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Order F16-20

MINISTRY OF HEALTH

Wade Raaflaub, Adjudicator

April 19, 2016

CanLII Cite: 2016 BCIPC 22
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Summary: The applicant, a health care practitioner whose billings were audited by the Ministry of Health, requested records relating to a hearing that he had. The Ministry withheld the records on the basis that they were privileged under s. 14 of FIPPA. With one exception, the adjudicator found that the Ministry was authorized to refuse access to the information.

Statutes Considered: B.C.: *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 14, 15, 22, 56(1), 57(1), 58, 58(2)(a), 58(2)(b) and 59(1); *Medicare Protection Act*, R.S.B.C. 1996, c. 286.

Authorities Considered: B.C.: Order F10-20, 2010 BCIPC 31 (CanLII); Order F14-38; 2014 BCIPC 41 (CanLII); Order F15-41, 2015 BCIPC 44 (CanLII); Order F15-52, 2015 BCIPC 55 (CanLII).

Cases Considered: *Descôteaux et al. v. Mierzwinski,* [1982] 1 SCR 860, 1982 CanLII 22 (SCC); *Puxley v. Canada (Treasury Board – Transport Canada)* (1994), 24 Admin. L.R. (2d) 43 (Fed. T.D.); *R. v. B.*, 1995 CanLII 2007 (BC SC); *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)*, 1995 CanLII 634 (BC SC); *Del Zotto v. M.N.R.*, [2000] 4 FCR 321, 2000 CanLII 17139 (FCA); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (CanLII); *Jacobson v. Atlas Copco Canada Inc.*, 2015 ONSC 4 (CanLII).

Other Source Considered: Jones, David Phillip and de Villars, Anne S., *Principles of Administrative Law*, 4th ed. (Scarborough, Ont.: Thomson Canada Ltd., 2004).

INTRODUCTION

[1] This inquiry involves an applicant's access request to the Ministry of Health ("Ministry") under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for records relating to a hearing that he attended to address his alleged improper billings as a health care practitioner. The Ministry refused to give access to some of the requested information under ss. 14 (legal advice), 15 (disclosure harmful to law enforcement) and 22 (disclosure harmful to personal privacy). It also withheld other information on the basis that it was not responsive to the access request.

[2] The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review the Ministry's decision. As investigation and mediation did not resolve the matter, the applicant asked for an inquiry.

[3] After the matter came to inquiry, the applicant indicated that he was no longer interested in the information withheld under ss. 15 and 22. While he remained interested in the information withheld as non-responsive, the Ministry subsequently released that information to him.

ISSUE

[4] The sole issue in this inquiry is whether the Ministry is authorized to refuse to disclose the information at issue under s. 14 of FIPPA. In accordance with s. 57(1), the Ministry has the burden of proving that the applicant has no right of access.

DISCUSSION

[5] **Background** - The Ministry's Billing Integrity Program ("BIP") audits the claims for fees for services made by health care practitioners to ensure that they have made their claims in accordance with the *Medicare Protection Act*, its accompanying regulation and a payment schedule. The Medical Services Commission ("MSC") has the authority, after giving a health care practitioner the opportunity to be heard, to require him or her to repay any claimed amounts that do not comply with the legislation. The hearing is conducted by a panel of three individuals appointed by a sub-body of the Commission, called the Health Care Practitioners Special Committee for Audit Hearings ("Committee").

[6] The applicant is a health care practitioner whose fee claims were audited by the BIP, and he was given a hearing before a panel of the Committee. The panel made findings against the applicant, which are now the subject of an ongoing appeal.

[7] The applicant requested from the Ministry copies of records relating to himself in the custody and control of the BIP and MSC, excluding hearing transcripts and records that originated from his own lawyer. The Ministry refused to disclose some of the information on the basis that it is privileged under s. 14 of FIPPA.

[8] **Information at Issue** - The information at issue consists of email correspondence on 27 pages.

Preliminary Matters

Request to add issues

[9] Despite indicating that he was no longer interested in the information being withheld under s. 22, the applicant refers to s. 22 in his submissions, saying that he meant only that he was not interested in information that "legitimately falls" within the section. He submits that he is entitled to the names of government employees, for example.

[10] The applicant has effectively changed his mind about whether the application of s. 22 should be an issue in the inquiry. Given that he very clearly indicated, after the matter had already proceeded to inquiry, that he did not want s. 22 to be an issue, I will not now add it at this late stage of the process.

[11] In his inquiry submissions, the applicant also raises an issue regarding the adequacy of the Ministry's search for responsive records. While he noted this as a concern in his initial request for review, he failed to pursue this aspect of the matter at investigation and mediation, or prior to the Notice of Inquiry being issued. The OIPC investigator asked the applicant to provide evidence to support his allegation that the public body had failed to conduct an adequate search, adding that if she did not receive a response, no further action would be taken. She did not receive a response. Accordingly, the investigator's Fact Report, which serves to define the issues at inquiry, did not include adequacy of search as an issue proceeding to inquiry when it was sent to the parties for comment. The applicant still made no objection regarding the issues. Given all of this, the investigator closed the aspect of the matter regarding adequacy of search. The applicant now submits that there was a lack of jurisdiction to do so.

[12] Section 56(1) of FIPPA states that, if a matter is not settled by an investigator, the Commissioner may conduct an inquiry, meaning that the Commissioner has the discretion to do so, as well as to identify the issues. Given the chronology as just described, the Commissioner quite properly exercised her discretion, through the Notice of Inquiry, not to include an issue regarding the adequacy of the Ministry's search for records. As the adjudicator now delegated to exercise the Commissioner's jurisdiction in this inquiry, I

decline to add the issue regarding adequacy of search at this late stage of the process.

Request to cross-examine

[13] The Ministry submitted an affidavit sworn by the lawyer who represented the Ministry in the course of the applicant's Committee hearing. The applicant requests an opportunity to cross-examine the lawyer on his evidence. The applicant challenges the reliability of the affidavit, and points out what he alleges to be an inconsistency in the evidence of the lawyer.

[14] The Ministry objects to the request to cross-examine on the basis that there is sufficient written information for me to determine the weight to give its lawyer's evidence and to dispose of the issue in the inquiry. It argues that there is no inconsistency in the affidavit. Following the Ministry's objection, the applicant provided a further, unsolicited submission on the matter regarding cross-examination. The Ministry objects to this submission because it is beyond the number of submissions allotted to an applicant in the OIPC's usual inquiry process.

[15] I will allow the applicant's additional submission, as it is on a narrow procedural issue regarding cross-examination, which arose partway through the inquiry. In my view, it is appropriate for me to receive the submissions relevant to that narrow issue.

[16] As for whether I will permit the applicant to cross-examine the Ministry's lawyer, the OIPC, akin to a tribunal, is master of its own procedure, meaning that the opportunity to cross-examine a witness does not necessarily follow from the fact of a written inquiry, or the right to be represented by counsel.[1] Having said this, cross-examination may be a necessary element of procedural fairness where important issues of credibility are raised, or where there is no other effective means of refuting the allegations or arguments of the other side.[2]

[17] Here, I do not find that an important issue of credibility has arisen in respect of the evidence of the Ministry's lawyer. Further, the applicant has had an effective opportunity to explain the inconsistency that he alleges to exist in the affidavit, as well as respond to the Ministry's response. I have sufficient argument in the parties' submissions, and sufficient evidence in the records at issue, to consider and give appropriate weight to the affidavit evidence of the

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[1] Jones, David Phillip and de Villars, Anne S., *Principles of Administrative Law*, 4th ed. (Scarborough, Ont.: Thomson Canada Ltd., 2004) at p. 285, citing *Del Zotto v. M.N.R.*, [2000] 4 FCR 321, 2000 CanLII 17139 (FCA).

[2] *Ibid.* at p. 286, citing *Puxley v. Canada (Treasury Board – Transport Canada)* (1994), 24 Admin. L.R. (2d) 43 (Fed. T.D.).

Ministry's lawyer. Therefore, I decline to permit the applicant to cross-examine the Ministry's lawyer on his affidavit.

Legal advice – s. 14

[18] Section 14 of FIPPA states:

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

[19] Previous OIPC orders have stated that s. 14 encompasses both legal advice privilege (also referred to as solicitor client privilege or legal professional privilege) and litigation privilege.[3] The Ministry submits that the information at issue is protected by legal advice privilege as well as litigation privilege. I will first review the information at issue to determine whether it is subject to legal advice privilege. I will consider whether it is subject to litigation privilege in the alternative, where necessary.

Information subject to legal advice privilege – s. 14

[20] The test for legal advice privilege has been articulated as follows:

> [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:
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> 1. there must be a communication, whether oral or written;
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> 2. the communication must be of a confidential character;
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> 3. the communication must be between a client (or his agent) and a legal advisor; and
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> 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.[4]

The parties' submissions

[21] The Ministry submits that the information at issue meets the four-part test regarding legal advice privilege. While it acknowledges that some of the email

[3] See, e.g., Order F15-41, 2015 BCIPC 44 (CanLII) at para. 43.
[4] *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22, cited in, e.g., Order F14-38, 2014 BCIPC 41 (CanLII) at para. 46.

correspondence that it is withholding does not directly seek or give legal advice, it argues that this correspondence forms part of ongoing communications that took place so that legal advice could be sought and given leading up to and during the hearing involving the applicant. The Ministry submits that, if the email correspondence were disclosed, it would indirectly reveal privileged communications because it would permit the applicant to draw accurate inferences as to the nature of the legal advice. The Ministry adds that communications to and from its lawyer's legal staff were on behalf of its lawyer as his agents, and are therefore also privileged. It further submits that privilege attaches to factual information given and received in confidence as part of the necessary exchange of information between solicitor and client for the purpose of providing legal advice.[5] Finally, the Ministry submits that it has not waived any privilege.

[22] The applicant submits that the Ministry simply names certain individuals and their employment positions, and then makes very general conclusory statements in affidavits that the information at issue is privileged. He argues that no attempt is made to address each specific record by describing its nature and date, and how the contents fall within the scope of privilege. The Ministry responds that the records speak for themselves, and that I am in a position to review them.

Review of the information at issue

[23] The information at issue consists of written communications, meaning that part (1) of the test regarding legal advice privilege is satisfied.

[24] I also find that part (2) of the test is met, in that the communications are of a confidential character, given their content, express indications of confidentiality in some of the emails, and statements in the affidavits of the Ministry's lawyer and a BIP employee that the email correspondence was understood to be confidential and has been kept confidential.

[25] As for part (3) of the test and whether the communications are between a client (or its agent) and a legal advisor (or his or her agent), the complexity in this case centres on the fact that various individuals act in more than one capacity. The Ministry's lawyer provides legal advice to the Ministry, and in particular BIP staff, in their dealings with health care practitioners' fee claims. He then acts as counsel for the Ministry once a matter proceeds to a hearing. In addition, he provides legal advice, such as regarding proper process, to BIP staff when they act as liaisons and coordinators for the Committee, once the

[5] It cites *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (CanLII) at para. 42. See also *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)*, 1995 CanLII 634 (BC SC) at para. 58.

Committee is charged with arranging and managing a hearing. The Ministry makes clear in its submissions, however, that its lawyer does not provide legal advice to the Committee panel that makes decisions in the course of the hearing.

[26] Given who is and who is not a client of the Ministry's lawyer, as well as the fact that some of the same staff communicate on behalf of the Ministry, the Committee and the Committee panel, I must review the records to determine on whose behalf a particular individual is acting when sending or receiving email correspondence. On my review, I find that almost all of the email correspondence is between BIP staff, as liaisons and coordinators for the Committee, and the Ministry's lawyer or one of his three legal assistants named in his affidavit, in their capacities assisting the Committee with matters relating to process. The communications are therefore between a client and its legal advisor or his agents. Sometimes, the Ministry's lawyer or his legal assistants are only copied, a point to which I return below.

[27] There are two emails on page 75 of the records that I find not to be communications between a client and legal advisor. The first is from the chair of the Committee panel to BIP staff who are assisting him. The second email forwards the first one to other Ministry staff, including the Ministry's lawyer.

[28] Although the Ministry's lawyer is a recipient of the content of both emails, I find that it is in his capacity as counsel for the Ministry in the hearing. Because the Ministry's lawyer does not provide legal advice to BIP staff assisting the Committee insofar as he is acting in his capacity as counsel for the Ministry in the hearing, the communications are not within the context of a solicitor-client relationship. Even if his dual role means that he might be characterized as also receiving the emails in his capacity as legal advisor to the Committee, the content of the emails emanates from the chair of the Committee panel, whereas the Ministry's lawyer does not provide any legal advice whatsoever to the Committee panel. The communications are therefore still not within the context of a solicitor-client relationship.

[29] Given the foregoing, I find that the emails on page 75 are not subject to legal advice privilege. I will consider whether they are subject to litigation privilege below.

[30] I now turn to part (4) of the test regarding legal advice privilege, namely whether the information at issue is directly related to the seeking, formulating, or giving of legal advice, including where the Ministry's lawyer or legal staff is merely copied, or where the information is merely factual.

[31] The Ministry notes that previous OIPC orders have found that s. 14 can apply to email correspondence that was only copied to a lawyer (or his or her

legal staff).[6] While this is true, a communication – even a confidential one – addressed by a client to someone, and which is copied to the client's lawyer, does not, without more, mean that the communication is privileged.[7] For information, including factual information, to be privileged, it must have been provided for the purpose of obtaining or providing legal advice; it is not sufficient that the information be supplied for the purpose of simply providing information.[8]

[32] Certain emails withheld by the Ministry clearly involve the seeking, formulating or giving of legal advice, in that the Ministry's lawyer is being asked his view on a particular question, or is providing an answer. Where he or his staff are merely copied, or the email merely conveys factual information, I find that the emails are part of the exchange of information in order to keep the Ministry's lawyer apprised so that he can provide legal advice. Those emails are therefore also subject to legal advice privilege.

Information subject to litigation privilege – s. 14

[33] The test for litigation privilege has been articulated as follows:

> Litigation privilege protects from disclosure materials created or gathered by a lawyer, including communications between a lawyer and third parties, where litigation was in reasonable prospect at the time of the communication, and the dominant purpose of the communication was litigation[.] This privilege does not exist to protect the confidential relationship between solicitor and client, but to facilitate the adversarial process of litigation. Thus, even non-confidential material may be protected if the dominant purpose for its existence is litigation in reasonable prospect or in progress[.][9]

[34] I found earlier that two emails on page 75 of the records are not subject to legal advice privilege. As for whether they are subject to litigation privilege, the Ministry submits that the Committee hearing was ongoing or reasonably contemplated at the time that all of the records at issue were created, and that they were created for the dominant purpose of facilitating, furthering or dealing with the hearing.

[35] I find that the two emails on page 75 are not subject to litigation privilege. While the information in them relates to the hearing involving the applicant, and the Ministry's lawyer received copies and therefore might be said to have

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[6] It cites Order F10-20, 2010 BCIPC 31 (CanLII) at para. 14.
[7] *Ibid.*
[8] Order F15-52, 2015 BCIPC 55 (CanLII) at para. 14, citing *Jacobson v. Atlas Copco Canada Inc.*, 2015 ONSC 4 (CanLII) at paras. 24-25, where information was not found to be supplied for the purpose of the lawyer providing advice.
[9] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at para. 72 [internal citations omitted].

gathered them within the meaning of the above test, the dominant purpose of the communications was not litigation. The two items of email correspondence on page 75 are simply administrative, or clerical, in nature.

Possibility of severing

[36] The applicant argues that the Ministry makes no attempt to release what he considers to be non-privileged portions of the records, such as the names of the parties involved in the communications. The Ministry takes the position that all of the email correspondence is privileged.

[37] If a communication is subject to legal advice privilege, the whole of the communication is normally privileged.[10] In my view, the whole of the communications in this case includes the names of the senders and recipients of the email correspondence.

Conclusion – s. 14

[38] I conclude that the Ministry is authorized to refuse the applicant access to almost all of the information at issue, on the basis that it constitutes legal advice and is therefore privileged under s. 14. There is one exception in relation to the two emails on page 75 of the records, and I will therefore order their disclosure to the applicant, subject to the following.

[39] There is what appears to be a personal email address on page 75. The Ministry withheld it under s. 22 elsewhere in the records, and I presume that it was an oversight on the Ministry's part not to similarly apply s. 22 to this same email address on page 75. Because I decided at the outset of this Order that the Ministry's application of s. 22 would not be added as an issue in the inquiry, the information on page 75 to which the Ministry must give access does not include the personal email address.

CONCLUSION

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

1. Subject to paragraph 2, the Ministry of Health is authorized to refuse the applicant access to the information at issue under s. 14, on the basis that it is subject to legal advice privilege. Under s. 58(2)(b), I confirm the Ministry's decision to refuse access.

[10] See, e.g., *Descôteaux et al. v. Mierzwinski,* [1982] 1 SCR 860, 1982 CanLII 22 (SCC) at p. 892.

2. The Ministry of Health is not authorized to refuse the applicant access to the information withheld on page 75 of the records. This does not include the personal email address. Under s. 58(2)(a), I require the Ministry to give the applicant access to the information on page 75, with the exception of the personal email address.

3. The Ministry must provide the applicant with the information set out in paragraph 2 before June 1, 2016 in accordance with s. 59(1). The Ministry must also concurrently provide the OIPC Registrar of Inquiries with a copy of its letter to the applicant, along with the information to be disclosed.

April 19, 2016

ORIGINAL SIGNED BY

Wade Raaflaub, Adjudicator

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