



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F14-33

MINISTRY OF TECHNOLOGY, INNOVATION AND CITIZENS' SERVICES

Evan Kelly, Adjudicator

September 3, 2014

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Summary: The applicant requested records related to the processing of a previous request for records. The Ministry released 33 pages of records but withheld a further 10 pages on the basis they were subject to solicitor-client privilege. The adjudicator found that the Ministry was authorized under s. 14 of FIPPA to withhold the 10 pages of records.

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

Authorities Considered: B.C.: Order 02-38, 2002 CanLII 42472 (BC IPC); Order 00-06, 2000 CanLII 6550 (BC IPC); Order F13-10, 2013 BCIPC 11 (CanLII); Order F14-03, 2014 BCIPC 3 (CanLII); Order No. 29-1994, 1994 CanLII 545 (BC IPC); Order F11-17, 2011 BCIPC 23 (CanLII).

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *R. v. B.*, 1995 Can LII 2007 (BCSC); *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)*, 1995 CanLII 634 (BCSC); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

INTRODUCTION

[1] The BC Freedom of Information and Privacy Association (“applicant”) requested (“current request”) all records related to a previous access request it made to the Ministry of Health. The Ministry of Health had denied the applicant’s previous request in its entirety.

[2] The Ministry of Technology, Innovation and Citizens' Services ("Ministry") identified 43 pages of records as responsive to the applicant's current request. The Ministry released 33 of those pages but refused to disclose the remaining 10 pages under s. 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), asserting that the records are subject to solicitor-client privilege.

[3] The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review the Ministry's decision. Mediation did not resolve this matter, and it proceeded to a written inquiry under Part 5 of FIPPA.

ISSUE

[4] The issue to be decided is whether the Ministry is authorized by s. 14 of FIPPA to refuse to disclose the disputed records as subject to solicitor-client privilege.

[5] Section 57(1) of FIPPA states:

57(1) At an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part.

[6] Accordingly, the Ministry bears the burden to demonstrate that s. 14 of FIPPA applies to the disputed records.

DISCUSSION

[7] **Background**—The applicant is a non-profit society dedicated to the protection and promotion of freedom of information and privacy rights in Canada. This inquiry concerns records related to a previous access to information request the applicant made to the Ministry of Health. The Ministry of Health denied the applicant's previous request for records in its entirety and the applicant evidently now seeks to ascertain why this denial occurred.¹

[8] A centralized unit within the Ministry responds to all requests for records made to the BC Government. It handled the previous request on behalf of the Ministry of Health and therefore the public body named in the current inquiry.

[9] The previous access request was made in 2012 to the Ministry of Health for certain data sharing and other agreements that the Ministry of Health had entered into. This previous request included any correspondence related to

¹ The applicant requested the OIPC review the Ministry of Health's response to the previous request and that matter has also proceeded to an OIPC inquiry. As of the time of the release of these reasons, the inquiry arising from the previous request is still being determined by an adjudicator.

these agreements with a particular focus on discussion of delays or other impediments to access to data for research purposes.

[10] **Disputed records**—This inquiry relates to 10 out of 43 pages identified by the Ministry as responsive to the applicant’s current request. The 33 pages of records that were released to the applicant contained emails between government staff, emails and letters between government staff and the applicant, and an internal government form regarding the previous request. The 10 pages of disputed records are: a series of emails between legal counsel from the Legal Services Branch, Ministry of Justice, and Ministry staff and a document attached to one of those emails.² The Ministry produced the disputed records to the OIPC pursuant to s. 44(1)(b) of FIPPA and I have reviewed them.

[11] **Section 14 exception**—Section 14 of FIPPA states:

Legal advice

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

[12] This section encompasses both the legal advice privilege and the litigation privilege.³

[13] With respect to the legal advice privilege, previous OIPC orders⁴ have adopted the common law test from *R. v. B.*,⁵ which requires that four conditions must all be met for the privilege to apply:

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.

[14] The court in *R. v. B.* stated that if these four conditions are all satisfied, then privilege extends to the communication and “the papers relating to it”.⁶

² In its submissions, the Ministry described the disputed records to this level of detail.

³ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.

⁴ For example, Order 00-06, 2000 CanLII 6550 (BC IPC); Order F13-10, 2013 BCIPC 11 (CanLII); Order F14-03, 2014 BCIPC No. 3 (CanLII).

⁵ *R. v. B.*, 1995 CanLII 2007 (BCSC).

⁶ *Ibid.* at para. 22.

Positions of the Parties

The applicant

[15] The applicant emphasizes the purposes of FIPPA and in particular s. 2 which states that the purposes of the legislation include “giving the public a right of access to records” and “specifying limited exceptions to the rights of access”. The applicant further submits that s. 4 of FIPPA provides a “right of access to any record in the custody or under the control of a public body” and that any exceptions to this right, such as in s. 14, are to be applied with regard to the purposes of FIPPA.⁷ The applicant acknowledges that s. 14 includes the “legal advice privilege” and that the four-part test in *R. v. B.* applies in this case.

[16] The applicant requests that the Ministry be ordered to release the disputed records in their entirety or if necessary with redactions of portions that are privileged pursuant to s. 4(2) of FIPPA.

[17] Further, the applicant quotes a list of ten factors from Order 02-38 that it submits should be considered by a public body when exercising the discretion to withhold or release records that are “technically protected from disclosure”.⁸ The applicant contends that “the Ministry either failed to consider, or gave insufficient weight to the general purposes of [FIPPA] and the stated legislative purpose that public bodies should make information available to the public.”⁹

The Ministry

[18] In its initial submissions, the Ministry correctly notes that s. 14, unlike some other exceptions to the right of access in FIPPA, does not require the Ministry to prove that harm would result from the disclosure of the disputed records. The Ministry further submits that the disputed records are protected by the common law “legal advice” privilege which is incorporated, but not modified, by s. 14. It agrees that the four-part test in *R. v. B.* applies to s. 14 and cites authorities to assert that the solicitor-client privilege is “fundamental to the proper functioning of our legal system”¹⁰ and should be “as close to ‘absolute’ as possible”¹¹.

⁷ Applicant’s initial submissions at para. 14, citing *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at paras. 62-63.

⁸ Applicant’s initial submissions at para. 21, citing Order 02-38, [2002] B.C.I.P.C.D. No. 38 (QL) at paras. 149-152.

⁹ Applicant’s initial submissions at para. 22.

¹⁰ The Ministry’s initial submissions at para. 4.10, citing *British Columbia (Auditor General) v. British Columbia (Attorney General)*, 2013 BCSC 98 at paras. 23-24.

¹¹ The Ministry’s initial submissions at para. 4.11, citing *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 at para. 40.

[19] The Ministry provided affidavit evidence that states the disputed records were confidential written communications between Ministry staff and Ministry of Justice lawyers that were for the purpose of obtaining and giving legal advice.

[20] In its reply submissions, the Ministry addresses the applicant's submission that the discretion under s. 14 was not exercised properly. The Ministry submits that "the exceptions in Part 2 are not to be seen as derogating from the purposes of the Act" but instead are intrinsic to FIPPA and that s. 14 should be given "due meaning and respect".¹² It further acknowledges that under s. 14 the Ministry could have waived privilege to release the disputed records but submits that instead it elected to assert its privilege.

Analysis

Are the disputed records privileged?

[21] I am satisfied that the first three conditions in the test to apply s. 14 are clearly met. First, the emails and the attached document that comprise the disputed records are written communications. Second, the communications are of a confidential character, and are marked as such. Third, lawyers for the Legal Services Branch, Ministry of Justice, act as legal advisors to Ministry staff as their clients.

[22] The fourth condition requires a direct relation of the communication to the seeking, formulating, or giving of legal advice. This condition should not be narrowly interpreted as protecting only the specific request for legal advice and the lawyer's specific response. As discussed above, privilege extends to papers related to such communications.

[23] Having reviewed the disputed records, and in light of the above discussion, I am satisfied that all ten pages are directly related to the seeking, formulating, or giving of legal advice. The disputed records contain communications between Ministry staff and legal counsel in the process of obtaining legal advice or are papers related to this communication. Privilege applies to all ten pages in their entirety.

Is severing under s. 4(2) of FIPPA possible?

[24] The Supreme Court of British Columbia has stated that s. 4(2) does not modify or dilute solicitor-client privilege.¹³ As stated above, I find that all ten

¹² The Ministry's reply submissions at para. 1.

¹³ *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)*, 16 BCLR (3d) 64 at paras. 57-65, reviewing Order No. 29-1994, 1994 CanLII 545 (BC IPC) at p. 12.

pages of the disputed records are privileged in their entirety. Therefore, severing of the record is not an issue here.

The Ministry's exercise of discretion under s. 14

[25] Having found that the disputed records are privileged, I will now address the discretionary nature of s. 14. The applicant contends that the Ministry did not properly exercise this discretion. If I agree with the applicant, the only remedy available is to remit the matter back to the Ministry for reconsideration of its discretion.¹⁴

[26] The Supreme Court of Canada's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*¹⁵ provides useful guidance in determining this matter. In that case, the court considered among other issues, the exercise of the discretion to either release or withhold records under two discretionary exceptions in the *Ontario Freedom of Information and Protection of Privacy Act*. The exceptions applied by the public body to withhold the records related to law enforcement and solicitor-client privilege. On review, the Assistant Information and Privacy Commissioner upheld the public body's decisions despite the fact it had not given reasons to the appellant for not releasing the records.¹⁶

[27] The Supreme Court of Canada held that the Assistant Commissioner should have followed a two-step process when reviewing the public body's application of a discretionary exception provision: "First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable."¹⁷ The Court further stated that the Commissioner may remit the matter back to the public body if "the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations".¹⁸ The approach to reviewing discretion under FIPPA in BC is consistent with the Supreme Court's formulation in this case.¹⁹

[28] The Court found that the Assistant Commissioner failed to review the public body's exercise of discretion under the law enforcement exception, but came to a different conclusion regarding privilege. The Court affirmed that privilege should be seen as being as close to absolute as possible; it also affirmed that privilege does not involve a balancing of interests on a case-by-

¹⁴ Order F11-17, 2011 BCIPC 23 (CanLII) at paras. 35-38.

¹⁵ [2010] S.C.J. No. 23, 2010 SCC 23.

¹⁶ *Ibid.* at paras. 13-15.

¹⁷ *Ibid.* at para. 68.

¹⁸ *Ibid.* at para. 71.

¹⁹ Order F11-17, *supra* note 14 at paras. 35-38.

case basis. It therefore did not overturn the Assistant Commissioner's decision to uphold the institution's refusal to disclose privileged records in the particular case before the Court.

[29] I conclude, based on the Ministry's submissions, that it considered the exercise of discretion and declined to waive privilege under s. 14. Their discretion was exercised without any indication of impropriety, therefore there is no basis for me to interfere.

CONCLUSION

[30] For the reasons set out above, I make the following order under s. 58 of FIPPA:

1. The Ministry is authorized under s. 14 to refuse to disclose the 10 pages of records that they asserted solicitor-client privilege over.

September 3, 2014

ORIGINAL SIGNED BY

Evan Kelly, Adjudicator

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