



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
— for —  
British Columbia

Order F06-09

**PROVINCIAL HEALTH SERVICES AUTHORITY**

Celia Francis, Adjudicator  
May 24, 2006

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**Summary:** Applicant requested records related to PHSA's interactions with external legal counsel. Records are protected by solicitor-client privilege.

**Key Words:** solicitor-client privilege—legal professional privilege—litigation privilege.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 14.

**Authorities Considered:** **B.C.:** Order 02-01, [2002] B.C.I.P.C.D. No. 1.

## **1.0 INTRODUCTION**

[1] The applicant, who formerly worked for the Provincial Health Services Authority ("PHSA"), requested access under the *Freedom of Information and Protection of Privacy Act* ("Act") to copies of records related to the PHSA's interactions with two named lawyers, "and which relate to myself or matters relating to me", for the period from 2003 to the date of his request. The PHSA responded by telling the applicant the places it had searched. It then said that it had located a number of responsive records, of which it was disclosing some and withholding the rest under s. 14 of the Act on the grounds that they were protected by solicitor-client privilege.

[2] The applicant requested a review of the PHSA's response, suggesting that the PHSA's reasons for withholding records were "not in keeping with the intent of the Act". Because the matter did not settle in mediation, a written inquiry took place under Part 5 of the Act.

## 2.0 ISSUE

[3] The issue before me in this case whether the PHSA is authorized by s. 14 to refuse access to information. Under s. 57(1) of the Act, the PHSA has the burden of proof regarding s. 14.

## 3.0 DISCUSSION

[4] **3.1 Section 6**—The applicant said that the PHSA's duty to assist him under s. 6 of the Act should be an issue in this inquiry. He questioned both the timeliness and completeness of the PHSA's response.<sup>1</sup> The PHSA responded that its compliance with s. 6 was not listed as an issue in this inquiry and that it would not therefore respond to the applicant on this point.<sup>2</sup>

[5] I agree with the PHSA on this point and will not consider the applicant's complaints regarding the s. 6 matters.

[6] **3.2 Solicitor-Client Privilege**—The PHSA applied s. 14 to almost all of the records. Section 14 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.

[7] The Information and Privacy Commissioner has considered the application of s. 14 in numerous orders and the principles for its application are well established. See, for example, Order 02-01.<sup>3</sup> I will not repeat those principles but apply them here.

[8] The PHSA described the four categories of correspondence in issue in this case as follows: internal memorandums of Bull, Housser & Tupper ("BHT") prepared for the purpose of providing legal advice to PHSA staff; communications between BHT and PHSA staff for the purpose of giving or seeking legal advice; communications between Dives, Grauer & Harper ("DGH") and individuals at the Children's and Women's Health Centre ("CWHC"; part of

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<sup>1</sup> Para. 25, initial submission.

<sup>2</sup> Para. 1, reply submission.

<sup>3</sup> [2002] B.C.I.P.C.D. No. 1.

the PHSA) named as defendants in legal proceedings (defamation suits) commenced by the applicant, through a PHSA employee as agent; and communications between DGH and PHSA and CWHC regarding the legal actions, where the PHSA and CWHC had a joint or common interest with the defendants in the actions.

[9] The PHSA said the records themselves support the application of solicitor-client privilege. It also said that litigation privilege applies and that the litigation in question is still ongoing as the applicant has appealed the trial judge's decisions in the legal actions. It also argued that the use of an agent between the law firms and the defendants or the PHSA does not affect the privilege.<sup>4</sup>

[10] The PHSA provided some *in camera* argument and open and *in camera* evidence from the BHT and DGH lawyers involved,<sup>5</sup> and from PHSA's Vice President, Medical Affairs, Quality, Safety and Risk Management,<sup>6</sup> in support of its position on solicitor-client privilege, including the nature of the retainer, the solicitor-client relationship, the work done by its external legal counsel, the joint interest of the defendants, the CWHC and PHSA in the outcome of the legal actions and the CWHC's and PHSA's interest in the successful defence of the litigation, based on qualified privilege.<sup>7</sup>

[11] The applicant provided his view of the situations in which solicitor-client privilege applies and does not apply. He also generally rejected the PHSA's application of s. 14 and its arguments on the use of an agent in its communications with its external legal counsel. He also suggested that records of interactions of the BHT and DGH lawyers with PHSA staff are not privileged and made a number of allegations about the actions of various individuals involved in his case which in his view negate any privilege.<sup>8</sup> The PHSA said it was not in a position to respond to these allegations.<sup>9</sup>

[12] I am satisfied from the material before me that the records which the PHSA withheld under s. 14 relate to the giving, seeking or formulation of confidential legal advice between solicitor and client and that they were also created with the dominant purpose of litigation which was underway at the time and which was still ongoing at the time of the inquiry. They are therefore protected by both litigation privilege and legal professional privilege and I find that they fall under s. 14.

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<sup>4</sup> Paras. 4-17, initial submission.

<sup>5</sup> See Washington and Dives affidavits.

<sup>6</sup> See Cochrane affidavit.

<sup>7</sup> The applicant objected to the submission of *in camera* material at paras. 2-5 of his reply. It is, in my opinion, properly received as *in camera*.

<sup>8</sup> Paras. 6-8 & 18-24, initial submission; paras. 1-6, reply submission.

<sup>9</sup> Para. 2, reply submission.

#### **4.0 CONCLUSION**

[13] For the reasons given above, under s. 58 of the Act, I confirm that the PHSA is authorized by s. 14 to refuse the applicant access to the records in dispute in this case.

May 24, 2006

#### **ORIGINAL SIGNED BY**

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Celia Francis  
Adjudicator

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