



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
*for British Columbia*

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Order F17-53

**MINISTRY OF HEALTH**

Elizabeth Barker  
Senior Adjudicator

November 15, 2017

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**Summary:** A journalist requested records related to the health risks associated with eating meat from the Coquitlam pig farm where the remains of Robert Pickton's murder victims were found. The journalist requested a review of the Ministry of Health's decision to refuse to disclose some records under s. 14 (solicitor client privilege) and s. 15(1)(g) (prosecutorial discretion) of FIPPA. The adjudicator confirmed the Ministry's decision to refuse access to most of the records under s. 14. However, the adjudicator found that s. 14 did not apply to six pages and ordered the Ministry to disclose them to the applicant. It was not necessary to consider s. 15(1)(g).

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

**Authorities Considered: BC:** Order F17-30, 2017 BCIPC 32.

**Cases Considered:** *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53; *Canada v. Solosky*, 1979 CanLII 9 (SCC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *R. v. B.*, 1995 CanLII 2007 (BCSC); *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC).

**Publication Considered:** Dodek, Adam M., *Solicitor-Client Privilege* (Toronto: LexisNexis, 2014); Sopinka, Ledermann & Bryant, *The Law of Evidence in Canada Fourth Edition* (Toronto: LexisNexis, 2014).

## INTRODUCTION

[1] A journalist (applicant) made the following request under the *Freedom of Information and Protection of Privacy Act* (FIPPA):

Please send me all records that discuss whether the remains of any of the victims of B.C. serial killer and Coquitlam pig farmer Robert Pickton ended in the food supply, or were used for pork products – either for his friends, family or the general public – and any health risks that could result from this, and how many people may have consumed such tainted food products.

[2] The Ministry of Health (Ministry) provided the applicant with records but withheld some information from the under s. 14 (solicitor client privilege) and s. 22 (unreasonable invasion of third party personal privacy) of FIPPA.

[3] The applicant disagreed with the Ministry's decision to withhold information under s. 14, and requested a review by the Office of the Information and Privacy Commissioner (OIPC). He did not request a review of the s. 22 severing. Mediation did not resolve the s. 14 issue and the applicant requested that it proceed to inquiry. After the Notice of Inquiry was issued, the Ministry requested permission to add s. 15(1)(g) (exercise of prosecutorial discretion) to the issues in the inquiry. The OIPC consented and the Notice of Inquiry was amended accordingly. The Ministry provided an inquiry submission but the applicant did not.

## ISSUES

[4] The issues in this case are whether the Ministry is authorized under s. 14 and/or s. 15(1)(g) of FIPPA to refuse the applicant access to the requested information. Section 57(1) of FIPPA places the onus on the Ministry to prove that the applicant has no right of access to the information it is refusing to disclose.

## DISCUSSION

### ***Background***

[5] This case involves communications with lawyers working in two different branches of the Ministry of Attorney General: the Legal Services Branch (LSB) and the BC Prosecution Service (formerly called the Criminal Justice Branch).

### ***Disputed records***

[6] There are 15 pages of emails and handwritten notes in dispute. The Ministry has not provided me with a copy of the records. It submits that the affidavit evidence it provided is sufficient for me to make a decision regarding

the application of s. 14.<sup>1</sup> One affidavit is from the Ministry's Provincial Health Officer (PHO). The other affidavit is from a crown counsel with the BC Prosecution Service. She is also the Information Access and Privacy Coordinator (Privacy Coordinator) responsible for processing access requests under FIPPA for BC Prosecution Service records. Each affidavit includes a table providing the date and type of record (email or handwritten note), who was involved in each communication and what it was about.

[7] Section 44(1) of FIPPA gives the OIPC the power to order production of records for which solicitor client privilege is claimed. However, the OIPC will only do so if necessary to decide the issue.<sup>2</sup> In this case, I conclude that the affidavit evidence describing the records is sufficient to make a determination about the privilege claim and that it is not necessary to order production of the records.

### ***Solicitor client privilege, s. 14***

[8] 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 encompasses both legal advice privilege and litigation privilege.<sup>3</sup> The Ministry submits that legal advice privilege applies to the information it is withholding under s. 14.

[9] When deciding if legal advice privilege applies, BC Orders have consistently applied the following criteria:

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.

[10] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions set out above are satisfied, then legal advice privilege applies to the communications and the records relating to it.<sup>4</sup>

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<sup>1</sup> It cites the Supreme Court of Canada's *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 in support.

<sup>2</sup> See order F17-30, 2017 BCIPC 32 at paras. 17-21 where this is discussed in more detail.

<sup>3</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 26.

<sup>4</sup> *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v. Solosky*, 1979 CanLII 9 (SCC) at p. 13.

[11] The PHO and the Privacy Coordinator provide the following information about the 15 pages of records:

[12] **Pages 11-13 and 17-19** –The PHO says that pages 11-13 is an email string between “various Ministry employees” and pages 17-19 is an email string between “various Ministry employees” and the BC Center for Disease Control. The only other information the Ministry provides about these pages is the following statement in the PHO’s affidavit: “The Section 14 Information on pages 13 and 17 is information that, if disclosed, would reveal the substance of an issue upon which I requested confidential legal advice from [F.G.] LSB legal counsel.”<sup>5</sup>

[13] **Page 33** –The PHO says that this is an email string between “various Ministry employees” discussing legal advice provided by “lawyers from the AG’s dept”. He says that disclosing it would reveal confidential legal advice he obtained from a LSB lawyer.

[14] **Page 34** –The PHO says that this is an email that the LSB lawyer sent him and it contains legal advice he asked her to provide. The email is copied to another LSB lawyer. This email also contains the PHO’s handwritten notes. He says he wrote notes of his conversation with the Criminal Justice Branch’s Director of Legal Operations who is also a crown counsel. The PHO says the conversation was made for the purpose of obtaining that crown counsel’s legal advice and the notes record the advice provided.

[15] **Page 35** – The PHO says that this is an email between Ministry staff and the Province’s Public Affairs Bureau relaying the legal advice provided to the PHO by the LSB lawyer.

[16] **Page 51** –The PHO says that these are his handwritten notes of a conversation he had with the LSB lawyer. He says the purpose of the conversation was to obtain legal advice.

[17] **Page 82** – The Privacy Coordinator says that this is the PHO’s handwritten notes “referring to a conversation he had” with crown counsel. She says, “BCPS Counsel, although their role is very different from other government legal counsel, are also counsel for Her Majesty in Right of the Province of British Columbia.”<sup>6</sup> She references the *Crown Counsel Act*, which states among other things, that the functions and responsibilities of the Criminal Justice Branch include advising the government on all criminal law matters (s. 2(d)). She says, “Crown Counsel also has the responsibility to keep relevant ministry executive advised of factors that may affect either ministry operations or the prosecution. Crown Counsel may provide legal advice regarding the prosecution and the potential impact on a trial of the release of any information outside of the

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<sup>5</sup> Ministry’s submissions, para. 8.

<sup>6</sup> Privacy Coordinator’s affidavit at para. 12.

prosecution process.”<sup>7</sup> She explains that the court proceedings surrounding the Pickton prosecution were subject to a court ordered publication ban and a crown counsel was “consulted in order to provide legal advice regarding this specific prosecution and the potential impact on that trial of the release of any information outside of the prosecution process.”<sup>8</sup>

[18] **Pages 91-92** – The Privacy Coordinator says that this is an email string between Health Canada and the PHO, forwarding the legal advice the crown counsel gave the PHO. The email was also copied to the RCMP.

[19] **Pages 93-94** - The Privacy Coordinator says that this is an email from the crown counsel providing legal advice to the PHO.

### *Findings*

[20] The evidence that the Ministry provides establishes that, with the exception of the email strings on pages 11-13 and 17-19 (which I discuss below), the disputed records are protected by legal advice privilege. I am satisfied that the LSB lawyers and crown counsel were acting as the Ministry’s legal advisors at the time of their communications with the PHO. The communications between Ministry employees and the Ministry’s legal advisors directly relate to the seeking, formulating or giving of legal advice, and there is nothing to indicate that those communications were not confidential between client and lawyer. I also find that legal advice privilege applies to the internal Ministry employee-only communications about the legal advice (page 33) because disclosing these emails would reveal the privileged communications.

[21] On the other hand, the Ministry’s evidence is insufficient to establish that disclosing the email strings on pages 11-13 and 17-19 would reveal a confidential communication between a client and solicitor that is directly related to the seeking, formulating, or giving of legal advice. The PHO’s evidence is that these emails are about a particular matter. He also says that he requested legal advice about that matter. There is no evidence, however, that these email chains contain any mention of legal advice, lawyers or what the PHO and the lawyers may have said to each other when they spoke about the matter. Just because the matter is at some point the subject of legal advice does not, in my view, suffice to establish that a record that mentions that matter is privileged. The Ministry has not provided persuasive evidence that these two email chains contain confidential communications between the Ministry and its legal advisors that directly relate to the seeking, formulating, or giving of legal advice. In conclusion, I find that the Ministry has not proven that the email strings on pages 11-13 and 17-19 are protected by legal advice privilege.

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<sup>7</sup> Privacy Coordinator’s affidavit at para 8.

<sup>8</sup> Privacy Coordinator’s affidavit at para. 10.

### *Waiver*

[22] The Ministry says it subsequently shared the legal advice it obtained with the Province's Public Affairs Bureau (page 35) and with Health Canada and the RCMP (pages 91-92).<sup>9</sup> This raises the issue of whether, by doing so, it waived privilege over those communications.

[23] Waiver of 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 that privilege.<sup>10</sup> The law is well established that the privilege belongs to, and may only be waived by, the client. Once solicitor client privilege is established, the onus of showing it has been waived is on the party seeking to displace it.<sup>11</sup>

[24] Given of the importance of solicitor client privilege to the functioning of the legal system, evidence justifying a finding of waiver must be clear and unambiguous.<sup>12</sup> In this case, the applicant provides no submissions or evidence. There is simply insufficient evidence to confidently find that there has been a waiver in this circumstance. Therefore, I conclude that there has been no waiver of the privileged communications on pages 35 and 91-92.

### *Summary*

[25] In summary, the Ministry has not proven that the email strings on pages 11-13 and 17-19 are protected by solicitor client privilege, so it may not refuse to disclose them to the applicant under s. 14. The Ministry has proven, however, that the other records are protected by solicitor client privilege and are properly withheld under s. 14.

### ***Exercise of prosecutorial discretion, s. 15(1)(g)***

[26] It is not necessary to decide whether s. 15(1)(g) applies because I find that the information the Ministry is refusing to disclose under that exception may be withheld under s. 14.

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<sup>9</sup> The Ministry says that common interest privilege applies to pages 91-92.

<sup>10</sup> *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at para 6.

<sup>11</sup> *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420 at para. 22; *Maximum Ventures Inc. v. de Graaf*, 2007 BCSC 1215 at para. 40 [*Maximum*].

<sup>12</sup> *Maximum*, at para. 40.

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## **CONCLUSION**

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

1. The Ministry's decision to refuse to disclose pages 33, 34, 35, 51, 82, 91-92 and 93-94 to the applicant under s. 14 is confirmed.
2. The Ministry is not authorized to refuse to disclose pages 11-13 and 17-19 to the applicant under s. 14.
3. I require the Ministry give the applicant access to pages 11-13 and 17-19 by December 29, 2017. The Ministry must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

November 15, 2017

## **ORIGINAL SIGNED BY**

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Elizabeth Barker, Senior Adjudicator

OIPC File No.: F16-66711