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Order F15-64

MINISTRY OF HEALTH

Elizabeth Barker
Senior Adjudicator

December 3, 2015

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Summary: An applicant requested records related to the costs of a 2012 investigation into a health data breach in the Ministry of Health. The adjudicator determined that the Ministry was not required under s. 25(1)(b) of FIPPA (public interest) to disclose the total amounts paid to lawyers who provided legal services in relation to the investigation. Further, the adjudicator found that the Ministry was not authorized to refuse to disclose the information under s. 14 of FIPPA (solicitor client privilege).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14 and 25(1)(b).

Authorities Considered: B.C.: Order 02-38, 2002 CanLII 42472 (BC IPC); Investigation Report F15-02, 2015 BCIPC 30; Order F15-16, 2015 BCIPC 17. **Alberta:** Order F2007-014, 2008 CanLII 88778 (AB OIPC).

Cases Considered: *Maranda v. Richer*, 2003 SCC 67; *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427; *Donell v. GJB Enterprises Inc*., 2012 BCCA 135; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner*), 2005 CanLII 6045 (ON CA); *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2007 CanLII 65615 (ON SCDC); *Corporation of the City of Waterloo v. Cropley and Higgins*, 2010 ONSC 6522 (CanLII).

INTRODUCTION

[1] This inquiry relates to a request for records related to the costs of an investigation of a health data breach in the Ministry of Health's Pharmaceutical

Services Division ("Ministry"). The Ministry disclosed some responsive records but withheld some information from those records under ss. 14, 13, 15, 19 and 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The applicant disagreed with the Ministry's decision and she requested a review by the Office of the Information and Privacy Commissioner ("OIPC").

[2] Mediation resolved the issues related to ss. 13, 15 and 19 and the Ministry disclosed additional information. However, the issues related to ss. 14 and 22 were not resolved, and the applicant requested that they proceed to written inquiry. The applicant also submitted that s. 25 applied to the records.

[3] In her submissions the applicant clarified that she no longer wants access to the information the Ministry is withholding under s. 22, namely a contractor's home address. Therefore, the Ministry's application of s. 22 to the records is no longer at issue.

ISSUES

[4] The issues in this inquiry are as follows:

1. Is the Ministry required by s. 25 of FIPPA to disclose the requested information without delay?

2. Is the Ministry authorized under s. 14 of FIPPA to refuse access to the requested information?

[5] Section 57 of FIPPA places the burden on the Ministry to establish that it is authorized under s. 14 to refuse to disclose the information at issue. Section 57 is silent on the burden of proof for s. 25. However, I agree with the following statement from Order 02-38:

> Again, where an applicant argues that s. 25(1) applies, it will be in the applicant's interest, as a practical matter, to provide whatever evidence the applicant can that s. 25(1) applies. While there is no statutory burden on the public body to establish that s. 25(1) does not apply, it is obliged to respond to the commissioner's inquiry into the issue, and it also has a practical incentive to assist with the s. 25(1) determination to the extent it can.[1]

DISCUSSION

[6] **Background -** In 2012, the Province of British Columbia ("Province") investigated a health data breach that occurred in the Ministry's Pharmaceutical Services Division. The investigation examined allegations of inappropriate conduct, contracting and data-management practices involving employees and

[1] Order 02-38, 2002 CanLII 42472 (BC IPC), at para. 39.

contractors. The applicant is a former Ministry employee who is pursuing a lawsuit for wrongful dismissal in relation to that investigation.

[7] **Information in Dispute -** The information in dispute is located under the heading "Legal Fees" on page two of a spreadsheet called "Ministry of Health Investigations 2012-06012 Costs June 1, 2012 – April 30, 2013".[2] The withheld information provides legal fee information for lawyers at the Ministry of Justice's Legal Services Branch ("LSB") and one external legal counsel.[3]

[8] The applicant states in her submissions that she only wants the actual aggregate amounts paid, not retainer information, estimates of future costs or other details.[4] Based on a careful review of the information in dispute, it is clear that the only information that relates to actual aggregate amounts paid – as opposed to names of clients, retainer information or estimates of future legal costs – is in the YTD column that is attributed to LSB.[5] Therefore, I conclude that it is the only information in dispute in this case. I will refer to it from this point forward as the "LSB fees".

Public Interest (s. 25)

[9] The applicant submits that disclosure of the information in dispute is in the public interest, so it should be disclosed under s. 25. Section 25 of FIPPA requires a public body to disclose information, even if other provisions in FIPPA would otherwise require or authorize it to be withheld. If s. 25 applies, the information must be disclosed "without delay" rather than within the usual timeframe for responding set out in s. 7 of FIPPA. The part of s. 25 that is relevant here states:

> **25**(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> **…**
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

[10] The applicant submits that s. 25 applies in this case because the health data breach investigation was flawed and poorly documented and it had "devastating and horrendous" [6] consequences, such as the suicide of a co-op

[2] The Ministry says that at the time of the applicant's access request, the spreadsheet was the only record in the Ministry's custody or under its control that contained the information requested.
[3] The Ministry says that only one external legal counsel was retained.
[4] Applicant's submissions, para. 3.2.
[5] The Ministry also withheld information from the Comments column and three endnotes, and it too is about possible future legal costs.
[6] Applicant's submissions, p. 11.

student, negative employment consequences for numerous individuals, and the shutting down of drug safety research. She says that the public deserves to know why the Province took the actions it did and how much was spent, including legal costs. She submits that the information that the government has publicly disclosed thus far about the costs of the investigation is inaccurate, so disclosure of the disputed information in this case is in the public interest. She says, "[t]his request can supply one small piece of the puzzle. How can releasing this information not be in the public interest?"[7]

[11] The Ministry submits that s. 25 does not apply because there is no urgent and compelling need to disclose the information. It also says that it has already publicly disclosed information about the cost of the investigation, including legal costs. It submits that this prior disclosure weighs against a finding that s. 25 is triggered in this case.

[12] Section 25 overrides all of FIPPA's discretionary and mandatory exceptions to disclosure, and consequently there is a high threshold before it can properly be called into play. Previous orders have explained this concept as follows: "…the duty under section 25 only exists in the clearest and most serious of situations. A disclosure must be, not just arguably in the public interest, but *clearly* (i.e., unmistakably) in the public interest...".[8]

[13] In Investigation Report 15-02,[9] Commissioner Denham recently analyzed s. 25(1)(b) and clarified that there is no requirement that there be an element of temporal urgency (i.e., urgent or compelling need) in order to require the disclosure of information that is clearly in the public interest.[10] She recognized that records may disclose problems or concerns of a kind or degree that make their disclosure clearly in the public interest, even if there is no associated temporal urgency. In short, there is no need to establish temporal urgency in order for s. 25(1)(b) to apply.

[14] Commissioner Denham went on to explain that information that is in the public interest "affects, or is in the interests of, a significant number of people, something that transcends private interest, that is of concern or interest to the public."[11] However, the fact that the public may have a potential interest in what the information reveals about an issue would not meet the threshold for disclosure of that information as being "clearly" in the public interest. She wrote:

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[7] Applicant's submissions, p. 11.
[8] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45 citing Order No. 165-1997, [1997] B.C.I.P.C.D. No. 22.
[9] Investigation Report F15-02, 2015 BCIPC 30. This report was issued after this inquiry was completed, so the parties did not have the benefit of its reinterpretation of s. 25(1)(b).
[10] The applicant's agrees that s. 25 does not require temporal urgency before the public interest requires disclosure.
[11] Investigation Report F15-02, 2015 BCIPC 30, at p. 30.

> It seems to me, however, that "clearly" means something more than a 'possibility' or 'likelihood' that disclosure is in the public interest. The ordinary meaning of that word, reflected in dictionary definitions, strongly suggests that more than "possibly" or "likely" is needed. I must also consider that s. 25 overrides all of FIPPA's discretionary and mandatory exceptions to disclosure, suggesting that the Legislature did not intend a low threshold for disclosure in the public interest.
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> Given all of this, s. 25(1)(b) requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest. A public body should, when deciding whether information "clearly" must be disclosed in the public interest, consider the purpose of any relevant access exceptions (including those protecting third-party interests or rights that will be, or could reasonably be expected to be, affected by disclosure). In addition, the nature of the information and of the rights or interests engaged, and the impact of disclosure on those rights or interests will be factors in assessing whether disclosure is "clearly in the public interest".[12]

[15] I have considered the parties' submissions as well as the content and context of the information in dispute. The applicant has established that the topic of the health data breach investigation and the negative consequences flowing from it to the employees and contractors is of interest to the public. She provided newspaper articles that demonstrate that fact.[13] However, there is nothing in those news articles or in the parties' submissions and evidence that suggests that the general public shares the applicant's heightened level of interest in the specific information at issue in this case, namely the LSB fees. While I accept that the LSB fees may be interesting to the public in the sense that it is generally concerned with how its tax dollars are spent, there was nothing to indicate that disclosing the amount paid to LSB over an eleven month period would change or contribute in any significant way to the public discourse about the health data breach investigation.

[16] The reasons for invoking s. 25(1)(b) must be of sufficient gravity to warrant overriding all other provisions of FIPPA, including the exceptions found in Part 2 of FIPPA. Based on the content and context of the LSB fees I am not satisfied that disclosure meets that level of significance or magnitude. In conclusion, I find that disclosure of the LSB fees is not "clearly" in the public interest and s. 25(1)(b) does not apply.

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[12] Investigation Report F15-02, 2015 BCIPC 30, at pp. 28-29.

[13] Further, it is publicly known that in July 2015, the Legislative Assembly's Select Standing Committee on Finance and Government Services referred the matter to the BC Ombudsperson for investigation.

Solicitor client privilege – s. 14

[17] Section 14 of FIPPA says that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. The Supreme Court of Canada in *Maranda v. Richer ("Maranda")*[14] has confirmed that there is a presumption that lawyers' billing information is privileged. LeBel, J. said:

> The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements… Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved.

[18] The presumption that such information is privileged may be rebutted, however. In *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner) ("Central Coast")*[15] the BC Supreme Court said that the correct approach to determining whether the presumption has been rebutted is to consider the following two questions:

1. Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? and
2. Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

[19] I will follow the approach set out in *Maranda* and *Central Coast* to determine whether the LSB fees are presumptively privileged and whether that presumption has been rebutted.

Parties' submissions

[20] The Ministry submits that the presumption that the LSB fees are protected by solicitor client privilege applies and is not rebutted in this case. It submits that disclosure will directly reveal or allow the applicant to deduce the content of communications protected by privilege, such as:

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[14] *Maranda v. Richer*, 2003 SCC 67. Quote at paras. 32-33.

[15] *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427 (CanLII). Quote at paras. 104-106.

- how frequently legal advice was sought by the Province;
- how seriously the Province was taking the particular issue;
- the nature of the legal advice provided to the Province;
- the Province's litigation strategy in relation to the investigation;
- the state of the Province's preparation for trial;
- whether the amount indicates only a minimum expenditure that shows an expectation of compromise or capitulation in the litigation; and
- whether an increase in expenditures indicates unforeseen complexities or an expectation that the matter will go to trial.[16]

[21] The Ministry submits that the applicant is an "assiduous and particularly well-informed inquirer".[17] She was previously employed by the Ministry, so the Ministry submits she has extensive knowledge of government operations and is familiar with the role of LSB and, likely, the hourly rate it charges ministries. In addition, the Ministry says that the applicant has sought and obtained other records relating to the health data breach investigation, through previous access requests under FIPPA. The Ministry adds that she already knows that the LSB fees relate to legal issues flowing from that investigation, and that they also relate to the applicant's ongoing litigation in relation to that investigation. The Ministry submits that disclosure of the LSB fees would undermine the confidentiality of its solicitor client privileged communications by allowing the applicant to deduce the timing and extent of legal advice and even the Province's strategy with respect to her litigation.[18]

[22] The applicant disputes that the information she seeks would directly or indirectly reveal information that is subject to privilege. She denies that she acquired any knowledge of LSB's billing rates while employed by the Ministry, or that the information she seeks would allow her to deduce any privileged information about her own specific litigation. She submits that she could deduce nothing that relates to her own litigation because the information is not about just her – it is about a complex matter that involved many employees and contractors.[19]

Analysis

[23] The LSB fees are contained in an internal Ministry financial spreadsheet that records the fact that certain sums of money were paid to LSB for legal

[16] Ministry's initial submissions, para. 5.28.
[17] Ministry's initial submissions, para. 5.34.
[18] I note that the Ministry's submissions relate to all of the information withheld under s. 14, not just the LSB fees.
[19] She says that it caused at least three union grievances and five lawsuits. Para. 3.6-3.7.

services. It is information that is "intrinsically connected to the solicitor-client relationship and the communications inherent to it."[20] I find that the presumption that LSB fees are protected by solicitor client privilege applies.

[24] Whether the presumption is rebutted is, of course, dependent on the facts of this particular case. However, that being said, I note that previous orders have found the presumption to be rebutted in cases involving total amounts of legal fees. For example, in BC Order F15-16,[21] Adjudicator Alexander found that the privilege was rebutted for the total amount of fees paid by the Private Career Training Institutions Agency to various law firms. He concluded that there was no way even an assiduous inquirer could deduce what the legal services were, whether one or more lawyers provided them, how many hours were spent on a matter or when the legal services were provided. Several Ontario cases have also found the presumption to be rebutted with respect to the global or aggregate amount of legal fees – whether those totals appear in the legal invoices themselves or in the public bodies' own documents and summaries of the legal fees.[22] Similarly, the Alberta Information and Privacy Commissioner also ordered disclosure in a case involving the total amount due on each of several legal bills of account (submitted to the Edmonton Police Services for work done regarding the access applicant).[23]

[25] Turning back to this case, the LSB fees reveal the total amounts LSB was paid during an eleven month period to provide legal services related to the health data breach investigation. I cannot see how anyone, even an assiduous inquirer, could understand anything about privileged communications based on this information. It is true that the applicant knows that the legal services related in some way to the investigation of a health data breach and the employment and contractual consequences flowing from it. However, there were multiple employees and contractors involved in the matters under investigation and the LSB fees could pertain to any one or more legal matters. It is not possible to deduce anything about what legal work was actually done in exchange for the LSB fees, and what portion of the fees might relate to the applicant's litigation or any other identifiable matter. Nor does the eleven month time frame covered by the spreadsheet reveal when the work was actually done. Further, the spreadsheet does not divulge which of the lawyers at LSB did the work, so even if one knew LSB's rates, at most one could only glean a rough estimate of how many hours of legal work were provided. In summary, given its non-specific and aggregate nature, the LSB fees do not disclose anything about privileged

[20] *Donell v. GJB Enterprises Inc*., 2012 BCCA 135, at para. 49.
[21] Order F15-16, 2015 BCIPC 17.
[22] *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner*), 2005 CanLII 6045 (ON CA); *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2007 CanLII 65615 (ON SCDC); *Corporation of the City of Waterloo v. Cropley and Higgins*, 2010 ONSC 6522 (CanLII).
[23] Order F2007-014, 2008 CanLII 88778 (AB OIPC).

communications regarding legal advice sought and received or the Ministry's litigation strategy.

[26] In conclusion, I find that the presumption that the LSB fees are protected by solicitor client privilege has been rebutted. There is no reasonable possibility that disclosure of the LSB fees will directly or indirectly reveal any communication protected by privilege and even an assiduous inquirer, aware of background information, could not use the information to deduce or otherwise acquire privileged communications. Therefore, the Ministry may not refuse to disclose the LSB fees under s. 14 of FIPPA.

CONCLUSION

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

1. The Ministry is not required to disclose the LSB Fees under s. 25(1)(b) of FIPPA.

2. The Ministry is not authorized under s. 14 of FIPPA to refuse to disclose the LSB fees. I have highlighted the information that may not be withheld under s. 14 in a copy of page two of the record that is being sent to the Ministry along with this order.

3. The Ministry must give the applicant access to this information by January 19, 2016. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the record.

December 3, 2015

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

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