



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

Order F05-10

PROVINCIAL HEALTH SERVICES AUTHORITY

Celia Francis, Adjudicator
April 7, 2005

Quicklaw Cite: [2005] B.C.I.P.C.D. No. 11
Document URL: <http://www.oipc.bc.ca/orders/OrderF05-10.pdf>
Office URL: <http://www.oipc.bc.ca>
ISSN 1198-6182

Summary: Applicant requested names of legal counsel paid for by PHSA for PHSA employees. PHSA refused access under s. 14 on grounds that information, if it exists, would reveal terms of any retainer between solicitor and client and therefore information protected by solicitor-client privilege. Requested information, if it exists, is protected by solicitor-client privilege.

Key Words: solicitor-client 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.

Cases Considered: *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 2034.

1.0 INTRODUCTION

[1] The applicant sent the following request to the Provincial Health Services Authority (“PHSA”):

Please consider this as a formal request. I herein ask for:

- definition of the legal counsel for all individuals at the [Children’s and Women’s Health] Centre [“CWHC”] and at the PHSA who were given support with counsel during the course of their interactions with me or with affairs that relate to my employment.

[2] The applicant gave an example of interactions involving named individuals and went on to say:

I also understand that counsel was provided or offered to a large number of individuals at the Centre during the time I was being abused in the bogus human rights process. Such individuals would include all of the former complainants including [named individual], members of peer review committees, MAC [Medical Advisory Committee], [three named individuals], among many others.

[3] The PHSA refused access to the requested information under ss. 14 and 22 of the *Freedom of Information and Protection of Privacy Act* (“Act”). The applicant requested a review of this decision, saying the application of solicitor-client privilege was “extreme”. Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. The Office invited representations from the applicant, the public body and a third party. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

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

1. Is the PHSA authorized by s. 14 to withhold information?
2. Is the PHSA required by s. 22 to withhold information?

[5] Under s. 57(1) of the Act, the PHSA has the burden of proof regarding s. 14 while, under s. 57(2) the applicant has the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[6] **3.1 Procedural Matters** – The PHSA requested an extension of the inquiry deadlines and also asked that the Office give notice to a third party. The applicant objected to both requests, saying there had already been a delay in dealing with the matter under review. In a letter to the parties, the Registrar of Inquiries for this Office said that the applicant had not shown how a delay or the inclusion of a third party in the inquiry would prejudice him and that the Information and Privacy Commissioner had directed her to grant the extension and to give notice to the third party.

[7] The applicant also objected on p. 1 of his reply to the submission of *in camera* material by the PHSA and a third party, saying it was difficult for him to comment on submissions he could not see. He suggested that the material was not properly *in camera* and asked that I either not consider it or “make it transparent”. I understand the applicant’s concerns but am satisfied that the material is properly received *in camera*.

It is also germane to the issues before me and I have considered it in arriving at my decision.

[8] **3.2 Solicitor-Client Privilege** – 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.

[9] 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, [2002] B.C.I.P.C.D. No. 1. I will not repeat those principles but will apply them here.

[10] The PHSA says it is stating its position without revealing whether or not the requested records exist. It then says that identifying solicitors acting for CWHC employees who were supported by the PHSA would disclose the financial arrangements for the retainer of counsel by those individuals (*i.e.*, that the PHSA was financing the legal advice) and thus violate the solicitor-client privilege attaching to that relationship. It appears from the PHSA's submission that it interpreted the applicant's request as being for the names of individual employees for whom legal counsel acted, as well as the names of the legal counsel. I consider this a reasonable interpretation of the request.

[11] The PHSA says the British Columbia Court of Appeal dealt with this issue in *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 ("*Legal Services Society* No. 2"). The PHSA also says that the privilege does not belong to the PHSA but to third parties and it does not have discretion to waive that privilege (paras. 7-11, initial submission). The PHSA provides *in camera* affidavit evidence from a senior PHSA employee in support of its arguments on s. 14 (*in camera* McKerrow affidavit). I also considered *in camera* submissions from a third party on this matter.

[12] The applicant stated in his reply that he wants the "names of legal counsel for various individuals", not information about fees and retainers, and says the names of legal counsel are known in other cases, for example, the Legal Services Society case on which the PHSA relies. Solicitor-client privilege attaches only to confidential communications between solicitor and client where the client seeks legal advice, he argues, and does not apply to the requested information in this case. Even if it does, he says, the PHSA has waived privilege in its distribution of the information within the PHSA. The PHSA has, he says, "abused the provisions under section 14" (para. 3, p. 4, initial submission; para. 5, p. 1, and para. 5, p.3, reply).

[13] Although the existence of a solicitor-client relationship is not privileged, the terms of that relationship, including information relating to financial arrangements between solicitor and client, are privileged (see *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 2034) ("*Legal Services*

Society No. 1”). In light of the material before me and both *Legal Services Society No. 1* and *Legal Services Society No. 2*, referred to above, I am unable to see a distinction between the nature of the disputed information, as requested in this case, and that in the cases just mentioned. I agree with the PHSA that disclosure of the requested information, if it exists, would disclose the financial arrangements for any retainer of counsel for PHSA employees and thus information protected by solicitor client privilege. I therefore find that s. 14 applies to this information.

[14] As I have found that s. 14 applies to the requested information, I do not need to consider whether s. 22 applies to it.

4.0 CONCLUSION

[15] For the reasons given above, under s. 58 of the Act, I confirm that the PHSA is authorized by s. 14 to refuse access to the requested information.

April 7, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator