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Order P16-01

**CANADIAN UNION OF PUBLIC EMPLOYEES (BRITISH COLUMBIA  
REGIONAL OFFICE)**

Elizabeth Barker  
Senior Adjudicator

February 18, 2016

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**Summary:** The applicant made a request for access to her own personal information in the control of CUPE's BC Regional Office. CUPE disclosed some of the applicant's personal information to her, but withheld other information on the basis that the information was protected by solicitor client privilege, so s. 23(3)(a) of PIPA applied. The adjudicator found that CUPE was authorized by s. 23(3)(a) of PIPA to refuse to disclose the information because it is protected by solicitor client privilege.

**Statutes Considered:** *Personal Information Protection Act*, S.B.C. 2003, c. 63, ss. 23(1)(a) and 23(3)(a).

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

**Cases Considered:** *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *University of Calgary v. JR*, 2015 ABCA 118 (leave to appeal to SCC granted October 29, 2015); *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259; *R. v. B.*, 1995 CanLII 2007 (BCSC); *Canada v. Solosky*, 1979 CanLII 9 (SCC); *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC); *Alfred Crompton Amusement Machines Ltd. v. Commissioners of Customs and Excise (No. 2)*. [1972] 2 All E.R. 353 (CA).

**Authors cited:** Ronald D. Manes and Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993).

## INTRODUCTION

[1] Section 23(1)(a) of the *Personal Information Protection Act* (“PIPA”) gives individuals a right of access to their personal information under the control of an organization. The applicant requested access to her personal information under the control of the Canadian Union of Public Employees’ BC Regional Office (“CUPE”).

[2] CUPE disclosed some of the applicant’s personal information to her, but it withheld other personal information under s. 23(3)(a) of PIPA on the basis that the information is protected by solicitor client privilege. The applicant requested the Office of the Information and Privacy Commissioner (“OIPC”) review CUPE’s decision. Mediation did not resolve the issues in dispute, and the matter proceeded to written inquiry.

## ISSUE

[3] The issue in this inquiry is whether CUPE is authorized to refuse to disclose information under s. 23(3)(a) of PIPA because the information is protected by solicitor client privilege. Section 51(a) of PIPA puts the burden on CUPE to prove that s. 23(3)(a) authorizes it to refuse access to the requested information.

## DISCUSSION

[4] **Background** - CUPE is a national union with headquarters in Ottawa. Any group of employees in Canada can apply to CUPE for a charter as a local union. The applicant was a City of Surrey employee and a member of CUPE Local 402 until shortly before her access request.<sup>1</sup>

[5] **Records** - The records that are responsive to the applicant’s access request cover a ten year span, and the applicant received hundreds of records in response. CUPE is withholding nine records in their entirety, comprised of emails and handwritten notes documenting conversations. More specifically, the nine records in dispute are as follows:<sup>2</sup>

- Notes taken by CUPE’s in-house legal counsel who was working out of CUPE’s BC Regional Office (“CUPE’s lawyer”). The notes document

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<sup>1</sup> CUPE and Local 402 are separate and distinct legal entities. CUPE provides resources and services to CUPE locals to assist them not only with negotiating and administering collective agreements, but also with union business generally. (CUPE’s reply submissions, paras. 27 and 38 and CUPE’s Assistant Regional Director for BC, statutory declaration, Exhibit N).

<sup>2</sup> The description of the records is from CUPE’s response to the access request. The more fulsome descriptions were accepted into the inquiry on an *in camera* basis.

her telephone conversation with the CUPE servicing representative assigned to Local 402 (“servicing representative”): (“Record 1”).

- Two emails between CUPE’s lawyer and the servicing representative: (“Records 2 and 3”).
- An email from Local 402’s external lawyer (“Local 402’s lawyer”) to Local 402’s president and the servicing representative: (“Record 4”).
- Notes of CUPE’s lawyer documenting her telephone conversation with Local 402’s lawyer. (“Record 5”)
- Email from CUPE’s lawyer to CUPE’s Regional Director for BC and CUPE’s Assistant Regional Director for BC: (“Record 6”).
- Notes of CUPE’s lawyer documenting two telephone conversations she had with Local 402’s lawyer and a third conversation she had with CUPE’s Regional Director for BC: (“Record 7(a), 7(b), 7(c)”).
- Two emails between CUPE’s lawyer and Local 402’s lawyer: (“Records 8 and 9”).

[6] **Preliminary Matters** – There were three preliminary matters raised by the parties in this inquiry.

*Records not provided*

[7] CUPE provided a summary of the nine records with its initial submissions and further detail in a follow-up statutory declaration from CUPE’s lawyer.<sup>3</sup> Both the summary and the statutory declaration were accepted into the inquiry on an *in camera* basis because they reveal detail about the content of the records at issue. I also have the description of the records that CUPE provided the applicant when it responded to her access request.<sup>4</sup>

[8] The applicant objects to CUPE not providing the records for this inquiry. She argues that I must examine the records rather than rely on CUPE’s description of them. She believes that CUPE has manipulated the descriptions of the records to reflect solicitor client privilege, so its descriptions are not to be believed.<sup>5</sup>

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<sup>3</sup> June 11, 2014 letter and September 18, 2015 statutory declaration.

<sup>4</sup> CUPE’s January 28, 2014 response to access request.

<sup>5</sup> Applicant’s June 30, 2015 letter accompanying her submission.

[9] In a small number of cases when the issue relates to solicitor client privilege, the OIPC has accepted descriptions of records rather than reviewing the records themselves. In this regard the British Columbia Court of Appeal in *Gichuru v. British Columbia (Information and Privacy Commissioner)*<sup>6</sup> considered the degree of detail required for a sufficient description of records. Citing previous decisions, the Court explained that how and to what extent the documents need be described will depend upon the circumstances, and that the grounds for privilege have to be established in respect of each document.<sup>7</sup>

[10] In my view, CUPE's descriptions provide sufficient detail to allow me to make a determination about whether each of the records is privileged. The more fulsome of the two descriptions is provided in the statutory declaration of CUPE's lawyer. The descriptions provided include the date of the record, the names and description of the roles of those involved in the communication, and the nature and purpose of the communication. Despite the applicant's assertions to the contrary, there is nothing in the evidence before me that causes me to suspect that CUPE's descriptions of the records are false or that casts doubt on the credibility of those descriptions.

[11] While s. 38(1) of PIPA provides the Commissioner with the power to make an order requiring an organization to produce for the Commissioner a document for the purposes of an inquiry, I am satisfied that such an order is not necessary in this instance. The descriptions of the records are sufficiently detailed to allow me to examine the validity of CUPE's claim of privilege.

#### *Request for oral hearing*

[12] In her submissions, the applicant requests that OIPC hold an oral inquiry to determine whether the disputed information is privileged. She says that she "cannot fully describe the organization's lack of credibility in a limited written submission."<sup>8</sup> CUPE submits that an oral hearing is not necessary because credibility is not at issue in this inquiry.

[13] In rare cases, the Commissioner may choose to hold an oral inquiry, for example if the issues involve significant questions of credibility. However, in my view, this is not one of those cases. There are no significant issues of credibility pertinent to the issue of whether the records are protected by solicitor client privilege. Therefore, having considered the applicant's submissions on this point and having reviewed the other material before me, I conclude that an oral inquiry

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<sup>6</sup> *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259. The Court found that the description of some of the records was not sufficiently detailed to enable the adjudicator to determine the validity of the claim that litigation privilege applied.

<sup>7</sup> *Gichuru* at para. 41 and 42, citing *Visa International Service Assn. v. Block Brothers Realty Ltd.* (1983), 64 B.C.L.R. (2d) 390 at para. 5 and *Saric v. Toronto-Dominion Bank*, 1999 BCCA 459.

<sup>8</sup> Applicant's June 30, 2015 letter accompanying her submission, and para. 53 in her submission.

is not necessary to dispose of the issue in dispute. I decline the applicants' request for an oral inquiry.

*References to mediation material*

[14] The Commissioner will not ordinarily consider mediation materials in reaching a decision and issuing an order. CUPE objects to what it says are the applicant's references to mediation material in her submissions.<sup>9</sup> I have reviewed the parts of the applicant's submissions that CUPE objects to. With one exception, they are references to the OIPC Investigator's Fact Report, and they do not reveal the content of without prejudice discussions, the investigator's opinions or recommendations, or information about any offers or attempts to resolve the dispute between the parties during OIPC mediation. The only exception is one sentence at the top of page four of the applicant's June 30, 2015 letter that accompanied her submissions. I have not considered that sentence or otherwise relied on it when deciding whether the disputed records may be withheld under s. 23(3)(a).

[15] **Solicitor client privilege** - CUPE is withholding nine records on the basis that s. 23(3)(a) applies because they are protected by solicitor client privilege. The parts of s. 23 relevant in this inquiry state:

23 (1) Subject to subsections (2) to (5), on request of an individual, an organization must provide the individual with the following:

(a) the individual's personal information under the control of the organization;

...

(3) An organization is not required to disclose personal information and other information under subsection (1) or (2) in the following circumstances:

(a) the information is protected by solicitor-client privilege;

...

[16] CUPE submits that the records in dispute are protected by legal advice privilege. For legal advice privilege to apply the following conditions must be satisfied:

1. there must be a communication, whether oral or written;
2. the communication must be confidential;
3. the communication must be between a client (or agent) and a legal advisor; and

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<sup>9</sup> CUPE's reply submissions, para. 18.

4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[17] Not every communication between client and solicitor is protected by solicitor client privilege, but if the four conditions above are satisfied, then privilege applies to the communications and the records relating to it.<sup>10</sup> The above criteria have consistently been applied in BC Orders, and I will take the same approach here.<sup>11</sup>

#### *Parties' submissions*

[18] CUPE submits that the four preconditions for legal advice privilege have clearly been met in this case. It says that the records “constitute confidential communication, between a client or his or her agents and legal advisors, for the purpose of seeking, formulating or giving legal advice.”<sup>12</sup> In support of its submissions, CUPE provides two statutory declarations: one from CUPE’s lawyer with detail (*in camera*) about the records, and the other from CUPE’s Assistant Regional Director for BC, which provides information about the processing of the applicant’s access request.

[19] The applicant disputes that solicitor client privilege applies to the disputed records. In particular, she submits that CUPE’s lawyer was not working in the capacity as a lawyer when the communication in the records occurred because CUPE’s lawyer coordinated CUPE’s response to the applicant’s access request several years later. The applicant says this demonstrates that CUPE’s lawyer was working as CUPE’s privacy coordinator, not its lawyer. Further, the applicant submits that any of the communication between CUPE’s lawyer and Local 402 cannot be privileged because CUPE’s lawyer was not Local 402’s lawyer.<sup>13</sup> On a related note, the applicant asserts that an in-house lawyer can never have more than one client, so CUPE’s lawyer could never have provided legal advice to anyone other than CUPE. She also submits that any communication between CUPE’s lawyer and Local 402’s lawyer cannot be privileged because they would have been communications between two lawyers, not communication between a client and lawyer.<sup>14</sup>

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<sup>10</sup> For a statement of these principles see *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22 and *Canada v. Solosky*, 1979 CanLII 9 (SCC) at p. 13.

<sup>11</sup> For example: Order 01-53, 2001 CanLII 21607 (BC IPC) and Order F13-10, 2013 BCIPC 11 (CanLII).

<sup>12</sup> CUPE’s initial submissions, para. 16.

<sup>13</sup> Applicant’s submissions, paras. 25, 36-40

<sup>14</sup> Applicant’s submissions, para. 46.

[20] Records 1, 2, 3, 6 and 7 (c) - I have carefully considered CUPE's description of these records, in particular the statutory declaration of CUPE's lawyer, who participated in all of these communications. I am satisfied, based on her evidence, that these records are communications she had in her capacity as CUPE's lawyer with CUPE employees. Communication of in-house counsel, including those with another corporate employee, will be privileged if undertaken in the in-house counsel's capacity as a solicitor for the purpose of giving professional legal advice.<sup>15</sup> The fact that CUPE's lawyer coordinated the response to the applicant's access request at a later date does not persuade me, as the applicant argued, that she was not acting in her capacity as CUPE's lawyer at the time of the communications in the responsive records.

[21] In my view, these communications were clearly between a solicitor and her client. I am also satisfied that they relate directly to providing legal advice and seeking instructions on legal matters. Regarding confidentiality, CUPE's lawyer states that no one other than the participants she identifies participated in the communications, and I can see nothing in the inquiry materials that indicates that the communications were not kept confidential between CUPE's lawyer and CUPE staff. Therefore, I find that these records meet the criteria for legal advice privilege.

[22] Record 4 - Record 4 is an email communication between Local 402's lawyer, Local 402's president, and the servicing representative. The evidence of CUPE's lawyer is that Local 402's lawyer provides legal advice in this email. The statutory declarations of CUPE's lawyer, as well as the statutory declaration of CUPE's Assistant Regional Director for BC (in particular Exhibit C), satisfy me that this communication involves a legal matter that CUPE and Local 402 were mutually engaged in, and that Local 402's lawyer was representing both CUPE and Local 402 in that matter. Therefore, I find that this email was a communication between a solicitor and his clients, and the communication was directly related to seeking, formulating and giving legal advice. The evidence of CUPE's lawyer is that no one other than the three email participants was part of this communication, and there is nothing that would suggest otherwise, so I also find that it was a confidential communication. This record meets the criteria for legal advice privilege.

[23] Records 5, 7(a) and (b), 8 and 9 - These records contain communications between CUPE's lawyer and Local 402's lawyer. In her statutory declaration, CUPE's lawyer provides information about how the various matters that CUPE

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<sup>15</sup> *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, at 21; *Alfred Crompton Amusement Machines Ltd. v. Commissioners of Customs and Excise (No. 2)*. [1972] 2 All E.R. 353, at 376. See also: Ronald D. Manes and Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993), pp. 53-54.

and Local 402 were dealing with overlapped. Based on what she says, it is evident to me that CUPE and Local 402 shared their lawyers and their legal advice as it related to the matters that both organizations had in common. I am satisfied that these communications directly relate to the two lawyers formulating and providing legal advice to their respective clients on matters that were of mutual concern to both CUPE and Local 402. CUPE's lawyer states that the communications were not shared with others, and there is no evidence indicating this occurred. Finally, contrary to what the applicant submits, in some circumstances where the facts support it, privilege can apply to communications between two parties' lawyers.<sup>16</sup> This is one of those circumstances. Therefore, I find that these records also meet the criteria for legal advice privilege.

#### *Waiver of privilege*

[24] Solicitor client privilege may be lost when a client waives it. A waiver of solicitor client privilege is ordinarily established where it is shown that the possessor of the privilege knows of the existence of the privilege and voluntarily shows an intention to waive privilege.<sup>17</sup>

[25] The applicant says, "I respectfully submit that the inclusion of multiple third parties and the sharing of records and information establishes that any potential element of privilege was waived."<sup>18</sup> She does not elaborate, nor does she explain who she means by "multiple third parties". However, I understand her to be arguing that by sharing their communications, CUPE and Local 402 waived any solicitor client privilege over those communications. CUPE makes no submissions regarding waiver.

[26] I have already found that all of the communication for which solicitor client privilege is claimed, even where CUPE and Local 402 shared their communication, meets all the criteria for solicitor client privilege. After carefully reviewing the applicant's submissions and the information in this case, I can find nothing to suggest that CUPE or Local 402 disclosed the privileged communications to anyone besides each other. Therefore, I find that there was no waiver of solicitor client privilege.

[27] In conclusion, I find that CUPE has established that it is authorized to refuse to disclose information under s. 23(3)(a) of PIPA because the information is protected by solicitor client privilege.

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<sup>16</sup> Manes and Silver at paras. 3.10 and 4.13.

<sup>17</sup> Manes and Silver, p. 187-191; *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* 1983 CanLII 407 (BC SC).

<sup>18</sup> Applicant's submissions, at para. 83.

**CONCLUSION**

[28] For the reasons given above, under s. 52(2)(b) of PIPA, I confirm CUPE's decision to refuse the applicant access to the nine records at issue.

February 18, 2016

**ORIGINAL SIGNED BY**

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Elizabeth Barker, Senior Adjudicator

OIPC File No.: P14-56773