



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

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Order F19-33

## MINISTRY OF ATTORNEY GENERAL

Lisa Siew  
Adjudicator

September 12, 2019

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**Summary:** The applicant requested access to a variety of records about himself in the files of a specific Ministry of Attorney General employee. The Ministry of Attorney General denied access to the records on the basis that s. 14 (solicitor client privilege) of FIPPA applied. The adjudicator determined that s. 14 applied to most of the withheld information, but ordered the Ministry to disclose two particular emails to the applicant.

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

### INTRODUCTION

[1] An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to a variety of records about himself in the files of a specific Ministry of Attorney General (Ministry) employee for a specified time period. The Ministry withheld the entirety of the requested records under s. 14 (solicitor client privilege) of FIPPA. The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation failed to resolve the issues in dispute and the applicant requested that the matter proceed to inquiry.

## PRELIMINARY MATTER

### *Disclosure in the public interest – s. 25*

[2] The applicant argues that there is a significant public interest in the records which outweighs any claim of solicitor client privilege by the Ministry.<sup>1</sup> Although the applicant does not explicitly reference s. 25, I understand the applicant to be arguing that s. 25 applies in these circumstances.

[3] Section 25 of FIPPA requires a public body to disclose information without delay, in certain circumstances, despite any other provision of the Act. This section overrides all of FIPPA's discretionary and mandatory exceptions to disclosure.<sup>2</sup> There is a high threshold before this section can properly come into play. In Order 02-38, former Commissioner Loukidelis determined that the duty to disclose under s. 25 exists only 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."<sup>3</sup>

[4] Section 25 was not set out in the notice of inquiry or the OIPC investigator's fact report as an issue for consideration in this inquiry. Past OIPC orders and decisions have said parties may raise new issues at the inquiry stage only if they request and receive permission to do so.<sup>4</sup> The applicant did not seek permission to add this issue to the inquiry. He also did not explain why he is raising s. 25 at this late stage and why he should be permitted to raise this issue now. There is also nothing in the materials before me to suggest that s. 25 may be engaged. For these reasons, I decline to add s. 25 as an issue in this inquiry.

## ISSUE

[5] The issue I must decide in this inquiry is whether the Ministry is authorized to withhold the information in dispute under s. 14. Section 57(1) of FIPPA places the burden on the Ministry to prove the applicant has no right of access to the records in dispute.

## DISCUSSION

### ***Background***

[6] The applicant is a former employee of the BC Public Service Agency. The applicant alleges his employment was wrongfully terminated.<sup>5</sup> As a result, the

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<sup>1</sup> Applicant's submission at para. 16.

<sup>2</sup> *Tromp v Privacy Commissioner*, 2000 BCSC 598 at paras. 16 and 19.

<sup>3</sup> Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45, emphasis in original.

<sup>4</sup> Order F07-03, 2007 CanLII 30393 (BC IPC) and Order F11-28, 2011 BCIPC 34 at para. 11.

<sup>5</sup> Applicant's submission at para. 8.

applicant corresponded with a variety of government officials and employees making employment-related allegations and seeking monetary and other remedies.<sup>6</sup>

[7] A lawyer employed with the Labour, Employment and Human Rights Group of the Ministry's Legal Services Branch (Lawyer) became involved in these matters. The applicant's access request is for a variety of records about himself that he believes may be in the Lawyer's file.<sup>7</sup>

### ***Records in dispute***

[8] The Ministry is withholding information from approximately 132 pages of records. The records consist mostly of emails and email chains along with some attachments. The Ministry chose not to provide the records for my review. It relies instead on an index of records to describe the records and an affidavit from the Lawyer that consists of general assertions as to how privilege applies to the records.

[9] During the inquiry, I determined that I did not have sufficient evidence to decide whether s. 14 applied to the disputed records. I offered the Ministry an opportunity to submit additional information and evidence to support its s. 14 claim. It provided a second affidavit from the Lawyer that identified the parties involved in the communications, the general subject matter of the legal advice and the circumstances in which the legal advice was sought and rendered. After reviewing this information, I conclude that I now have sufficient information and evidence to make a decision regarding s. 14 without seeing the records.<sup>8</sup>

### ***Section 14 – solicitor client privilege***

[10] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The courts have determined that s. 14 encompasses legal advice privilege and litigation privilege.<sup>9</sup> The Ministry claims legal advice privilege over the information it has withheld in the disputed records.

[11] Legal advice privilege applies to confidential communications between solicitor and client for the purposes of obtaining and giving legal advice.<sup>10</sup> The

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<sup>6</sup> Affidavit #2 of Lawyer with the Labour, Employment and Human Rights Group of the Ministry's Legal Services Branch at para. 9.

<sup>7</sup> Ministry's submission dated December 19, 2018 at para. 9.

<sup>8</sup> Section 44 of FIPPA gives the Information and Privacy Commissioner, and his or her delegate, the power to order production of records over which solicitor client privilege is claimed.

<sup>9</sup> *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para. 26

<sup>10</sup> *College* at paras. 26-31.

courts and previous OIPC orders accept the following test for determining whether legal advice privilege applies:

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.

If these four conditions are satisfied then the communications (and papers relating to it) are privileged.<sup>11</sup>

[12] Courts have also found that solicitor client privilege extends to communications that are “part of the continuum of information exchanged” between the client and the lawyer in order to obtain or provide the legal advice.<sup>12</sup> The protection given to these communications ensures that the party seeking the information is unable to infer the nature and content of the legal advice sought or received.<sup>13</sup>

### **The parties’ positions on s. 14**

#### *Ministry’s position*

[13] The Ministry submits that it has properly applied s. 14 to the disputed information and records. It says the records reveal written requests for legal advice; confidential communications between provincial employees, legal counsel and/or a legal assistant; information provided by provincial employees for the purpose of obtaining legal advice, as well as legal advice provided by legal counsel.<sup>14</sup>

[14] The Ministry submits that the attachments are “privileged in their context as attachments to a privileged communication.”<sup>15</sup> It says the attachments form part of the continuum of communications between solicitor and client and provided the Lawyer with the context he needed to provide his legal advice.

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<sup>11</sup> *R v B*, 1995 CanLII 2007 (BCSC) at para. 22. See also Order F17-43, 2017 BCIPC 47 at paras. 38-39.

<sup>12</sup> *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83; *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp Development*] at paras. 40-46.

<sup>13</sup> *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 at para 39, quoting *Camp Development* at para. 46.

<sup>14</sup> Ministry’s submission dated December 19, 2018 at para. 32.

<sup>15</sup> Ministry’s submission dated December 19, 2018 at para. 49.

[15] To support its assertions, the Ministry provided two affidavits from the Lawyer. The Lawyer identifies himself as the legal counsel who provided the provincial employees with legal advice.<sup>16</sup> He also discusses his legal assistant and her role in the communications.

*Applicant's position*

[16] Most of the applicant's submission deals with challenging the validity of his employment termination, including allegations of misconduct against the Ministry and its employees. I have fully reviewed and considered the applicant's submissions and his concerns; however, I will only refer to the aspects of the applicant's submission that relate to the issues for this inquiry.<sup>17</sup>

[17] The applicant submits that his request for the records at issue is consistent with Canadian law and "current and modern practices."<sup>18</sup> In support of his position, the applicant cites a document from the Law Society of BC regarding the *Security Services Act* and court cases from Nova Scotia and Ontario.<sup>19</sup> The applicant argues that these cases are clearly applicable and submits "any further debate or discussion over the matter is clearly not necessary as the matter is 'indisputable'" and the information must be disclosed.<sup>20</sup>

*Ministry's response*

[18] The Ministry submits that the authorities relied on by the applicant are irrelevant to a determination of whether s. 14 applies to the records. The Ministry explains that the Law Society protocol the applicant refers to "deals with the protection of solicitor-client privilege in the event that the Registrar under the *Security Services Act* demands documents which may be subject to solicitor-client privilege from an investigator who is subject to that Act."<sup>21</sup>

[19] The Ministry also submits the case authorities relied on by the applicant are irrelevant. The Ministry says one of the cases deals with the Crown's disclosure obligations in a criminal proceeding and the other involved the court appointment of an independent lawyer to review the computer of a deceased lawyer for litigation-related documents.

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<sup>16</sup> Lawyer's affidavit #1 at paras. 5-7.

<sup>17</sup> As an OIPC adjudicator, it is not within my jurisdiction under FIPPA to decide the applicant's employment-related grievances. Nor do I have the statutory authority to grant the applicant's requested remedies such as injunctive relief, monetary damages or costs.

<sup>18</sup> Applicant's submission at para. 18.

<sup>19</sup> "Protocol Between the Law Society of British Columbia and the Office of the Registrar, *Security Services Act* With Respect to Issues Relating to the Protection of Solicitor-Client Privilege in Connection with Investigations Carried Out in Accordance with the said *Act*"; *R. v Jalili*, 2018 ONSC 6408; and *Medjuck v Medjuck*, 2018 NSSC 321.

<sup>20</sup> Applicant's submission at para. 19.

<sup>21</sup> Ministry's submission dated January 24, 2019 at para. 9.

### Analysis and findings on s. 14

[20] The Ministry's submission and the index of records describes some of the records as emails between the Lawyer and one or more named employees from either the BC Public Service Agency,<sup>22</sup> the Office of the Premier,<sup>23</sup> or the Ministry of Attorney General.<sup>24</sup> Some of these emails also include attachments and/or include an individual identified as the Lawyer's legal assistant. There are also emails just between the Lawyer and a legal assistant, a couple of which include attachments.<sup>25</sup> The Ministry describes the content of all these records as either "seeking legal advice", "containing legal advice" and/or "information forming the basis of [the Lawyer's] legal advice." The records also include documents described as the Lawyer's notes and research.<sup>26</sup>

[21] I accept that legal advice privilege applies to the emails between the Lawyer and the named government employees. The Ministry provided an affidavit from the Lawyer who was directly involved in the communications. The Lawyer says he reviewed all the records in dispute and confirms he provided legal advice, in his capacity as legal counsel, to individual employees of the Ministry, the Public Service Agency, and the Office of the Premier. He explains that his practice area is primarily providing legal advice and legal services on the management of employer/employee relationships between the Province and its public servants.<sup>27</sup> The Lawyer says the records reveal confidential legal advice he provided to these employees.

[22] The Lawyer's evidence identifies the general subject matter of the legal advice and discusses the context in which his legal advice was sought and provided. The Lawyer explains that the applicant "wrote to the Province both directly and through legal counsel making employment-related allegations and seeking monetary and other remedies."<sup>28</sup> He provides examples of the applicant's correspondence. The Lawyer says it is a result of these communications that the applicant's name appears in his legal files. The Lawyer's evidence allows me to understand the context of his legal advice and persuades me that the emails between him and the government employees are protected by legal advice privilege.

[23] I also find the emails that include the Lawyer's legal assistant are protected by privilege. The scope of solicitor client privilege extends to communications that include individuals who professionally assist lawyers in

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<sup>22</sup> Records located at pp. 33-37, 43-55, 69-73, 74-79, 82-86, 125, 129-132.

<sup>23</sup> Records located at pp. 56-57, 61, 63, 68, 80-81.

<sup>24</sup> Records located at pp. 1-4, 5-7, 8-16, 21-27, 66-67.

<sup>25</sup> Records located at pp. 17-20, 28-32, 38-39, 40-42, 58-59, 60, 62, 64-65, 126.

<sup>26</sup> Records located at pp. 95-112.

<sup>27</sup> Affidavit #2 of Lawyer at para. 4.

<sup>28</sup> Affidavit #2 of Lawyer at para. 9.

providing or preparing legal advice.<sup>29</sup> The Lawyer explains that his legal assistant helps him in providing legal advice to his clients. He says his legal assistant organizes his legal files, corresponds with his clients on his behalf and manages and files his client documents and correspondences.<sup>30</sup> Based on the description of the records and the Lawyer's evidence, I accept that the legal assistant was professionally assisting the Lawyer with the provision or preparation of legal advice in these communications.

[24] As for the email attachments, solicitor client privilege applies to an attachment that would reveal privileged communications or would allow one to infer the content and substance of privileged advice.<sup>31</sup> The Lawyer says these records consist of draft documents he reviewed and provided legal advice on, as well as documents his clients provided to him or his legal assistant for the purpose of informing him so that legal advice could be sought or given.<sup>32</sup> The Lawyer explains that his clients provided him with documents that informed him of relevant background information so his legal advice was informed by all relevant contextual information.<sup>33</sup> The Lawyer claims he cannot be more specific about the nature of the attachments without disclosing or leaving an inference as to the legal advice sought by his clients.

[25] I accept that legal advice privilege applies to the email attachments in this case since they are directly related to the legal advice sought from the Lawyer or fall under the "continuum of communications" between a lawyer and a client. A "continuum of communications" involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as "history and background from a client" or communications to clarify or refine the issues or facts.<sup>34</sup> As a result, I conclude the disclosure of this information would reveal privileged communications or allow someone to infer legal advice sought and/or previously provided by the Lawyer.

[26] I am also satisfied that privilege applies to several records described in the Ministry's index of records as "email with attachments", "email and attachments" or "email chain" that was provided to the Lawyer for his "ongoing legal advice."<sup>35</sup> During the inquiry, I offered the Ministry an opportunity to provide further information about these records since I found the description of these records vague. The Lawyer also did not specifically address these records in his affidavits and the Ministry did not identify the participants in these emails to establish that these communications were between a solicitor and a client.

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<sup>29</sup> *Descôteaux v Mierzwinski*, 1982 CanLII 22 (SCC) at 872-873.

<sup>30</sup> Affidavit #2 of Lawyer at para. 6.

<sup>31</sup> *Murchison v Export Development Canada*, 2009 FC 77 at para. 45; Order F18-19, 2018 BCIPC 22 at para. 40; Order F18-18, 2018 BCIPC 21 at paras. 36 and 39.

<sup>32</sup> Affidavit #1 of Lawyer at para. 7.

<sup>33</sup> Affidavit #2 of Lawyer at para. 5.

<sup>34</sup> *Camp Development*, *supra* note 12 at para. 40.

<sup>35</sup> Records located at pp. 87-94, 113-115, 116-118, 119-121 and 122-124.

[27] The Ministry clarified that it purposely withheld certain information about these records in its description because saying more would reveal privileged information. The Ministry confirmed that it provided these records to the Lawyer as part of the continuum of communication between a lawyer and a client. It also says the disclosure of this information would allow an individual to draw accurate inferences as to the legal advice sought or given. Taking all this into account, I accept that legal advice privilege applies to this information.

[28] I also find solicitor client privilege applies to the Lawyer's notes and research. In the index of records, the Ministry describes the Lawyer's notes and research as documents "which form the basis of [his] legal advice."<sup>36</sup> The Ministry's description of this record is limited and the Lawyer does not specifically address this record. However, previous decisions have said that legal advice privilege applies to a lawyer's working papers directly related to communications between a lawyer and a client about the seeking, formulating or giving of legal advice.<sup>37</sup> Given the importance of solicitor client privilege I have taken into account these previous authorities in determining whether privilege applies to this record.

[29] In my view, the protection given to a lawyer's working papers ensures that the party seeking the information is unable to infer the content of any privileged communications. In this case, the notes and research were created by the Lawyer in formulating and providing legal advice to the Ministry. One could easily infer from these documents what legal advice was sought by the Ministry and provided by the Lawyer. As such, I confirm the Ministry's decision to withhold this information since it would reveal privileged communications between the Lawyer and the Ministry.

[30] I have considered the applicant's arguments and the authorities he cites in support of his position. The Ministry says the applicant's cases are not relevant or applicable to the issue in this inquiry. I agree with the Ministry and find the applicant's case law to be unpersuasive because the facts and legal principles in those authorities are different from this inquiry. The applicant does not sufficiently explain how the Law Society protocol and the court cases he cites apply to the specific issue in this inquiry.

[31] I am not satisfied, however, that legal advice privilege applies to two emails at pages 127 and 128 of the records. The Ministry's index of records describes them as follows:

Email from [Lawyer] to [BW and KT], dated October 4, 2006 requesting meeting regarding [the Lawyer's] legal advice.

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<sup>36</sup> Records located at pp. 95-112.

<sup>37</sup> *Susan Hosiery Ltd v MNR*, [1969] 2 Ex. C.R. 27 at paras. 8-9. See also Order PO-3899, 2018 CanLII 108211 at para. 36. Order F18-46, 2018 BCIPC 49 at para. 22.

Email from [BW to YS, KT] and [Lawyer], dated October 4, 2006, requesting meeting regarding [Lawyer's] legal advice.

[32] The Ministry does not sufficiently explain or discuss whether these meeting requests contain privileged information or reveal legal advice provided by the Lawyer. The Ministry's description and evidence does not persuade me that someone looking at these emails could accurately infer the Lawyer's legal advice. The Lawyer's affidavits do not specifically address these emails. Without more information, I am not persuaded that these two requests for a meeting are protected by legal advice privilege.<sup>38</sup> I find the Ministry's assertions regarding privilege and its limited descriptions of these two emails does not satisfy its burden under FIPPA.

## **CONCLUSION**

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

1. Subject to paragraph 2 below, I confirm in part the Ministry's decision, to refuse access to the information withheld under s. 14 of FIPPA.
2. The Ministry is not authorized under s. 14 to refuse to disclose the information withheld at pages 127 and 128 of the records. The Ministry must disclose this information to the applicant and concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, along with a copy of the relevant records.

[34] Under s. 59 of FIPPA, the Ministry is required to give the applicant access to the information it is not authorized to withhold by October 25, 2019.

September 12, 2019

## **ORIGINAL SIGNED BY**

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Lisa Siew, Adjudicator

OIPC File No.: F17-71192

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<sup>38</sup> For a similar finding see Order F17-13, 2017 BCIPC 14 at paras. 33-34.