



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

Order F09-25

PROVINCIAL HEALTH SERVICES AUTHORITY

Michael McEvoy, Adjudicator

November 24, 2009

Quicklaw Cite: [2009] B.C.I.P.C.D. No. 31

Document URL: <http://www.oipc.bc.ca/orders/2009/OrderF09-25.pdf>

Summary: A doctor sought records relating to an harassment investigation about him that resulted in the suspension of his hospital privileges. The PHSA argued solicitor-client privilege applied to most of the information and therefore withheld it. Disclosing the remainder, the PHSA contended, would result in the unreasonable invasion of third-party privacy, contrary to s. 22. Legal professional privilege applied to those records for which s. 14 was asserted, and the PHSA was required to withhold the balance of the disputed information under s. 22 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss.14; 22(1), 22(2)(c) and (f), 22(3)(d) and (f).

Authorities Considered: **B.C.:** Decision F07-08, [2007] B.C.I.P.C.D. No. 28; Order F09-07, [2009] B.C.I.P.C.D. No. 10; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-25, [2001] B.C.I.P.C.D. No. 26; Order F06-19, [2006] B.C.I.P.C.D. No. 32; Order 02-08, [2002] B.C.I.P.C.D. No. 8.

Cases Considered: *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2007 BCCA 562; *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2006 BCSC 1473; *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665.

1.0 INTRODUCTION

[1] This case concerns an applicant seeking records that relate to an investigation into complaints against him of personal harassment in the workplace.

Specifically he requested the following records from the Provincial Health Services Authority (“PHSA”):

all materials relating to me and which relate to the recent harassment investigation so conducted by Ms. Hanne Jensen. This would include all materials, e-mails, notes to file, correspondence and any other relevant materials in her possession. Such material should include that which relates directly to my interactions with her as well as any material in her possession that relates to the investigation process and any other thereafter. This would include material from the time of last request (June 1, 2005) to the final reply from you relating to this request or up to the time of any inquiry relating to these new matters if that should occur.

[2] The PHSA applied to the Information and Privacy Commissioner under s. 43 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) for authorization to disregard the applicant’s request. Senior Adjudicator Celia Francis issued Decision F07-08,¹ denying the PHSA’s application.

[3] The PHSA subsequently responded to the applicant’s request by providing an index of the records from the file of Hanne Jensen (“Jensen”). The PHSA released some records and withheld others from Jensen’s files under ss. 14 and 22 of FIPPA.²

[4] The applicant asked this Office to review that decision. In the course of mediation that followed, the PHSA located further records responsive to the applicant’s request. It provided the applicant a schedule of these records that related to Michael Marchbank, Executive Vice-President of the PHSA, and Dr. Douglas Cochrane, Vice-President, Medical Affairs, Quality, Safety and Risk Management for the PHSA. The PHSA provided some of these records to the applicant while withholding others under ss. 14 and 22 of FIPPA.

[5] Later the PHSA located an additional set of responsive records described in a letter to the applicant.³ These records are from the files of the law firms Fasken Martineau LLP (“Fasken Martineau”), Bull Houser LLP (“Bull Houser”) and Alexander Holburn Beaudin & Lang LLP (“Alexander Holburn”). The PHSA withheld all these records under s. 14 of FIPPA.

[6] Mediation did not settle the matter and a written inquiry took place under Part 5 of FIPPA. This Office invited and received submissions from the applicant and the PHSA.

2.0 ISSUE

[7] The issues to be decided here are:

¹ [2007] B.C.I.P.C.D. No. 28.

² PHSA’s initial submission, para. 6.

³ Vanderburgh affidavit, Exhibit C.

1. Whether the PHSA is authorized by s. 14 of FIPPA to refuse to disclose certain requested records.
2. Whether the PHSA is required to withhold certain requested records under s. 22(1) of FIPPA.

[8] Section 57(1) of FIPPA provides that the PHSA must prove the applicant has no right of access regarding issue 1, while under s. 57(2) the burden of proof falls on the applicant concerning issue 2.

3.0 DISCUSSION

[9] **3.1 Background**—The applicant is a physician whose employment and hospital privileges at the Children and Women’s Health Centre of British Columbia (“Health Centre”) are presently suspended.⁴ The events giving rise to this suspension and multiplicity of legal proceedings that followed are a matter of public record⁵ and are also summarized in Order F09-07.⁶

[10] The facts of particular relevance here, which I glean from the parties’ submissions, are that the PHSA, through Fasken Martineau, appointed Jensen as a Human Rights Advisor under the Health Centre’s Human Rights Policy, to investigate harassment complaints against the applicant made by members of the Health Centre.

[11] The Supreme Court of British Columbia summarized this investigation process:⁷

After a complaint is made, an investigator prepares a report. There is then a progression through a number of administrative review stages. These reviews are undertaken internally within the [Health Centre] and I will refer to the entire progression as the internal review process. At the end of the internal review process, the [Health Centre] Board of Directors (the Board) makes a substantive decision regarding the complaint and, where necessary, makes an order. Although recommendations are made at various stages of the internal review, the Board’s decision is the first binding decision. Beyond the Board’s decision there is a right of appeal to the Hospital Appeal Board.

⁴ The PHSA’s initial submission referred me to *Cimolai v. Children’s and Women’s Health Centre of British Columbia*, 2007 BCCA 562 on this point. Paragraph two of the ruling notes the applicant sought an order by way of a judicial review proceeding that he be “reinstated to full employment and that the hospital pay to [the applicant] all benefits lost since his suspension”. The applicant’s reply submission, in this inquiry, argues he was not suspended, but “rather I am a dormant employee without salary.” In my view, nothing turns on this point.

⁵ See for example *Cimolai v. Children’s and Women’s Health Centre of British Columbia*, 2007 BCCA 562 cited by the PHSA.

⁶ [2009] B.C.I.P.C.D. No. 10, paras. 10-14.

⁷ *Cimolai v. Children’s and Women’s Health Centre of British Columbia*, 2006 BCSC 1473 at para. 8, referred to in the PHSA’s initial submission at para. 11.

[12] Jensen conducted an investigation into the complaints (“Report”) and found them to have been “substantiated”. A recommendation followed from two doctors at the Health Centre that the applicant’s privileges, and appointment as a member of the Health Centre, be cancelled. The Health Centre informed the applicant it was referring the Report to its Medical Advisory Committee. In the meantime, the applicant filed an application for judicial review challenging the Report. The BC Supreme Court dismissed the application because the applicant had not exhausted all of the procedural steps on internal review and therefore it was premature to conduct a judicial review. The applicant failed in his attempts to have this decision overturned by the British Columbia Court of Appeal and Supreme Court of Canada. The PHSA says the internal review process regarding the findings in the Report is ongoing.⁸

[13] **3.2 Solicitor-Client Privilege**—The PHSA says solicitor-client privilege protects, what by my count are, 539 records plus files containing collections of notes and memoranda and the like.

[14] Section 14 of FIPPA reads as follows:

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

[15] It is well established that s. 14 of FIPPA encompasses two kinds of privilege recognized at law: legal professional privilege (sometimes referred to as legal advice privilege) and litigation privilege.⁹

[16] The Commissioner has noted the four elements required to establish legal professional privilege in a number of orders:¹⁰

1. there must be a communication, whether oral or written,
2. the communication must be of a confidential character,
3. the communication must be between a client (or his agent) and a legal advisor, and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[17] The second kind of privilege, litigation privilege, protects information in records where the dominant purpose for creation of the records was to prepare for or conduct litigation under way or in reasonable prospect at the time the records were created.¹¹

⁸ PHSA’s initial submission, para. 19.

⁹ See for example Order 01-53, [2001] B.C.I.P.C.D. No. 56.

¹⁰ Order 01-25, [2001] B.C.I.P.C.D. No. 26, at para. 60, from *B. v. Canada* [1995] 5 W.W.R. 374 (BCSC), Order 01-53, para. 13 and Order F06-19, [2006] B.C.I.P.C.D. No. 32 at para. 36.

¹¹ See Order 02-08, [2002] B.C.I.P.C.D. No. 8 concerning this branch of the solicitor-client test, for example.

[18] Six affidavits provided by the PHSA collectively list the records in dispute and these affidavits along with the PHSA's initial submission identify which kind of privilege it believes applies to each record.

[19] I have carefully read and considered all submissions the parties provided and will refer to them below as necessary. For ease of organizing my findings, I will assess the requested records by affidavit.

Affidavit of Hanne Jensen

[20] Jensen lists 11 records over which legal professional privilege is claimed. One concerns legal advice Fasken Martineau provided to her. Three records concern her communications with Alexander Holburn relating to the provision of information and seeking of legal advice regarding the response to the applicant's request for her investigation files. The rest of the records are primarily communications with Fasken Martineau providing information to that law firm for the judicial review application the applicant commenced.

[21] The applicant argues that the PHSA and its lawyers are not counsel to Jensen and therefore the PHSA is not entitled to claim legal professional privilege. The applicant contends that Fasken Martineau acts as her "guidance" rather than her legal counsel.¹²

[22] I reject the applicant's submission. The legal professional privilege protects communications between a third party or agent of a client and the solicitor where the third party or agent is performing a function on the client's behalf, which is integral to the relationship between the solicitor and client.¹³ The PHSA says that Jensen's

...role as the harassment investigator under the Health Centre's Human Rights Policy is an integral function of the Health Centre and therefore Ms Jensen is part of the PHSA for the purposes of the solicitor client relationship. Ms Jensen's function as the investigator is integral to the relationship between the PHSA and Fasken Martineau LLP with respect to the conduct of the investigation and the subsequent legal proceedings, and to the relationship between the PHSA and Alexander Holburn Beaudin & Lang LLP with respect to the PHSA's response to the various requests for records related to Ms. Jensen's function as harassment investigator made by the Applicant under [FIPPA].

[23] I agree with the PHSA's characterization of the evidence. It is clear that Jensen performed a critical function on the PHSA's behalf, *i.e.*, to ensure the PHSA met the requirements of its human rights policy. In executing this policy on the PHSA's behalf, Jensen both sought and received legal advice. In these

¹² Applicant's reply submission, p. 5.

¹³ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, at paras. 43-50.

circumstances, I find that legal professional privilege covers the requested records referred to in Jensen's affidavit.

Affidavit of Michael Marchbank

[24] Michael Marchbank ("Marchbank"), was involved in monitoring the legal proceedings and legal issues arising from the harassment investigation and the Report and communicating with legal counsel for the PHSA for the purposes of obtaining legal advice. The PHSA claims privilege over the responsive records described as Marchbank's communications with Fasken Martineau and internal communications in his files that relate to providing instructions to counsel and obtaining legal advice. I am satisfied legal professional privilege covers these records based upon my review of the evidence and the application of the law concerning solicitor-client privilege.

Affidavit of Douglas Cochrane

[25] Douglas Cochrane ("Cochrane") says that, together with a colleague, he was responsible for communicating with the applicant about the Report and the further procedures before the Medical Advisory Committee ("Committee") and the PHSA board. Cochrane says he ensured referral of these matters to the Committee and that he regularly communicated with lawyers at Fasken Martineau, who advised the PHSA during the harassment investigation. Cochrane states that he obtained legal advice regarding the Health Centre's internal processes and that he communicated with Fasken Martineau lawyers to obtain legal advice regarding the judicial review proceedings and subsequent appeals.

[26] He states that he also communicated with lawyer Penny Washington of Bull Housser, who provided legal advice to the PHSA board in relation to any proceedings before the PHSA board arising out of the Report. Cochrane states that he also communicated with lawyer Eileen Vanderburgh at Alexander Holburn about the applicant's FIPPA requests for records related to the investigation and the Report.

[27] Cochrane specifically describes how each of the 152 responsive records in his files relates to the circumstances just described. I am satisfied based on all of the evidence and arguments before me that the PHSA has met the burden of proving these records fall within the definition of legal professional privilege.

Affidavit of Thora Sigurdson

[28] Thora Sigurdson ("Sigurdson") is a lawyer with Fasken Martineau. She states the PHSA retained her law firm to provide advice to the PHSA and the Health Centre respecting Jensen's investigation of harassment allegations made against the applicant. Sigurdson says that Fasken Martineau continues to provide legal advice concerning the Committee process. Fasken Martineau also acted in the various court proceedings noted above involving the PHSA and the

applicant. Sigurdson deposes that the records range from communications with other law firms retained by the PHSA concerning the same or related matters about the applicant to the communications between Fasken Martineau and Jensen. The PHSA argues the legal professional privilege covers all of the records while both the legal professional and litigation privilege cover a few of the records such as notes and memoranda prepared for the purpose of providing legal advice.¹⁴ I have assessed Sigurdson's affidavit in relation to each privilege claim, have considered the submissions of both parties, and am satisfied that all records are covered by the legal professional privilege.

Affidavit of Penny Washington

[29] Penny Washington ("Washington") is a lawyer with the firm of Bull Houser. She states that her file contains nine records, all of which are communications with Douglas Cochrane respecting the provision of legal advice. The applicant's submission concerning Washington's affidavit was both irrelevant and abusive in respect of the affiant and I will not repeat it here. I have no difficulty concluding that the nine records in question referred to in Washington's affidavit are covered by legal professional privilege.

Affidavit of Eileen Vanderburgh

[30] Eileen Vanderburgh ("Vanderburgh") is a lawyer with the law firm Alexander Holburn and is counsel for the PHSA. She states that she provided advice and legal representation to the PHSA concerning the applicant's requests for records under FIPPA.

[31] Vanderburgh identifies a number of records as privileged, including her communications with the PHSA, Jensen and Fasken Martineau, as well as her collections of notes and memoranda, all undertaken to provide legal advice to the PHSA. The PHSA submits, as it did with the records in Fasken Martineau's files noted in the Sigurdson affidavit, that legal professional privilege covers all of the records while both legal professional and litigation privilege apply to a few of the records such as notes and memoranda. Having reviewed the submissions of both parties, Vanderburgh's affidavit and the applicable case law concerning solicitor-client privilege, I am satisfied that all records identified in the Vanderburgh affidavit are covered by legal professional privilege.

[32] In summary, I find that the PHSA has properly claimed solicitor-client privilege over all records set out in the six affidavits attached to its initial submission.

[33] It is therefore not necessary for me to deal with any s. 22 arguments the PHSA made in respect of the above records.

¹⁴ PHSA's initial submission, paras. 35 and 37.

[34] **3.3 Third Party Privacy**—There are four fully withheld records that remain in dispute for which the PHSA only claimed a s. 22 exception. These records are listed as numbers 75, 207, 208 and 209 on the Appendix “A” attached to the affidavit of Douglas Cochrane. Record 75 is a one-sentence email communication between two employees of the Health Centre and records 207-209 are a three-page fax communication between Douglas Cochrane and a lawyer. The PHSA asserts they are required to withhold them under s. 22 of FIPPA. The parts of s. 22 relevant to this case are

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(f) the personal information has been supplied in confidence,

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(d) the personal information relates to employment, occupational or educational history,

...

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,

[35] The Commissioner discussed the application of s. 22 in Order 01-53¹⁵ and I have applied that decision and other decisions from this Office without elaboration.

[36] In my view, all four records contain personal information because they include recorded information about several identifiable individuals other than contact information.

¹⁵ [2001] B.C.I.P.C.D. No. 56.

[37] Section 22(4) sets out the circumstances in which a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. None of those circumstances applies here.

[38] I also conclude that the records contain third-party personal information relating to employment history, disclosure of which is presumed to be an unreasonable invasion of third-party privacy. In addition, the fax record describes financial information of a third party, meaning that disclosure of this information is also presumed to be an unreasonable invasion of third-party privacy.

[39] In respect of relevant circumstances under s. 22(2), I conclude that the personal information in all of these records was supplied in confidence. This is a relevant circumstance weighing against their disclosure. The applicant argues that the records are relevant to a fair determination of his rights under s. 22(2)(c); a circumstance weighing in favour of disclosing the information. The applicant does not explain how this would be so and my review of the records does not support the applicant's assertion.

[40] In summary, the presumption that disclosure of these four records would be an unreasonable invasion of third-party privacy has not been rebutted and therefore the PHSA is required to withhold them under s. 22(1).

4.0 CONCLUSION

[41] For reasons given above, under s. 58 of FIPPA, I make the following orders:

1. I confirm that the PHSA is authorized by s. 14 to refuse access to all records identified in the affidavit evidence attached to its submissions.
2. I require the PHSA to refuse access to the records listed as numbers 75, 207, 208 and 209 on the Appendix "A" attached to the affidavit of Douglas Cochrane and that it withheld under s. 22 of FIPPA.

November 24, 2009

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator