the Supreme Court, if
>
> (a) any person on whom a summons has been served by the delivery of it to the person, or by leaving it at the person's usual residence,
>
> (i) fails to appear before the commissioners at the time and place specified in the summons, or
>
> (ii) having appeared before the commissioners, refuses to be sworn, to answer questions put to the person by the commissioners, or to produce and show to the commissioners any documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry, or
>
> (b) a person is guilty of contempt of the commissioners or their office.
>
> (2) All jailers, sheriffs, constables, bailiffs and all other police officers must assist the commissioners in the execution of their office.

[15] I do not see how this provision supports the applicants' request for an award of costs and find that it does not.

Other issues

[16] In April of 2005, the applicants wrote to this Office about records that the Ministry disclosed in March 2005. It appears that the Ministry had originally withheld these records under s. 14, but later waived privilege in EST proceedings and thus disclosed them to the applicants. In their April 2005 letter, the applicants raised various questions about these records that they sought to have added to the inquiry. The Ministry said it would reply to separately to those questions. This Office then sent a letter to the applicants saying it was too late to add these issues and that the Ministry would reply in any case. I do not propose to deal with the applicants' further questions in this decision.

[17] **3.2 Solicitor-Client Privilege**—The Ministry originally withheld 63 pages of records under s. 14. The Ministry had waived privilege over most of these records and disclosed them to the applicants in the EST process and again disclosed the records to the applicants, under the Act. This meant that, by the time the inquiry closed, only 12 pages remained in dispute, in respect of which the applicants question the application of s. 14.[7]

[7] See, for example, pp. 6 & 11-12, reply.

[18] The Ministry acknowledges that s. 14 encompasses both branches of solicitor-client privilege, legal professional privilege and litigation privilege. It then describes the tests for applying s. 14, referring to a number of court cases on these points. It says that the Ministry has a solicitor-client relationship with lawyers employed by the Ministry of Attorney General and that one particular lawyer has the function of providing legal advice and representation to the Director of Employment Standards and her delegates. It said that the records in question—principally notes and records of communications—come from a file that this lawyer created in her role as counsel to the Director's delegate. The Ministry says that this means all of the records are protected by solicitor-client privilege and thus s. 14.[8]

[19] Section 14 of the Act reads as follows:

> ***Legal advice***
>
> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[20] The principles applicable to s. 14 and waiver of privilege are well established. See, for example, Order 00-07,[9] Order 01-10,[10] and Order 02-01.[11] I will not repeat those principles, but will apply them here.

[21] The 12 pages of records in dispute consist of notes, emails and other items. There is considerable duplication of information within the records.

[22] The Ministry's submissions on why s. 14 applies to these records are brief. I accept that a Ministry of Attorney General lawyer was in a solicitor-client relationship with the Ministry. I also accept, based on the Ministry's submissions and evidence, as well as the contents of the records themselves, that the communications were confidential and related to the giving or seeking of legal advice. I find that s. 14 applies to these records in their entirety.

Waiver of solicitor-client privilege

[23] The Ministry acknowledges that disclosure of privileged information to someone outside the solicitor-client relationship can amount to a waiver of privilege. It adds that waiver does not follow from disclosure that is inadvertent, unintentional or otherwise made in error, or where fairness does not require a finding that privilege has been waived. The Ministry says it is clear in this case that the government never demonstrated an intention to waive privilege over these records and that it consistently took steps to protect and maintain privilege. It refers in a footnote to its submission to the judicial

[8] Paras. 5.01-5.10, initial submission; Adamic affidavit.
[9] [2000] B.C.I.P.C.D. No. 7.
[10] [2001] B.C.I.P.C.D. No. 11.
[11] [2002] B.C.I.P.C.D. No. 1.

review decision of Thackray J. (as he then was) in *British Columbia (Ministry of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)*[12]. According to the Ministry, in that decision, Thackray J. held that disclosure of two records in response to an access request under the Act, while advertent and intentional, was made in the erroneous belief that the information could not be withheld under s. 14 and that disclosure did not waive privilege respecting the disclosed records.[13]

[24] In this case, the Ministry says, disclosure of the lawyer's file material was neither intentional nor advertent. The Ministry says legal counsel for the applicants was allowed to view records in an August 2003 meeting, on a "without prejudice basis", in order to narrow the scope of the request to records not already disclosed through the EST process. The applicants' lawyer was not allowed to read or study the records at length, it says, but to skim them, and Ministry staff did not realize the extent to which privileged records were being made available at that time.[14]

[25] The Ministry acknowledges that privileged documents were disclosed a second time when Ministry staff accidentally included them in a box sent to another legal representative of the applicants as part of the second phase of the disclosure. It says privilege was not waived over the documents by these unintentional disclosures (paras. 5.20-5.21, initial submission; Adamic affidavit; paras. 57-95, Carlson affidavit).

[26] The applicants acknowledge that some of the records their lawyer viewed in August 2003 might have been protected by solicitor-client privilege. They argue however that the Ministry waived privilege in the parallel EST proceedings and that privilege therefore does not apply here. They say that, in any case, privilege does not apply because the Ministry's lawyer was part of the investigation and possibly the adjudication of the applicants' claim.[15] In Order 00-07, I referred to *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd.*[16], in which McLachlin J. (as she then was) said the following:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Hunter* v. *Rogers*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

[12] (1995), 16 B.C.L.R. (3d) 64 (S.C.).
[13] Paras. 5.11-5.17, initial submission.
[14] Paras. 5.18-5.19, initial submission; paras. 13-33, Carlson affidavit.
[15] p. 3, Appendix "A", initial submission; paras. 21-30, Kitsul affidavit; pp. 11-12, reply.
[16] (1983), 35 C.P.C. 146 (B.C.S.C.).

> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Hunter* v. *Rogers, supra*, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich* v. *Stamp* (1979), 27 O.R. (2d) 395, 14 C.P).C. 246, 11 C.C.L.T. 49, 106 D.L.R. (3d) 340n, 59 C.C.C. (2d) 87 (S.C.C.)], it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use the privilege to prevent his opponent exploring its validity.

[27] The first disclosure in this case occurred in the context of a supervised viewing of records by the applicants' lawyer. According to the parties' submissions, the intention of the meeting was to narrow the scope of the access request to records the applicants had not already received through the EST process. While the evidence conflicts as to the conditions for this viewing,[17] there is agreement between the parties that the lawyer was not allowed to read the records, or to take notes or make copies, but simply to skim the records and identify those he wanted. It appears the Ministry did not have the opportunity to review the records before the viewing.[18] There is some indication that Ministry representatives may have been aware of the presence of possibly privileged material in the records, which appears to explain the stringent conditions it imposed on the viewing of the records. The material before me also shows that the Ministry withheld under s. 14 a number of the records that the applicant's lawyer viewed and that they were disclosed in error in December 2003 to the applicant's lawyer. These records were, according to the evidence, clearly labelled as withheld under s. 14 and the Ministry was able to retrieve them. The Ministry says it later waived privilege over some of these records in the EST proceedings and continued to withhold the remainder (the records in dispute in this inquiry) under s. 14.

[28] I am satisfied that this issue can be resolved on the basis of the material before me. I accept, in all of the circumstances, that the Ministry knew of the privilege and did not evince an intention of waiving it either during the August 2003 meeting nor in accidentally disclosing records in December 2003. Nor do I consider that fairness and consistency require implied waiver, particularly in the absence of any clear evidence of a voluntarily intention to waive privilege. The Ministry's waiver of privilege over certain records in the context of the EST proceedings does not constitute waiver of privilege over the remaining records. I find that the Ministry has not waived solicitor-client privilege over these records.

[29] **3.3 Duty to Assist**—The Ministry concedes that it did not meet its legislated time limit for responding to this request, since the second phase of its disclosure was 21

[17] For example, the Carlson affidavit says the viewing meeting was on a without prejudice basis, but this is denied in Kitsul's affidavit evidence.
[18] See para. 27, Carlson affidavit.

business days past the extended deadline. It argues, however, that this is not a reflection of its true efforts to avoid delay.[19] It then addresses in detail the various aspects of its response.[20] The Ministry also provides detailed affidavit evidence in support of its arguments from two Ministry employees[21] and further comment along the same lines in its reply submission.[22] I will not reproduce all of the argument and evidence but I have read and considered the material carefully.

[30] The arguments can be summarized this way:

- The Ministry performed an adequate search for responsive records.
- It made reasonable efforts to respond openly and completely by disclosing or withholding all responsive records located.
- It made reasonable efforts to assist in the handling and processing of the request; Ministry staff have provided a level of service beyond what is normal, in the face of the applicants' "enormously inflated" expectations[23] and "excessive" demands[24] and the applicants' attempts to combine the access request process with the employment standards process and to change the scope of the request.
- The records were both numerous (over 2,000 pages) and varied in nature, complex and poorly organized as a result of EST disclosures.
- Ministry staff tried at all times to deal with legal counsel for the applicants in an open, straightforward and accommodating manner, with their efforts far exceeding what the Act requires and what they normally do for applicants.
- The Ministry's duty to assist did not, in this case, include a duty to meet the applicants' demands related to the retrieval and return of certain bundles of documents mistakenly disclosed to the applicants' legal counsel, especially in view of what happened when a Ministry employee attempted to retrieve the bundles and how the applicants purported to change the "agreement" surrounding those events; the Ministry did its part in meeting that "agreement".
- The Ministry was not required to create a list of the withheld records to the applicants' specifications; it had already "expended an extraordinary amount of time and resources" by this time and did not have the resources to create such a list; later, the Ministry's lawyer advised the information and privacy staff not to create a list.
- While there was some delay in responding to the request (due in part to its initial closing of the request in the belief that the applicants would receive the requested records under the EST process—the Ministry later re-opened the request), the

[19] Paras. 5.23-5.24, initial submission.
[20] Paras. 5.25-6.05, initial submission.
[21] Carlson and Adamic affidavits.
[22] Paras. 2.01-2.03.
[23] Para. 5.30, initial submission.
[24] Para. 5.43, initial submission.

applicants' excessive demands and other events beyond the Ministry's control (staff changes, vacations, the applicants' changes in the scope of the request, the applicants' demands for responses within unreasonable time frames, other demands on staff time and a late decision to revert to the original scope of the request) contributed to the delay, although it made every reasonable effort and more to avoid delay.

[31] The applicants make extensive arguments to the effect that the Ministry failed them in performing its s. 6 duties. The applicants say, for example, that the Ministry still has not accounted for all responsive records, citing emails of March and February 2003 as examples. They also question the two-month gap between the first and second phases of the Ministry's records disclosure and what they perceive to be confusion surrounding the second disclosure of records, which (according to the Ministry) included the inadvertent disclosure of privileged records, suggesting the Ministry did not have proper request procedures in place. They also say that the Ministry did not keep to its side of the "agreement" in which Ministry staff retrieved some of the records which it had not intended to disclose. The applicants also argue that the Ministry should provide a detailed list of the records withheld under s. 14, along with its reasons for claiming privilege over these documents.[25] They also object to the Ministry's affidavits, saying, among other things, that they are incomplete and inconsistent with their own and other affidavits filed in the EST proceedings. They also object to the absence of affidavit evidence from a delegate of the Director of Employment Standards on his role in the request process.[26]

[32] Although the Ministry described the request process in exhaustive detail, it did not explain on what basis it considered the applicants' demands and expectations to be "enormously inflated" and "excessive". Assuming for the purpose of discussion that a public body can legitimately consider whether an applicant is making "inflated" and "excessive" demands in the context of a request, the Ministry has not explained here how or why the applicants' "demands" were "inflated" or "excessive". Nor has the Ministry explained how its efforts to accommodate the applicants' demands exceeded, as it contends, both what the Act requires and what the Ministry would normally do for access applicants. Nor has it explained why it believed that it had to accede to what it considered the applicants' "enormously inflated" expectations regarding levels of service. While s. 6 imposes a duty on a public body to assist applicants, it does not require the public body to treat applicants differently or better simply because those applicants make what the public body perceives to be unreasonable demands on public body resources.[27]

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[25] pp. 4-10, initial submission; Kitsul affidavits; pp. 2-13, reply.
[26] pp. 2 & 7-11, reply.
[27] I recognize that a public body in the Ministry's position may seek to provide service at a level beyond what the Act requires, but if the public body does so in response to demands by the applicant that cause the public body to respond late or otherwise not in compliance with the Act, the public body may in future cases have to re-consider this otherwise commendable approach, bearing in mind its primary obligation to fulfill its statutory duties.

[33] It is clear that the Ministry did not comply with its s. 7 time lines for response to the applicants' request and therefore, consistent with past decisions on this point, it cannot be said to have complied with its s. 6 duty, specifically, its duty to make every reasonable effort to respond without delay.[28] I will add as well that the Ministry's reasons for why it took so long to proceed with each phase of its response (the unspecified impact of other requests, of staff holidays and staff changes and the fact that 2,200 pages of records were involved) do not adequately account for the time the Ministry took with the second phase of its response (from early fall to mid-December).

[34] As for the adequacy of the Ministry's search for records, I am persuaded that it eventually conducted an adequate search for responsive records and has accounted satisfactorily for the steps it took in that search. I say this acknowledging the difference of opinion as to whether certain emails were (or should have been) retrieved and disclosed earlier or later.[29] It is apparent to me that the difference of opinion is due to different understandings of the disclosure requirements in the two processes and the impact of this on the search for and disclosure of records under the Act.

[35] I also find that the Ministry was not required by s. 6(1) of the Act to create a list of the 63 records it withheld initially under s. 14.[30] As for the other matters the applicants raised, again acknowledging the differences of opinion as to what was agreed-to before, during and after the August and December 2003 meetings, I am satisfied from the material before me that the Ministry complied with its s. 6(1) duty with respect to those meetings.

4.0 CONCLUSION

[36] For the reasons given above, under s. 58 of the Act, I confirm that the Ministry is authorized to refuse access to the records it withheld under s. 14, there having been no waiver of privilege respecting those records.

[37] No order is necessary regarding ss. 6(1) and 7.

February 3, 2006

ORIGINAL SIGNED BY

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Information and Privacy Commissioner
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OIPC File No. F03-18771

[28] See, for example, Order 01-47, [2001] B.C.I.P.C.D. No. 49.
[29] See, for example, pp. 9-10 applicants' reply submission, and tab 6 of their reply submission.
[30] See Order No. 105-1996, for example.