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Order F16-40

PROVINCIAL HEALTH SERVICES AUTHORITY

Chelsea Lott
Adjudicator

August 26, 2016

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Summary: The Provincial Health Services Authority retained a law firm to conduct a workplace investigation. The applicant requested a copy of the report the investigating lawyer produced. The public body withheld two responsive reports pursuant to ss. 14 (solicitor client privilege) and 22 (disclosure harmful to personal privacy) of FIPPA. The applicant argued ss. 14 and 22 did not apply, and that disclosure of the reports was in the public interest pursuant to s. 25. The adjudicator determined that the reports were privileged and the public body was authorized to withhold them under s. 14 and further held that section 25 was of no application in this case. Given the adjudicator's finding that the public body was authorized to withhold the records under s. 14, she declined to consider the application of s. 22.

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

Authorities Considered: B.C.: Order 02-38, 2002 CanLII 42472 (BC IPC); Order F15-27, 2015 BCIPC 29 (CanLII); Investigation Report F16-02, 2016 BCIPC 36 (CanLII); Investigation Report F15-02, 2015 BCIPC 30 (CanLII); Order F05-35, 2005 CanLII 48297 (BC IPC); Order F16-28, 2016 BCIPC 30 (CanLII); Order F16-26, 2016 BCIPC 28 (CanLII); Order F10-18, 2010 BCIPC 29 (CanLII); Order F14-29, 2014 BCIPC 32 (CanLII).

Cases Considered: *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *R. v. B.*, 1995 CanLII 2007 (BC SC); *Slansky v. Canada (Attorney*

General), 2013 FCA 199 (CanLII) leave to appeal to SCC refused 2014 CanLII 5977; *Wilson v. Favelle*, 1994 CanLII 1152 (BC–M).

INTRODUCTION

[1] The Provincial Health Services Authority (“PHSA”) retained a law firm to conduct a workplace investigation. At some time during or after the investigation, two high level employees of PHSA resigned.¹ This inquiry concerns the request by a journalist for the investigating lawyer’s report to PHSA.

[2] PHSA advised the applicant that it was withholding a 20-page report pursuant to s. 14 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[3] The applicant asked the Office of the Information and Privacy Commissioner (“OIPC”) to review PHSA’s decision. Investigation and mediation did not resolve the matter. The applicant requested it proceed to inquiry under Part 5 of FIPPA.

[4] During the inquiry, PHSA located an additional 10-page report which was responsive to the access request. The OIPC determined that both the 20-page report and the 10-page report (the “Reports”) were records in dispute in the inquiry.

[5] Also during the inquiry, PHSA indicated that it was withholding both reports in their entirety under s. 22 (disclosure harmful to personal privacy) in addition to s. 14. The applicant opposed the addition of s. 22 to the inquiry and he advised he was going to argue that s. 25 (disclosure in the public interest) applied. Ultimately, the OIPC decided to add ss. 22 and 25 to the issues to be decided at the inquiry.

ISSUES

[6] The issues before me are as follows:

1. Is PHSA required by s. 25 to disclose the information?
2. Is PHSA authorized by s. 14 of FIPPA to refuse access to the information?
3. Is PHSA required by s. 22(1) of FIPPA to refuse access to the information?

¹ Applicant’s submission at para. 2.

[7] Under s. 57(1) of FIPPA, PHSA has the burden of proof to establish that s. 14 authorizes it to withhold the requested information. However, s. 57(2) of FIPPA places the burden on the applicant to establish that disclosure of personal information would not be an unreasonable invasion of third-party personal privacy under s. 22 of FIPPA.

[8] Section 57 is silent on the burden of proof for s. 25. However, I adopt the following statement from Order 02-38:

... 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.²

DISCUSSION

[9] **PHSA** – The PHSA was established under the *Society Act* in 2001.³ PHSA is charged with overseeing and managing various province-wide health and health protection agencies including BC Cancer Agency, BC Centre for Disease Control, BC Mental Health and Substance Use Services, BC Transplant, BC Children's Hospital and BC Women's Hospital and Health Centre.⁴

[10] **Records** – The records in question comprise two reports prepared by the investigating lawyer which are 20-pages and 10-pages respectively. PHSA is withholding the Reports in their entirety under ss. 14 and 22.

[11] In his initial submissions, the applicant states that he is also seeking "supporting documentation" in addition to the Reports. The applicant's request for records did not include "supporting documentation," so any such records are not within the scope of this inquiry. The only records I will consider are the Reports.

[12] **Preliminary Matter** – In his submissions, the applicant argues that PHSA is not authorized by s. 13 to refuse to disclose the requested information.⁵ However PHSA is not withholding information under s. 13. Therefore, I will not consider the applicant's submissions regarding s. 13.

² Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 39.

³ RSBC 1996, c. 433. See *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII) at para. 10.

⁴ *Ibid* at paras. 8 – 11. The current names of the respective agencies have been used.

⁵ Applicant's submission at paras. 21-22.

Is Disclosure in the Public Interest?

[13] Section 25 of FIPPA provides for the mandatory disclosure of information by a public body where the disclosure is in the public interest. This section overrides every other section in FIPPA. Section 25 sets a high threshold that is only intended to apply in serious situations.⁶

[14] Section 25 reads as follows:

Information must be disclosed if in the public interest

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

- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
- (b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

...

[15] Pursuant to s. 25(1)(a), a public body is required to disclose information where there is an imminent risk of significant harm to the environment or to the health or safety of the public or a group of people.⁷ The information in dispute here is clearly not about matters described in s. 25(1)(a).

[16] Under s. 25(1)(b), the public body must disclose information if for any other reason, it is clearly in the public interest. There is no requirement for any imminence or urgency in order to require disclosure under s. 25(1)(b).⁸ The “public interest” does not mean information which has merely piqued the interest of the public.⁹

[17] The applicant argues that there is a public interest in how a publicly funded organization, namely PHSA, is managed. While that may be true, s. 25 is not triggered every time there is suspicion that a public body is not adequately carrying out its functions. There must be an issue of “objectively material, even significant public, importance.”¹⁰ I fail to see how this particular workplace investigation involving employees who have since left PHSA meets the high threshold required by s. 25. There is nothing in the materials which persuades

⁶ Order F15-27, 2015 BCIPC 29 (CanLII) at para. 29.

⁷ Investigation Report F16-02, 2016 BCIPC 36 (CanLII) at p. 21.

⁸ Investigation Report F15-02, 2015 BCIPC 30 (CanLII) at p. 27.

⁹ Investigation Report F16-02, *supra* at pp. 26-27.

¹⁰ Investigation Report F16-02, *supra* at p. 36.

me the information is captured by s. 25. Accordingly, I find that s. 25 does not apply to the information in issue.

Solicitor Client Privilege

[18] 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. PHSA asserts the Reports are protected by solicitor client privilege, so may be withheld under s. 14. Section 14 encompasses both legal advice privilege and litigation privilege.¹¹

[19] PHSA is claiming legal advice privilege over the Reports.¹² Legal advice privilege serves to promote full and frank communications between a lawyer and his or her client by protecting confidential communications that are related to the seeking or giving of legal advice.¹³

[20] 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
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.¹⁴

[21] 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.¹⁵ The above criteria have consistently been applied in OIPC orders, and I will take the same approach here.¹⁶

¹¹ *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.

¹² PHSA submission at para. 35.

¹³ Order F05-35, 2005 CanLII 48297 (BC IPC) at para. 7; *College of Physicians of BC*, *supra* at para. 30.

¹⁴ *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22.

¹⁵ *Ibid*

¹⁶ See for example Order F16-28, 2016 BCIPC 30 (CanLII) and Order F16-26, 2016 BCIPC 28 (CanLII).

Communication between client and lawyer

[22] PHSA submits that the Reports plainly constitute written communication between PHSA and its legal advisor. In support, PHSA says the investigating lawyer wrote the Reports on the law firm's letterhead and the Reports are addressed to the PHSA.¹⁷ The Executive Vice-President deposes that she was the one who received the Reports.¹⁸ I have reviewed the Reports and confirm they are written reports from the investigating lawyer addressed to PHSA. I am satisfied that the Executive Vice-President was acting on behalf of PHSA in receiving the Reports based on portions of her affidavit received *in camera*. I therefore find that the Reports were written communication between the PHSA, as client, and the investigating lawyer, as the PHSA's legal advisor. This satisfies the first and third parts of the four-part test.

Confidential communication

[23] I am satisfied based on the evidence before me that the communication contained in the Reports was intended to be confidential between the PHSA and the investigating lawyer. PHSA submitted *in camera* a document titled "Terms of Reference for an Investigation," which outlined certain terms of the lawyer's retainer.¹⁹ Given the *in camera* nature of this document, I am somewhat limited in what I can say about it, but I am satisfied that it contemplated a confidential investigation. I note that the Terms of Reference explicitly state that it was to be a privileged and confidential investigation.²⁰ Further, PHSA's Executive Vice-President deposed that she expressly sought the lawyer's agreement that the information collected would be treated confidentially and that all participants would be advised of the same confidentiality.²¹

[24] In addition, each page of the Reports has been stamped with the word "confidential".²² Both Reports commence with the following language:

This memorandum is subject to solicitor-client privilege and is confidential. It has been created for the purpose of providing legal advice. This memorandum should not be disclosed to anyone but the recipient for any purpose in order to avoid waiving solicitor-client privilege.²³

¹⁷ PHSA submission at para. 47.

¹⁸ Lupini affidavit at para. 19.

¹⁹ Lupini affidavit at para. 6. Although the actual document was received *in camera*, its title was disclosed by PHSA in a portion of Ms. Lupini's affidavit which was not *in camera*.

²⁰ PHSA submission at para. 49. In this footnote and in footnotes 21-24, 30 and 37 I am referring only to evidence and submissions which PHSA has openly disclosed to the applicant.

²¹ Lupini affidavit at paras. 8-11.

²² Lupini affidavit at para. 18.

²³ Lupini affidavit at para. 17.

[25] The Executive Vice-President deposed in her affidavit that she received the Reports and no one other than PHSA's in-house legal counsel received a copy of the Reports.²⁴

[26] Therefore, I am satisfied that the Reports are confidential communications between the PHSA and its legal advisor.

Communication directly related to seeking, formulating or giving of legal advice

[27] The applicant's argument as it relates to s. 14, is that PHSA only retained the lawyer to conduct an investigation. The applicant submits that PHSA is now seeking to change the character of its relationship with the lawyer in order to shield itself from potentially embarrassing revelations.²⁵ PHSA disputes the applicant's allegations. It relies on evidence that it retained the lawyer to provide legal advice and points to the substance of the Reports as evidence that she in fact provided legal advice.²⁶

[28] It is settled principle that where a lawyer provides advice other than legal advice, those communications are not caught by privilege.²⁷ Accordingly, where a lawyer acts only as an investigator and not as a legal adviser, there is no solicitor client privilege.²⁸ I am also mindful of the comments of the Court of Appeal in *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)* regarding investigations conducted by lawyers:

[32]...Where a lawyer acts only as an investigator, there is no privilege protecting communications to or from her. If, however, the lawyer is conducting an investigation for the purposes of giving legal advice to her client, legal advice privilege will attach to the communications between the lawyer and her client (see Gower at paras. 36-42)...²⁹

[29] As previously mentioned, I am constrained in my ability to describe the underlying facts because much of the evidence was submitted *in camera*. However, I am satisfied that PHSA retained the lawyer to provide legal advice and not merely investigate. In the present case, the Terms of Reference that outline the lawyer's retainer are consistent with the Executive Vice-President's evidence that she retained the lawyer to both investigate and provide legal advice. The affidavit evidence of the investigating lawyer further supports the conclusion that her role was that of legal advisor. I note the Terms of Reference

²⁴ Lupini affidavit at paras. 19-20.

²⁵ Applicant's submission at para. 29.

²⁶ PHSA reply submission at paras. 9-11.

²⁷ Order F10-18, 2010 BCIPC 29 (CanLII) at para. 25.

²⁸ Order F05-35, 2005 CanLII 48297 (BC IPC) at para. 10.

²⁹ *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665.

explicitly state the lawyer was retained “to provide legal advice and recommendations.”^{30,31} I have reviewed the Reports and it is evident that they contain legal advice. Based on the foregoing, I conclude the final part of the four-part test is met and both Reports are subject to legal advice privilege.

[30] My conclusion is in keeping with Order F05-35³² and Order F14-29³³ in which investigation reports were found to be subject to legal advice privilege.³⁴ In the circumstances of those Orders, as in this inquiry, the lawyer’s retainer required her to obtain facts and assess those facts in order to render legal advice. In my view, the Reports clearly fall within the scope of solicitor client privilege.

[31] **Summary s. 14** – I find that PHSA has established that legal advice privilege applies to all of the information it withheld under s. 14 and PHSA may refuse to disclose the Reports to the applicant on that basis.

[32] **Section 22** – In light of my findings regarding s. 14, it is not necessary for me to consider whether s. 22(1) of FIPPA applies.

CONCLUSION

[33] For the reasons above, under s. 58(2) of FIPPA, I confirm PHSA’s decision to refuse to give the applicant access to the information it withheld under s. 14 of FIPPA.

August 26, 2016

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator

OIPC File No.: F14-57688

³⁰ PHSA submission at para. 57.

³¹ The terms of a retainer although not conclusive are evidence of the nature of the relationship between lawyer and client. See *Slansky v. Canada (Attorney General)*, 2013 FCA 199 (CanLII) leave to appeal to SCC refused 2014 CanLII 5977 at para. 94.

³² Order F05-35, 2005 CanLII 48297 (BC IPC).

³³ Order F14-29, 2014 BCIPC 32 (CanLII).

³⁴ For a case where the evidence led to an opposite finding, see *Wilson v. Favelle*, 1994 CanLII 1152 (BC-M).