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Order F15-08

BC SECURITIES COMMISSION

Elizabeth Barker
Senior Adjudicator

February 26, 2015

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Summary: The applicant requested information regarding BCSC's communications with government and private organizations regarding the applicant and four named companies. BCSC refused to disclose the requested information on the grounds that the information was protected by solicitor-client privilege and s. 14 of FIPPA applied. The adjudicator found that BCSC had proven that litigation privilege applied to some of the records and they could be withheld under s. 14. However, neither litigation privilege nor legal advice privilege applied to the rest of the records, so they could not be withheld under s. 14.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* s. 14; *Securities Act*, RSBC 1996, chapter 418.

Authorities Considered: B.C.: Order 01-53, 2001 CanLII 21607 (BC IPC); Order F13-10, 2013 BCIPC 11 (CanLII).

Cases Considered: *Blank v. Canada (Minister of Justice),* 2006 SCC 39 (CanLII); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII); *Gichuru v. British Columbia (Information and Privacy Commissioner),* 2014 BCCA 259 (CanLII); *Hamalainen* v. Sippola, 1991 CanLII 440 (BC CA); *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 (CanLII); *R. v. B.,* 1995 CanLII 2007 (BC SC).

INTRODUCTION

[1] The applicant requested "All information from Jan 1, 2007 to April 15, 2013 including but not limited to the following: all correspondence by email, telephone, conversation notes, etc., regarding [four named companies and the applicant] with CCRA, Investment Industry Regulatory Organization of Canada and any other government and/or private organization my information was discussed or shared with, within Canada and/or internationally."[1]

[2] BC Securities Commission ("BCSC") refused to disclose the requested information on the basis that disclosure would harm a law enforcement matter, under s. 15(1)(a) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review BCSC's decision. Mediation did not resolve the matter and the applicant requested that it proceed to inquiry under Part 5 of FIPPA.

[3] Before the inquiry began, BCSC asked the OIPC to exercise its discretion under s. 56 of FIPPA to not hold an inquiry. The OIPC denied the application and the s.15 (1)(a) matter proceeded to inquiry.

[4] BCSC also applied for authorization under s. 43(b) of FIPPA to disregard the applicant's access request and any similar future requests because they are frivolous or vexatious. In Order F14-24, I denied BCSC's s. 43 application.

[5] The OIPC issued a *Revised Fact Report* and *Revised Notice of Inquiry* to reflect the outcome of BCSC's s. 56 and s. 43 requests and set a revised timeline for submissions for this inquiry.

[6] Before submissions in this inquiry were due, BCSC informed the applicant and the OIPC that it had decided that it would no longer withhold information under s. 15 of FIPPA, and it disclosed some of the previously withheld information. However, BCSC continued to withhold the balance of the records on the new grounds that they were protected by solicitor-client privilege, so s. 14 of FIPPA applied.

[7] The OIPC allowed BCSC to add the new issue of the application of s. 14 to the records. Both the applicant and the BCSC provided initial and reply submissions regarding the applicability of s. 14 to the records.

[1] Applicant's access request, dated April 16, 2013.

ISSUE

[8] The issue in this inquiry is whether BCSC is authorized, under s. 14 of FIPPA, to refuse access to the requested information. Under s. 57(1) of FIPPA, BCSC has the burden of proof in this inquiry.

DISCUSSION

[9] **Background**—BCSC is a provincial government agency reporting to the provincial legislature through the Minister of Finance, who is responsible for the administration of the *Securities Act*.[2] BCSC's responsibilities include taking action against those who contravene BC's securities laws.[3]

[10] On February 4, 2009, BCSC issued an Investigation Order stating that it was investigating the applicant (and others) for alleged violations of the *Securities Act.* BCSC uses the term "OSE Investigation" to refer to this investigation, and I will use the same term for ease of reference.

[11] On August 2, 2012, BCSC issued a Notice of Hearing related to the OSE Investigation.[4] The BCSC hearing took place in October and November 2013.[5] On August 29, 2014, BCSC issued its hearing decision that the applicant (and others) had breached s. 57(a) of the *Securities Act*, which states:

> **57** A person must not, directly or indirectly, engage in or participate in conduct relating to securities or exchange contracts if the person knows, or reasonably should know, that the conduct
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or exchange contract,…

[12] Submissions on sanctions related to the BCSC panel's decision were scheduled for February 2015.

[13] **Records in Dispute**—There are 567 records in dispute all of which were withheld under s. 14 of FIPPA. A CD-ROM with a copy of each record in PDF format has been provided to me for the purpose of this inquiry.

[14] **Solicitor Client Privilege, s. 14**—Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. The law is well established that s.14 of FIPPA

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[2] [RSBC 1996], chapter 418.
[3] BCSC's website at www.bcsc.ca.
[4] The Notice of Hearing also included a Temporary Order restricting the applicant's trading activities.
[5] BCSC's initial submissions, Appendix C.

encompasses both types of solicitor-client privilege found at common law: "legal advice" the privilege applicable to communications between solicitor and client for the purposes of obtaining legal advice, and "litigation privilege", which applies to communications and material produced or brought into existence for the dominant purpose of litigation.[6]

[15] BCSC submits that litigation privilege applies to all of the records in dispute and that legal advice privilege also applies to five of the records. The applicant submits that neither type of privilege applies.

Legal Advice Privilege

[16] When deciding if legal advice privilege applies, the decisions of the OIPC[7] have consistently applied the following test described in *R. v. B.*:

> … the 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 communications (and papers relating to it) are privileged.[8]

[17] BCSC claims legal advice privilege over five email chains[9] and submits that they refer to legal advice provided by its Senior Litigation Counsel. Each email involves several participants, which raises the question of whether the emails are confidential communications between BCSC and its lawyer. BCSC provided a table listing all of the records, which allowed me to identify the participants of these emails as BCSC's Senior Litigation Counsel, BCSC investigators, an Ontario Securities Commission investigator and an Ontario Securities Commission lawyer.

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[6] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII), para. 26.
[7] See: Order 01-53, 2001 CanLII 21607 (BC IPC) and Order F13-10, 2013 BCIPC 11 (CanLII).
[8] R.v. B., 1995 CanLII 2007 (BC SC), para. 22.
[9] Records, 492, 494, 498, 502 and 512.

[18] A party asserting that a document is privileged bears the onus of establishing the privilege.[10] While BCSC explains that its investigators were cooperating with the Ontario Securities Commission investigators, there was no explanation of BCSC's relationship with the Ontario Securities Commission regarding sharing legal advice.[11] In this case, BCSC has not established that the communication in these five records is confidential communications between BCSC and its lawyer. Therefore, I find that these five records are not subject to legal advice privilege because the element of confidentiality between BCSC and its legal counsel has not been established.

Litigation Privilege

[19] I will now consider all of the records, including the five records that I found were not protected by legal advice privilege, to determine if they are protected by litigation privilege.

[20] Unlike legal advice privilege, litigation privilege applies only in the context of litigation itself, and once the litigation has concluded the privilege ends.[12] A helpful description of the differences between legal advice privilege (also referred to simply as solicitor-client privilege) and litigation privilege is found in *Blank v. Canada (Minister of Justice)*:

> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client). [13]

[21] Recently, the BC Court of Appeal in *Gichuru v. British Columbia (Information and Privacy Commissioner)*[14] reiterated that the approach for determining if litigation privilege applies is the one laid out in *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*:

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[10] *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.,* 2006 BCSC 1180 (CanLII), para 58.
[11] BCSC did not claim or infer that common interest privilege applies.
[12] *Blank v. Canada (Minister of Justice),* 2006 SCC 39 (CanLII), paras. 34-41.
[13] At para. 28, quoting from R. J. Sharpe, "Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), pp. 164-65.
[14] 2014 BCCA 259 (CanLII), para. 32.

> 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* [(1991), 62 B.C.L.R. (2d) 254])
>
> 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. [15]

[22] I will apply the two part test used in *Gichuru* and *Keefer Laundry* in this case.

> *Was litigation ongoing or reasonably contemplated at the time the records were created?*

[23] Regarding the claim of litigation privilege, BCSC submits that all of the records in dispute were created at a time when litigation was reasonably contemplated, specifically March 3, 2009 onwards.

[24] BCSC provided affidavit evidence from the individual who was its Director of Enforcement ("Director") at the time the applicant's alleged misconduct surfaced. The Director says that he received a memo from an investigator with

[15] *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.,* 2006 BCSC 1180 *CanLII), paras. 96-99.

BCSC's Case Assessment Branch regarding the matter that became the subject of the OSE Investigation. The memo advised that BCSC had received a complaint, and that based on the preliminary investigation, further investigation was recommended. Consequently, on March 3, 2009 the Director met with the author of the memo and managers from the Case Assessment Branch and the Litigation Branch. The Director explains his decision-making regarding the OSE Investigation:

> I recall that there was consensus among the Managers that the preliminary evidence of market manipulation was strong and merited a referral to the Investigations Branch for a detailed review and investigation. I agreed and approved the OSE Referral at the meeting.
>
> Resource constraints prevented me from approving cases that were unlikely to result in litigation before a hearing panel of the Commissions. Based on my experience with market manipulation cases, I knew they were time-consuming and expensive to investigate. I would not have approved the OSE Referral unless I was confident that the file would progress to hearing. The OSE Referral contained a number of features that led me to conclude that litigation was the likeliest outcome of further investigation:
> ….
>
> From the time of the initial referral forward, I remained convinced that the case warranted the investment of significant resources. As the OSE Investigation progressed, my initial assessment of the case proved true: that this was a good candidate for litigation on account of the strength of evidence and the seriousness of the misconduct.[16]

[25] In my view, BCSC's hearing process, which resulted in the August 29, 2014 BCSC panel decision, is "litigation" because it was a quasi-judicial process involving a hearing and the interests of the participants were adversarial. I have also considered at what point that litigation was reasonably contemplated. The Director's evidence satisfies me that litigation was reasonably contemplated by BCSC when the Director referred the matter to a more in-depth level of investigation on March 3, 2009.

[26] The records in dispute are all dated after the Director's March 3, 2009 referral decision. A handful of emails have attachments that predate March 3, 2009, but I consider those email attachments, when read in context, to be an integral part of the communication to which they are attached. If not for the covering email communication, these attachments would not have been responsive to the applicant's access request.

[27] Therefore, I am satisfied that litigation was reasonably contemplated or underway at the time the records in dispute were created.

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[16] Director's affidavit, paras. 7-8 and 11.

What was the dominant purpose for which the records were created?

[28] Determining the dominant purpose for the creation of each record is a much more challenging issue in this case. As was noted by the BC Court of Appeal in *Hamalainen v. Sippola*, it is often difficult to determine when in the course of an investigation the focus becomes litigation as opposed to something else. Wood J wrote:

> Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.[17]

[29] The applicant disputes that the dominant purpose for creating the records was litigation; instead, he believes it was to investigate possible violations of the *Securities Act*. BCSC asserts that the dominant purpose for the creation of the records was to prepare for the BCSC hearing litigation.[18] As I will explain below, I find that only a small portion of the records were created for the dominant purpose of litigation.

[30] Unfortunately, there is no affidavit evidence from the authors of the records or from BCSC's Senior Litigation Counsel to assist in understanding BCSC's submission that the records were created for the dominant purpose of litigation.

[31] Although in his affidavit the Director speaks about the OSE Investigation and his assessment that it was a good candidate for litigation, he does not provide evidence about the purpose for the creation of the specific records in dispute in this inquiry. In fact, he does not indicate that he knows what records, in particular, are at issue. While he says that he referred the case for further investigation because he concluded that the likeliest outcome of that further investigation would be litigation, he does not say when the dominant purpose for the creation of the records transitioned from being "further investigation" to "litigation". When that transition occurred is not obvious from the records themselves.

[32] BCSC's Senior Investigator provided an affidavit in which he explains that he was assigned to the OSE Investigation. He says that from the outset, BCSC

[17] *Hamalainen* v. Sippola, 1991 CanLII 440 (BC CA), pp. 14-15.
[18] BCSC initial submissions, paras. 16 and 34.

investigators collaborated with investigators with the Ontario Securities Commission and the Investment Industry Regulatory Organization of Canada, and they all shared information for the purpose of furthering the OSE Investigation. The Senior Investigator's affidavit contains a table listing of all of the records, the type of record (email, letter, report, etc.), the date, and the name and organization of the author and recipients. He describes the records in dispute as follows:

> I have reviewed these records and I can confirm that every single communication was created for the purpose of furthering the OSE Investigation.
>
> Each communication falls within one of the following four categories:
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> a. Category "1" - Requests for, or receipts of information from an outside agency in furtherance of the OSE Investigation;
> b. Category "2" - Discussions about evidence and information gathered in furtherance of the OSE Investigation;
> c. Category "3" - Discussions about investigative strategy and steps taken or sought to be taken in furtherance of the OSE Investigation;
> d. Category "4" – Non-OSE related communications made for the purpose of furthering the OSE Investigation. [19]

Finally, the Senior Investigator makes no mention of litigation except to say that BCSC assigned a "litigator" to provide legal advice on the file.

[33] The majority of the records in dispute are email communications between BCSC's investigators and the investigators of other regulatory bodies, financial institutions and individuals who were interviewed as part of the OSE Investigation. There are several records, in which BCSC's Senior Litigation Counsel is also involved in the communication. Based on my understanding of the content and context of the records, it is apparent that the majority were created for the dominant purpose of investigating and uncovering the facts of what took place. They are about the practicalities of the OSE Investigation such as arranging meetings between investigators, scheduling witness interviews and sharing information with other regulatory bodies, and they do not even refer to the BCSC litigation. It is not evident to me that these records were created for the dominant purpose of the BCSC hearing litigation, and BCSC's submissions do not satisfactorily explain.

[34] I conclude that by August 2012 at the latest, when the Notice of Hearing was issued, BCSC must have been engaged in preparing for litigation. However, the fact that litigation was reasonably contemplated or underway does not mean that the particular records in this inquiry were created for the dominant purpose

[19] Senior Investigator's affidavit, paras. 7 and 8.

of BCSC's litigation. Given that the OSE Investigation eventually progressed to a panel hearing, no doubt BCSC has in its custody or control records that were created for the dominant purpose of litigation. However, in this inquiry, the records in dispute are those that are responsive to the applicant's access request, which was for records containing communication between BCSC and any governments or private organizations regarding the applicant and four named companies.

[35] As a result, with the exception of 23 records, BCSC has not satisfactorily demonstrated that the records were produced for the dominant purpose of litigation. It is evident that the majority of the records were created for the dominant purpose of investigating, communicating and cooperating with the investigations of other regulatory bodies. Therefore, the second element of the test for litigation privilege has not been proven regarding them, so they may not be withheld under s. 14.

[36] However, there are 23 records that are different than the rest because they actually refer to BCSC's litigation and their contents deal dominantly with litigation matters. They are as follows:

> 1000893, 1000895, 1157579, 0227, 0231, 0233, 0628, 0639, 0640, 0666, 0667, 0670, 0671, 0672, 0674, 0675, 0677, 0678, 0679, 0681, 0695, 0713, 0939.

[37] In my view, BCSC has successfully established that not only were these 23 records generated when litigation was reasonably contemplated, but they were also created for the dominant purpose of BCSC's litigation. Therefore, BCSC has proven that litigation privilege applies to the 23 records listed above.

[38] The applicant submits that any litigation privilege that may have existed no longer applies because the litigation has concluded. However, he acknowledges that the sanctions portion of the BCSC hearing is pending. He also agrees with BCSC that he has inquired about the process for appealing the August 29, 2014 hearing panel decision. In light of the fact that the sanctions portion of the BCSC hearing has not yet concluded, and an appeal cannot be ruled out at this point, I find that the litigation is not over. Therefore, litigation privilege still applies to these 23 records and BCSC may continue to withhold them under s. 14.

[39] As a last point, the applicant submits that solicitor-client privilege and litigation privilege do not apply in this case because "…BCSC has abused their authority, abused the process, and used intimidation to gain unfair advantage in the proceedings against myself and others…."[20] In support of this argument, he references the crime exception to legal advice privilege described in *Descôteaux v. Mierzwinski*, namely: "communications that are in themselves criminal or that

[20] Applicant's initial submissions, paras. 20, 28 and reply submissions, para. 11.

are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged." [21] Further, he relies on the following statement, also from the Supreme Court of Canada: "The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day."[22] In my view, the applicant's assertions in this regard are unsubstantiated.

[40] In conclusion, I find that BCSC has proven that 23 of the records in dispute are protected by litigation privilege and the litigation is not concluded. Therefore, those 23 records may be withheld under s. 14 of FIPPA.

CONCLUSION

[41] For the reasons stated above, pursuant to s. 58 of FIPPA, I make the following Order:

1. Subject to paragraph 2 below, BCSC is not authorized under s. 14 of FIPPA to refuse to disclose the records in dispute.

2. BCSC is authorized under s. 14 of FIPPA to refuse to disclose the following records: 1000893, 1000895, 1157579, 0227, 0231, 0233, 0628, 0639, 0640, 0666, 0667, 0670, 0671, 0672, 0674, 0675, 0677, 0678, 0679, 0681, 0695, 0713, 0939.

3. BCSC must comply with the terms of this Order by April 10, 2015 and concurrently send the Registrar of Inquiries its cover letter to the applicant.

February 26, 2015

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F13-53496

[21] *Descôteaux v. Mierzwinski* [1982] 1 S.C.R. 860, at p. 27.
[22] Applicant's reply submissions, para. 10, quoting from *Blank v. Canada (Minister of Justice),* 2006 SCC 39 (CanLII), para 44.