IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gichuru v. British Columbia (Information and Privacy Commissioner),* 2013 BCSC 1201

Date: 20130708
Docket: S113225
Registry: Vancouver

Between:

Mokua Gichuru

Petitioner

And

The information and Privacy Commissioner for British Columbia and The Law Society of British Columbia

Respondents

Before: The Honourable Mr. Justice Greyell

On judicial review from: Office of the Information & Privacy Commissioner for British Columbia, March 15, 2011, (*Decision F11-01; Law Society of British Columbia (Re)*, [2011] B.C.I.P.C.D. No. 11)

Supplementary Reasons for Judgment
(to *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835).

The Petitioner, Mokua Gichuru:	In Person
Counsel for the Respondent, The Information and Privacy Commissioner of British Columbia:	D. K. Lovett, Q.C.
Counsel for the Respondent, The Law Society of British Columbia:	A. M. Gunn, Q.C.
Place and Date of Trial/Hearing:	Vancouver, B.C. January 29 and 30, 2013
Place and Date of Judgment:	Vancouver, B.C. May 13, 2013

Place and Date of Hearing (re: Supplementary Reasons):	Vancouver, B.C. July 3, 2013
Place and Date of Judgment (re: Supplementary Reasons):	Vancouver, B.C. July 8, 2013

[1] Following the issue of my Reasons dated May 13, 2013 (2013 BCSC 835), Mr. Gichuru applied to reopen the hearing of the Petition, drawing my attention to his argument that the applicable standard of review was correctness while that of the OPIC was reasonableness.

[2] Upon review of his argument during the hearing of the Petition I agree with his position I have mischaracterized his position.

[3] Mr. Gichuru also requested I reopen the hearing to allow him to reargue his position. Given this matter is under appeal and that I have dealt with the OPIC decision on the grounds of both correctness and reasonableness I am of the view it would be inappropriate for the court to elaborate further on its reasons for dismissing the Petition.

"Greyell J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gichuru v. British Columbia (Information and Privacy Commissioner),* 2013 BCSC 835

Date: 20130708
Docket: S113225
Registry: Vancouver

Between:

Mokua Gichuru

Petitioner

And

The information and Privacy Commissioner for British Columbia and The Law Society of British Columbia

Respondents

Before: The Honourable Mr. Justice Greyell

On judicial review from: Office of the Information & Privacy Commissioner for British Columbia, March 15, 2011, (*Decision F11-01; Law Society of British Columbia (Re)*, [2011] B.C.I.P.C.D. No. 11)

Corrigendum to Reasons for Judgment

The Petitioner, Mokua Gichuru:	In Person
Counsel for the Respondent, The Information and Privacy Commissioner of British Columbia:	D. K. Lovett, Q.C.
Counsel for the Respondent, The Law Society of British Columbia:	A. M. Gunn, Q.C.
Place and Date of Trial/Hearing:	Vancouver, B.C. January 29 and 30, 2013
Place and Date of Judgment:	Vancouver, B.C. May 13, 2013
Place and Date of Corrigendum:	Vancouver, B.C. July 8, 2013

[1] This is a corrigendum to my Reasons for Judgment issued in this matter on May 13, 2013 indexed as *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835.

[2] I have amended my judgment by deleting paragraph 31 which read:

> [31] Mr. Gichuru agrees with the position of OIPC on the applicable standard of review.

"Greyell J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gichuru v. British Columbia (Information and Privacy Commissioner),* 2013 BCSC 1199

Date: 20130708
Docket: S113225
Registry: Vancouver

Between:

Mokua Gichuru

Petitioner

And

The information and Privacy Commissioner for British Columbia and The Law Society of British Columbia

Respondents

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment Re Costs

The Petitioner, Mokua Gichuru:	In Person
Counsel for the Respondent, The Information and Privacy Commissioner of British Columbia:	D. K. Lovett, Q.C.
Counsel for the Respondent, The Law Society of British Columbia:	A. M. Gunn, Q.C.
Place and Date of Trial/Hearing:	Vancouver, B.C. January 29 and 30, 2013
Place and Date of Judgment:	Vancouver, B.C. July 8, 2013

[1] The Law Society of British Columbia ("Law Society") seeks costs against the petitioner arising from the dismissal of the petitioner's application for judicial review from a decision made by an adjudicator of the Office of The Information and Privacy Commissioner for British Columbia ("OIPC") on May 13, 2011. My decision dismissing the petition is indexed as *Gichuru v. British Columbia (Information and Privacy Commissioner*, 2013 BCSC 835.

[2] The Law Society was named as a party in the petitioner and appeared at the hearing of the petition.

[3] In my decision I granted each of the parties the opportunity to make written submissions on costs. Those submissions have now been received.

[4] The Law Society's position is that there is no reason to depart from the usual rule that costs follow the event: Rule 14-1(9) of the *Supreme Court Civil Rules* ("*Rules*"). The Law Society says there are no special circumstances present in this case which would justify the court depart from the rule that a successful party should recover its costs.

[5] In particular the Law Society refers to three points it says are relevant to the determination of whether the court should exercise its discretion to depart from the normal rule.

[6] The first point relates to my findings which, the Law Society says, demonstrate that Mr. Gichuru's basis for bringing the application for review were, in a number of respects "inconsequential" or "had no merit" or that he had not supplied "any cogent basis" for his argument. That is, in general, Mr. Gichuru's arguments were bound to fail.

[7] Second the Law Society says it put Mr. Gichuru on notice well in advance of the hearing that it would seek costs if his petition were dismissed and also advised him it would rely on Rule 14-1(9). At the same time the Law Society issued an offer to settle this proceeding, advising Mr. Gichuru it would waive any entitlement to

costs if Mr. Gichuru discontinued the proceedings. Mr. Gichuru did not respond to that offer to settle and chose to proceed with the hearing.

[8] Third, the Law Society says that Mr. Gichuru is legally trained and, while currently a non-practicing member of the Law Society is familiar with the litigation process and could not reasonably have expected he could prosecute this application free of cost consequences should he not be successful, particularly having regard to the Law Society's notice to him it would be seeking costs, should he not succeed.

[9] In response, Mr. Gichuru says that he never took the position in these proceeding that if he was not successful he should not be held responsible for costs. Accordingly he says the Law Society's application was unnecessary and that it should be denied costs of this application.

[10] There is no reason in this case to depart from the usual rule that an unsuccessful party will pay the costs of the proceedings. There is no application from Mr. Gichuru to relieve him from the payment of costs. Even if there had been there is little chance he would have been successful, particularly given the notice he had, the Law Society would seek costs if he was unsuccessful. In any event Mr. Gichuru does not resist an award for costs.

[11] Accordingly I award the Law Society costs of this proceeding, assessed under Scale B of Appendix B of the *Rules*. However, in my view on such assessment the Law Society should only recover at 50% of the amount for the actual costs application as, based on Mr. Gichuru's submission, he agreed he was responsible for costs. The Law Society's submission anticipated defences that were not raised and would have more appropriately been dealt with in reply had they been raised.

"Greyell J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835

Date: 20130513
Docket: S113225
Registry: Vancouver

Between:

Mokua Gichuru

Petitioner

And

The information and Privacy Commissioner for British Columbia and The Law Society of British Columbia

Respondents

Before: The Honourable Mr. Justice Greyell

On judicial review from: Office of the Information & Privacy Commissioner for British Columbia, March 15, 2011, (*Decision F11-01; Law Society of British Columbia (Re)*, [2011] B.C.I.P.C.D. No. 11)

Reasons for Judgment

The Petitioner, Mokua Gichuru:	In Person
Counsel for the Respondent, The Information and Privacy Commissioner of British Columbia:	D. K. Lovett, Q.C.
Counsel for the Respondent, The Law Society of British Columbia:	A. M. Gunn, Q.C.
Place and Date of Trial/Hearing:	Vancouver, B.C. January 29 and 30, 2013
Place and Date of Judgment:	Vancouver, B.C. May 13, 2013

Introduction

[1] Mr. Gichuru brought this petition for judicial review of a decision dated March 15, 2011 of an adjudicator of the Office of the Information and Privacy Commissioner for British Columbia ("OIPC") on May 13, 2011. The adjudicator granted an application made pursuant to s. 56(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*] by the Law Society of British Columbia ("Law Society") that an inquiry not be held with respect to Mr. Gichuru's request that OIPC review the Law Society's decision to withhold information under *FIPPA*. Mr. Gichuru seeks an order of *certiorari* to quash the decision.

[2] The Law Society requests this petition be dismissed. It argues that the adjudicator's decision is to be reviewed on the standard of reasonableness. The Law Society submits the adjudicator's decision falls well within the range of possible, acceptable outcomes in view of the facts and law.

[3] Counsel for OIPC appeared at the hearing of this matter but confined her role to submissions on the appropriate standard of review that should be applied to the issues that were before the adjudicator and the decision he made pursuant to s. 56(1) of *FIPPA*.

Background

The Human Rights Complaint

[4] Mr. Gichuru is a lawyer and a non-practicing member of the Law Society.

[5] On April 22, 2004, Mr. Gichuru filed a complaint with the British Columbia Human Rights Tribunal ("HRT"), asserting the Law Society had discriminated against him in the course of his employment because of his mental disability, contrary to s. 13 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*]. Those proceedings remain ongoing. A host of actions have arisen out of this human rights complaint, including judicial review proceedings and appeals from those decisions.

[6] Throughout the course of this litigation, the Law Society was advised and represented by law firms Davis LLP and Nathanson, Schachter & Thompson LLP. Additionally, the Law Society has consulted with Lawson Lundell LLP in connection with potential judicial proceedings associated with the human rights complaint. The law firm of Heenan Blaikie LLP has acted as counsel for a third party in a related matter.

The Requests for Documents from the Law Society Pursuant to *FIPPA*

[7] As the Law Society is a public body, it is subject to the provisions of *FIPPA*.

[8] On October 24, 2009, Mr. Gichuru made a request to the Law Society for access to copies of correspondence between Davis LLP and third parties copied to the Law Society relating to him ("First Access Request").

[9] On December 8, 2009, the Law Society disclosed various records in response to the First Access Request, with the exception of 24 records. Those records were withheld on the basis they were exempted by s. 14 of *FIPPA*, which provides:

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

[10] On January 9, 2010, Mr. Gichuru submitted a second request to the Law Society for records pursuant to *FIPPA*, specifically copies of correspondence between the Law Society and third parties relating to him ("Second Access Request").

[11] On February 19, 2010, the Law Society disclosed various records in response to the Second Access Request. It withheld 27 records on the basis that those records were exempt from disclosure, again pursuant to s. 14 of *FIPPA*.

[12] In response to each disclosure request, the Law Society provided the petitioner with a table describing the documents it had severed. The description of each document identified when and to whom the communication was made and the basis for the claimed privilege. The Law Society claimed either solicitor-client privilege or litigation privilege.

Request for Review to OIPC

[13] On December 18, 2009, Mr. Gichuru wrote to OIPC and requested it review the Law Society's response to the First Access Request. The basis for his request was that "the records requested cannot be privileged as these records have been sent to or received from third parties not directly related to the litigation."

[14] On March 29, 2010, Mr. Gichuru requested a review of the Law Society's response to the Second Access Request. His ground for review was identical to his first request.

[15] OIPC unsuccessfully attempted to mediate both requests for review and on August 16, 2010, it scheduled an inquiry.

The Law Society's Application to OIPC to not Hold an Inquiry

[16] On November 8, 2010, the Law Society indicated its intention to apply under s. 56(1) of *FIPPA* to OIPC to not proceed with the inquiry.

[17] Section 56(1) provides:

> If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[18] On November 10, 2010, the Registrar of OIPC advised Mr. Gichuru and the Law Society by letter of the Law Society's application for OIPC to exercise its discretion under s. 56(1) of *FIPPA* to decline to conduct an inquiry. It informed the parties that the inquiry had been adjourned "in order to give the parties an opportunity to submit both argument and evidence as to whether the Commissioner should exercise her discretion to decline to conduct an inquiry." That letter set out a schedule by which each party was to file their submissions. It also attached general rules on the process for s. 56 applications, which included the procedure for filing submissions, the proper format of submissions, the discretion of OIPC to extend the time for filing submissions, notice, in camera submissions and the exclusion of mediation materials.

[19] The Law Society's initial submission was filed on December 3, 2010. In essence, the Law Society argued it was plain and obvious that the records at issue were subject to the exception established by s. 14 of *FIPPA*. Hence, there was no issue which would merit an inquiry.

[20] Attached to the submissions from the Law Society was an affidavit sworn by Ms. Jackie Drozdowski, the Information and Privacy Officer for the Law Society. Ms. Drozdowski deposed that she had reviewed each of the severed documents. Of the 27 records over which the Law Society had asserted solicitor-client privilege, 15 were communications from the Law Society to external counsel for the purpose of obtaining legal advice, ten were communications from external counsel to the Law Society providing legal advice and two were communications between external counsel for the purpose of providing legal advice to the Law Society.
Ms. Drozdowski deposed that of the remaining 24 records over which the Law Society had asserted litigation privilege, 15 were communications following the date the petitioner filed his human rights complaint in respect of potential witnesses, six were communications from external counsel to the Law Society in respect of those proceedings and three were communications between external counsel and prospective witnesses in those proceedings. She deposed that the dominant purpose for those communications was litigation.

[21] Mr. Gichuru filed his submission to OIPC on January 14, 2011. He opened his submission with a notification that he was no longer seeking production of one document listed in the First Access Request and several documents listed in the Second Access Request.

[22] Mr. Gichuru's central argument was that the Law Society had "failed to provide any information, let alone sufficient information, to enable an adjudicator to determine what the dominant purpose of the documents in question was."
Mr. Gichuru submitted the Law Society had sought to sever certain documents delivered to or received from "a third party in a related matter" without identifying the "related matter" or how that matter related to his litigation with the Law Society.

Mr. Gichuru maintained the onus fell on the Law Society to prove that litigation privilege applied to each document he sought. He argued the Law Society had not provided sufficient information to show it was plain and obvious that the records in dispute were subject to the exception of disclosure established under s. 14 of *FIPPA*.

[23] In the course of his submissions, Mr. Gichuru also made reference to an affidavit sworn on April 6, 2010 by Tamara Hunter of Davis LLP (which he did not annex to his submission). He asserted Ms. Hunter had deposed that upon reviewing certain documents withheld under the First Access Request, it was not obvious to her the dominant purpose of those documents. He explained that she had based her opinion on information she had received from the person at Davis LLP that had sent or received that correspondence.

[24] The Law Society's reply to Mr. Gichuru's submission was filed on January 21, 2011. It again submitted that Mr. Gichuru had failed to identify any issue meriting inquiry. The reply submission contained a further affidavit from Ms. Drozdowski in which she deposed:

> 8. In paragraphs 18 and 20 of the Initial Affidavit, I gave evidence that of the 51 communications that are responsive to the First or Second Access Request, litigation was indeed the dominant purpose of all of them. In light of the concerns expressed in the Applicant's Submissions, though, I have again reviewed the 26 communications that comprise the Remaining Records at Issue, (sic) Having done so, I reiterate that litigation was the dominant purpose for each of those communications. I also state that I cannot discern <u>any</u> purpose for those communications other than the litigation matters described in paragraphs 4 and 17 of the Initial Affidavit. In specific response to paragraphs 6 through 10 (inclusive) of the Applicant's Submissions, I confirm that none of the Remaining Records at Issue are to or from Howard Smith or Howard Smith Personal Law Corporation and none relate to the legal proceedings described in those paragraphs.
>
> [Emphasis in original.]

[25] Ms. Drozdowski also annexed Ms. Hunter's April 6, 2010 affidavit as an exhibit to her affidavit.

The Decision of the Adjudicator

[26] The adjudicator issued Decision F11-01 on March 15, 2011. He allowed the Law Society's application: there would be no inquiry into Mr. Gichuru's request.

[27] At the commencement of his reasons, the adjudicator set out the principles for exercising discretion under s. 56(1), citing a previous tribunal decision. He stated at para. 5:

> A number of previous decisions have laid out the principles for the exercise of discretion under s. 56(1). Senior Adjudicator Francis summarized those in Decision F08-11:
>
> - the public body must show why an inquiry should not be held
> - the respondent (the applicant for records) does not have a burden of showing why the inquiry should proceed; however, where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide "some cogent basis for arguing the contrary"
> - the reasons for exercising discretion under s. 56 in favour of not holding an inquiry are open-ended and include mootness, situations where it is plain and obvious that the records fall under a particular exception or outside the scope of FIPPA, and the principles of abuse of process, *res judicata* and issue estoppel
> - it must in each case be clear that there is no arguable case that merits an inquiry.
>
> [Citations omitted.]

[28] After setting out the background to the application and identifying the records at issue, the adjudicator discussed s. 14 of *FIPPA* and the categories of privilege that are protected by that provision:

> [11] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal professional privilege (sometimes referred to as legal advice or solicitor-client privilege) and litigation privilege. The Law Society argues that litigation privilege applies to all of the records, while legal professional privilege also applies to records 3 and 22 form the respondent's first request.
>
> [12] The decisions of this office have consistently applied the test for legal professional privilege at common law. Thackray J. (as he then was) put the test this way:

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 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.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.
>
> [13] Litigation privilege protects communications, including those between a lawyer and third party, where the dominant purpose for the communication was the preparation or conduct of litigation or the litigation was in reasonable prospect at the time of the communications. It is also settled law that litigation privilege ends when the litigation, giving rise to it, ends. The proviso, which the Supreme Court of Canada articulated in *Blank v. Canada (Minister of Justice)*, is that the privilege "may retain its purpose - and, therefore, its effect - where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended."
>
> [Citations omitted.]

[29] The adjudicator then addressed the arguments made by the parties regarding the Law Society's application. In particular, I note the adjudicator's comments concerning the petitioner's argument:

> [17] The applicant says at least some of the disputed records are "for the purpose of assisting other parties in litigation against the Applicant" rather than litigation between him and the Law Society. In support of this argument, the applicant provided two documents he obtained through a 2008 small claims court action that he commenced against a law firm ("Law Firm"). The documents are the cover pages of two Human Right Tribunal decisions involving the applicant. Those documents contained "fax headers" indicating Davis LLP had faxed them to the Law Firm.
>
> [18] The applicant also submits the Law Society's reference to "third party witnesses" is vague and there is no indication how these witnesses relate to the applicant's litigation with the Law Society. Finally, the applicant says a sworn affidavit by a Davis LLP lawyer in another proceeding casts doubt on the Law Society's submissions that the dominant purpose for creating certain records was litigation.

[Citations omitted.]

[30] The adjudicator held as follows:

> [21] Further, the Law Society conclusively addresses the applicant's questions about whether the withheld communications between the Law Society's counsel and third parties relate to his litigation with the Law Society. The sworn affidavit evidence the Law Society filed states the communications with third parties in this case relate to the applicant's human rights complaint and court proceedings arising from it. As noted above, solicitor-client privilege applies to a lawyer's communications with the third parties undertaken with respect to contemplated or actual litigation.
>
> [22] Finally, nothing in the affidavit filed by a lawyer with Davis LLP in another proceeding casts doubt on the Law Society's claim of solicitor-client privilege in this case. The Law Society attached this affidavit, originally filed in connection with the applicant's Human Rights Tribunal complaint, to its reply in this matter. In my view, this affidavit confirms, rather than calls into doubt, the Law Society's submission that the withheld communications here involve its lawyer, Davis LLP and were created for the dominant purpose of litigation. The affidavit in question refers to three records that were the exception to a claim of privilege in the Human Rights complaint. The Law Society's reply makes clear none of those records is at issue here.
>
> [23] To summarize, the Law Society has demonstrated that it is plain and obvious that solicitor-client privilege applies to the 26 disputed records in this case. The applicant makes no cogent case to the contrary. This being so, there is no arguable case that merits an inquiry.
>
> [Citations omitted.]

Positions of the Parties

[31] Mr. Gichuru agrees with the position of OIPC on the applicable standard of review.

[32] He argues that there are several grounds upon which this Court may quash the decision. Specifically, the adjudicator:

1) incorrectly stated and failed to apply the correct test for litigation privilege by

    (a) failing to require the Law Society establish the purpose of withholding documents that would have enabled him to determine the dominant purpose;

(b) reversing the onus of proof for a claim of litigation privilege by finding the petitioner had an obligation to establish the withheld records were not protected by litigation privilege;

(c) "conflating" the test for litigation privilege and solicitor-client privilege;

2) reversed the onus under s. 56(1) of *FIPPA* by requiring Mr. Gichuru establish that the withheld documents are not protected by litigation privilege;

3) made a patently unreasonable finding of fact that the petitioner had made two separate requests to the Law Society in the latter part of 2009 for correspondence; and

4) made a patently unreasonable finding of fact that Heenan Blaikie LLP acted as counsel for a third party in a matter related to his human rights complaint.

[33] In oral submissions, Mr. Gichuru also challenged the jurisdiction of OIPC to hear an application for OIPC to exercise its discretion to not hold an inquiry under s. 56(1).

[34] To be clear, Mr. Gichuru did not take issue with those documents over which the Law Society claimed solicitor-client privilege. The documents at issue are solely those over which the Law Society has claimed litigation privilege.

[35] The Law Society submits the petitioner has challenged a discretionary decision by an expert-decision maker. On that basis, the standard of review is reasonableness. The Law Society argues the petitioner has failed to establish the adjudicator's decision was unreasonable.

The Standard of Review

[36] The adjudicator's decision gives rise to two applicable standards of review.

[37] The interpretation and application of s. 14 of *FIPPA* engages the standard of correctness in view of the nature of the question at issue. In order to interpret and apply s. 14, the adjudicator must determine whether information is subject to

solicitor-client privilege. That issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", which has been held to engage the standard of correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 60 (*Dunsmuir*), citing from *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 62). See also *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (S.C.) at paras. 47 - 48; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 203 at para. 21 (affirmed 2003 BCCA 278).

[38] The central issue before this Court is the adjudicator's decision the inquiry would not proceed under s. 56(1).

[39] *FIPPA* establishes a specialized regulatory regime governing the right of access to information from public institutions, the purpose of which is to make public bodies more accountable to the public and to protect personal privacy: *FIPPA*, s. 2(1). It provides for an independent review process of decisions made under *FIPPA*. Part 5 of FIPPA governs the Information and Privacy Commissioner's ("Commissioner") authority to undertake an inquiry and make orders with regard to complaints. In this way, the Commissioner has developed an expertise with regard to this legislative regime. This Court must be deferential to the Commissioner's decision on matters that fall within its area of expertise: *Dunsmuir* at para. 49.

[40] The determination of whether to proceed with an inquiry under s. 56(1) of *FIPPA* is an exercise of the adjudicator's discretion. It provides that the commissioner "may conduct an inquiry". It is well established in the common law that the reasonableness standard applies to discretionary decisions: *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack*, 2011 BCSC 1244 at para. 198; *British Columbia (Minister of Water, Land and Air Protection) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCCA 210 at para. 34; *British Columbia Teachers' Federation, Nanaimo District Teachers' Association v. British Columbia (Information and Privacy)*, 2006 BCSC 131 at para. 72.

[41] The issue that I must determine is whether the adjudicator was reasonable in exercising his discretion to not hold an inquiry under s. 56(1).

[42] Therefore, the standard of review that applies to the questions raised by Mr. Gichuru is reasonableness, which requires that this Court accord deference to the adjudicator's decision.

Analysis

Was the Law Society's Application properly brought under s. 56(1)?

[43] I turn to the preliminary issue, raised in the petitioner's oral submissions, as to whether the Law Society's application was properly brought under s. 56(1) of *FIPPA* and whether OIPC had jurisdiction to hear this application.

[44] As I understand Mr. Gichuru's argument, *FIPPA*, unlike the *Code*, does not provide for a formal process whereby a party may apply for a determination that OIPC exercise its discretion to hold an inquiry or not. He seems to suggest that this process should be expressly provided for in the legislation and, on that basis, the Law Society had no standing to bring its application and the adjudicator had no jurisdiction to hear the matter.

[45] The petitioner is correct in pointing out that there is no formal process expressly provided for under *FIPPA* to bring an application under s. 56(1).

[46] Upon a plain reading of s. 56(1), if a complaint is not resolved by way of mediation, it is within the commissioner's discretion to determine whether or not to conduct an inquiry. There is nothing in *FIPPA* that prohibits a person from applying to the Commissioner to prevent an inquiry from being held.

[47] In place of an express legislative provision providing for this process, OIPC has established a practice of hearing applications brought pursuant to s. 56(1), as referenced in para. 5 of the adjudicator's reasons.

[48] I find s. 56(1) accords the commission broad discretionary power to determine whether or not to hold an inquiry. This provision does not prevent the Commissioner from receiving submissions from parties on how to exercise that discretion.

[49] It was within OIPC's discretionary authority to hear the application under s. 56(1) and to render a decision with regard to that application.

Whether the Adjudicator made "Patently Unreasonable" Findings of Fact

[50] I will first dispose of Mr. Gichuru's argument that the adjudicator's decision was based on patently unreasonable facts, namely, that the adjudicator misconstrued the nature of his access requests and that he mistakenly found Heenan Blaikie had acted as counsel for a third party in the human rights complaint.

[51] In my view, both grounds must be dismissed.

[52] It is apparent on the face of the adjudicator's decision that he made an error in para. 2 of his reasons when referring to the two requests being made in 2009. As summarized earlier, the First Access Request was made on October 29, 2009 and the Second Access Request was made on January 9, 2010. Regardless, this error is inconsequential to the ultimate decision reached by the adjudicator. Certainly, the decision does not suggest the adjudicator misconstrued the nature of those information requests.

[53] In relation to the second alleged patently unreasonable finding of fact, I note the Law Society submits in its amended response to the petition that Heenan Blaikie acted "as counsel for a third party in a related matter". If this was an error, and I have no evidence to suggest that it was, I attribute no significance to it.

Whether the Adjudicator erred in his Statement and Application of the Litigation Privilege Test?

[54] The central argument raised in this petition for judicial review regards whether the adjudicator properly stated and applied the test for litigation privilege. The petitioner says the adjudicator's decision that litigation privilege clearly applied was

unreasonable because he did not apply the proper legal test when determining this issue. By failing to do so, the adjudicator imposed a reverse onus upon the petitioner to establish the documents were not created for the dominant purpose of litigation.

Statement of the test for litigation privilege

[55] I will begin by setting out the law for litigation privilege. The test was described by Madam Justice Gray in *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras. 96 - 99 (*Keefer*):

> Litigation Privilege must be established document by document. To invoke the privilege, counsel must establish two facts for each document over which the privilege is claimed:
>
> 1. that litigation was ongoing or was reasonably contemplated at the time the document was created; and
>
> 2. that the dominant purpose of creating the document was to prepare for that litigation.
>
> (***Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*** (2005), 40 B.C.L.R. (4th) 245, 2005 BCCA 4 at paras. 43-44.)
>
> The first requirement will not usually be difficult to meet. Litigation can be said to be reasonably contemplated when a reasonable person, with the same knowledge of the situation as one or both of the parties, would find it unlikely that the dispute will be resolved without it. (***Hamalainen v. Sippola, supra***.)
>
> To establish "dominant purpose", the party asserting the privilege will have to present evidence of the circumstances surrounding the creation of the communication or document in question, including evidence with respect to when it was created, who created it, who authorized it, and what use was or could be made of it. Care must be taken to limit the extent of the information that is revealed in the process of establishing "dominant purpose" to avoid accidental or implied waiver of the privilege that is being claimed.
>
> The focus of the enquiry is on the time and purpose for which the document was created. Whether or not a document is actually used in ensuing litigation is a matter of strategy and does not affect the document's privileged status. A document created for the dominant purpose of litigation remains privileged throughout that litigation even if it is never used in evidence.

[56] The party seeking to protect documents on the basis of litigation privilege must set out sufficient facts in an affidavit to enable the court, or, the adjudicator in this case, to determine that litigation was ongoing or reasonably contemplated and

that the dominant purpose for which the document was created was litigation. It is not sufficient to simply make a bare claim that the documents are subject to litigation privilege.

[57] As stated in *Mazerolle v. Bright* (1999), 219 N.B.R. (2d) 25; [1999] N.B.J. No. 468 (C.A.) at para. 8:

> The onus of proving privilege is on the party who asserts it. ... It is not sufficient to simply state that the document was created for the dominant purpose of submitting it to a solicitor and contemplated or pending litigation. There must be other evidence that confirms the purpose. ...

[58] See also *Shooting Star Amusements Ltd. v. Prince George Agricultural and Historical Association*, 2009 BCCA 452 at para. 7 (*Shooting Star*).

[59] The adjudicator stated the law for litigation privilege at para. 13:

> Litigation privilege protects communications, including those between a lawyer and third party, where the dominant purpose for the communication was the preparation or conduct of litigation or the litigation was in reasonable prospect at the time of the communications.
>
> [Emphasis added.]

[60] He then went on to cite the leading case on litigation privilege, *Blank v. Canada (Minister of Justice)*, 2006 SCC 39.

[61] The adjudicator used the word "or" as if to suggest that there are alternative bases upon which to find litigation privilege has been established. His statement of the law is not accurate. Nevertheless, it is clear upon reading the decision as a whole that the adjudicator had correctly understood the test. I note para. 20, where the adjudicator held:

> The Law Society's sworn evidence is clear that the withheld records were created for the dominant purpose of litigation relating to the Law Society and the applicant.

[62] Above, in para. 19 of the adjudicator's reasons, he notes that litigation has been ongoing for some time.

[63] This reasoning does not suggest the adjudicator conflated litigation privilege with solicitor-client privilege. Nor does it suggest the adjudicator reversed the onus of proof for litigation privilege.

[64] In any event, Mr. Gichuru conceded in his submissions that the adjudicator had correctly stated the test for litigation privilege, obfuscating the position he has taken in this petition.

Application of the test for litigation privilege

[65] The petitioner argues the Law Society failed to establish the challenged documents were created for the dominant purpose of litigation.

[66] I note the adjudicator made the following "Findings" at paras. 19 and 20:

> [19] The Law Society describes the 26 disputed records in considerable detail, identifying each as a letter or email, the date on which it was written, the parties to the correspondence, the litigation to which it relates and the general nature of the content of each. The litigation to which the correspondence relates has been ongoing between these parties for approximately seven years.
>
> [20] … The Law Society's sworn evidence is clear that the withheld records were created for the dominant purpose of litigation relating to the Law Society and the applicant. The Law Society's sworn evidence is that none of the withheld records is to or from the Law Firm, and that none relates to the legal proceedings between the applicant and the Law Firm. Therefore, I find that the applicant's argument is conjecture lacking any cogent basis whatsoever.
>
> [Citations omitted.]

[67] I find the adjudicator had sufficient evidence to conclude the Law Society had met its onus of proof.

[68] The Law Society went beyond merely asserting litigation privilege: it provided ample material upon which to support its assertion.

[69] The adjudicator had before him the petitioner's two access requests made to the Law Society on October 24, 2009 and January 9, 2010 as well as the Law Society's responses of December 8, 2009 and February 19, 2010.

[70] In the Law Society's response to Mr. Gichuru's first request, it simply asserted a bare privilege over the withheld documents:

> The remainder of the records form part of our counsel's brief in relation to ongoing litigation matters and are being withheld under s. 14 of the Act. These records are subject to solicitor-client privilege and/or litigation privilege.

[71] This assertion alone clearly does not meet the Law Society's legal obligation.

[72] However, following Mr. Gichuru's request to OIPC, the Law Society provided Mr. Gichuru with a letter on July 19, 2010, attached to which was a table containing four columns. The columns described who sent the communication (all were from Davis LLP), to whom it was sent (either a third party potential witness or a named party), the date of the communication, the subject matter of the communication (most regarded "Gichuru v. Law Society"), a record number assigned to the document, the fact the document was withheld under s. 14 of *FIPPA* and the category of privilege asserted (solicitor-client or litigation privilege).

[73] The Law Society's response to the petitioner of February 19, 2010 also disclosed further documents and contained a similar table to that contained in the July 19, 2010 letter.

[74] Both tables were before the adjudicator.

[75] In addition to the above correspondence, the adjudicator also had before him the affidavits of Ms. Drozdowski, who specified the nature of the privilege asserted and the corresponding number of the document over which privilege was claimed. I excerpt from her first affidavit the fulsome detail she supplied to the adjudicator on the withheld records:

> **A. Records to Which Solicitor-Client Privilege Attaches**
>
> 15. I have reviewed the 51 records responsive to the First and Second Access Request that have been severed pursuant to section 14 of the Act. Of the 27 records over which the Law Society has asserted solicitor-client privilege:

(a) fifteen are communications from the Law Society to external counsel for the purpose of obtaining legal advice (First Access Request record number 22 Second Access Request record numbers 5, 9, 10, 11, 12, 13, 15, 17, 18, 21, 22, 23, 26, and 28);

(b) ten are communications from external counsel to the Law Society for the purpose of providing legal advice (First Access Request record number 3 and Second Access Request record numbers 6, 14, 16, 19, 20, 24, 25, 29, and 31); and

(c) two are communications between external counsel for the purpose of providing legal advice to the Law Society (Second Access Request record numbers 27 and 30).

16. To the best of my knowledge and belief, at no point has the Law Society waived (either expressly or impliedly) the solicitor-client privilege that attaches to the records described in paragraph 15 of this affidavit:

B. Records to Which Litigation Privilege Attaches

17. To the best of my knowledge and belief, litigation has been in reasonable prospect (or in progress) between the Applicant and the Law Society since at least 2004, when the Applicant filed the Human Rights Complaint. That litigation has consisted of proceedings before the British Columbia Human Right Tribunal, the Supreme Court of British Columbia, and the Court of Appeal for British Columbia.

18. All the records described in paragraph 15 of this affidavit were ones communicated when, to the best of my knowledge and belief, litigation between the Applicant and the Law Society was in reasonable prospect or in progress and for which the dominant purpose for the communication was that litigation.

19. Of the remaining 24 records over which the Law Society has asserted litigation privilege:

(a) fifteen are communications after 2004 to or from the Law Society in respect of prospective witnesses in the litigation proceedings (First Access Request document numbers 1, 2, 4, 6, 7, 8, 9, 10, 11, 18, 19, 20, 21, and Second Access Request record numbers 7 and 8);

(b) six are communications after 2004 from external counsel to the Law Society in respect of the litigation proceedings (First Access Request document numbers 5, 23, 24, 25, 26, and 27); and

(c) three are communications after 2004 between external counsel and prospective witnesses in the litigation proceedings (First Access Request document numbers 13, 14, 15).

20. To the best of my knowledge and belief, the dominant purpose for the communications described in paragraph 19 of this affidavit was the litigation

> described in paragraph 17 of this affidavit between the Applicant and the Law Society. To the best of my knowledge and belief, at no point has the Law Society waived (either expressly or impliedly) the litigation privilege that attaches to the records described in paragraph 19 of this affidavit.

[76] This was sufficient information, in my view, to establish that litigation privilege applied.

[77] It is also apparent from my reading of Ms. Hunter's affidavit that it was prepared in connection with Mr. Gichuru's application in the human rights complaint to compel production of correspondence between Davis LLP and "Third Parties" concerning him. Ms. Hunter simply deposes that she conducted an extensive review of Davis LLP's "voluminous files (paper and electronic) in order to identify the documents sought by the Complainant [Mr. Gichuru]" and concluded that with the exception of three documents, the identified correspondence was sent or received for the dominant purpose of litigation. She then described the three exceptions and deposed that copies of those communications had been sent to Mr. Gichuru by a lawyer with Nathanson, Schachter & Thompson LLP under cover of a letter dated January 28, 2010. The adjudicator was correct to find that this letter did not bear any significance on the issue of whether the Law Society had a justifiable claim to privilege.

[78] In my view, short of disclosing the actual content of the document, a step which a party is not required to take to avoid "accidental or implied waiver of the privilege that is being claimed" (*Keefer* at para. 98), the Law Society fulfilled its evidentiary obligation.

Reverse onus under s. 56(1) of FIPPA

[79] Mr. Gichuru argued the adjudicator reversed the onus under s. 56(1) of *FIPPA* by requiring that he establish the withheld documents were not protected by litigation privilege. I also find this argument has no merit. The adjudicator never at any point shifted the burden of proof to Mr. Gichuru in either applying the test for litigation privilege or in determining whether to exercise his discretion to not hold an inquiry under s. 56(1) of *FIPPA*.

[80] The adjudicator did find, correctly, in my view, that Mr. Gichuru had not supplied any cogent basis for his argument beyond conjecture. A similar finding can be made here.

Disposition

[81] I find the adjudicator's decision to exercise his discretion to not hold an inquiry under s. 56 of *FIPPA* was reasonable.

[82] This petition is dismissed.

[83] The Law Society is granted leave to make submissions on costs. The Law Society will have 15 days from the date of publication of this decision on the issue of costs. Mr. Gichuru will have 15 days following the filing of those submissions to respond.

"Greyell J."