Order F22-23

MINISTRY OF FINANCE

Lisa Siew
Adjudicator

May 16, 2022

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Summary: An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to copies of legal invoices issued by a law firm in relation to a human rights complaint. The Ministry of Finance (Ministry) withheld the records in their entirety under s. 14 (solicitor-client privilege) of FIPPA. The adjudicator confirmed the Ministry's decision that it was authorized to withhold the information at issue under s. 14.

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

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested copies of all invoices and billing or account summaries related to a BC Human Rights Tribunal complaint. The applicant submitted his access request to the Provincial Health Services Authority (Health Authority).

[2] The Health Authority transferred the request to the Ministry of Finance (Ministry), under s. 11 of FIPPA, since it determined the requested records were under the Ministry's custody and control. The Ministry withheld the responsive records in their entirety under s. 14 (solicitor-client privilege) of FIPPA.

[3] The applicant was dissatisfied with the Ministry's response and requested the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision. The OIPC's investigation and mediation process did not resolve the dispute between the parties and the matter proceeded to this written inquiry under Part 5 of FIPPA.

ISSUE AND BURDEN OF PROOF

[4] The issue I must decide in this inquiry is whether the Ministry is authorized to withhold the information at issue under s. 14. Section 57(1) of FIPPA places the burden on the Ministry, as the public body, to prove the applicant has no right of access to the information withheld under s. 14.

DISCUSSION

Background

[5] The Ministry's Risk Management Branch (Branch) administers and delivers the Health Care Protection Program (Program). The Program provides insurance and professional risk management services to BC public health care agencies, including claims and litigation management.[1] The Health Authority is insured under the Program.[2]

[6] The applicant made a complaint to the British Columbia Human Rights Tribunal (Tribunal) against the Health Authority and BC Emergency Health Services (collectively "the Respondents"). BC Emergency Health Services (Emergency Services) is an agency under the Health Authority. As part of the Program, the Branch retained a law firm (Law Firm) to represent the Respondents in the Tribunal proceedings.

[7] The applicant alleged the Respondents discriminated against him contrary to s. 13 (discrimination in employment) of the *Human Rights Code*. Ultimately, the Tribunal dismissed the complaint. The applicant has filed a petition for judicial review of the Tribunal's decision with a court date still to be scheduled.

Records in dispute

[8] The Ministry chose not to provide the responsive records for my review. Instead, it provided an affidavit from the Branch's internal legal counsel (K.K.) who attests the responsive records consist of legal invoices issued from the Law Firm that the Branch hired to represent and defend the Respondents.[3]

[9] K.K. also affirms that there are no billing or account summaries related to the Tribunal proceedings and that the responsive records only consist of "detailed invoices."[4] The Ministry did not identify the number of invoices at issue, but K.K. says the Law Firm issued invoices to the Branch "from time to time" for

[1] Ministry's submission dated March 18, 2022 at paras. 3-4.
[2] *Ibid* at para. 3.
[3] K.K.'s affidavit at paras. 4 and 8.
[4] *Ibid* at para. 10.

its legal services.[5] Therefore, I conclude there is more than one invoice at issue here.

[10] The applicant does not dispute the nature of the records, but submits it is necessary in this case to order production of those records. I will address the applicant's arguments regarding production below, but the Ministry's evidence satisfies me that the only records responsive to the applicant's access request are legal invoices issued by the Law Firm in relation to the Tribunal proceedings.

Solicitor-client privilege – s. 14

Is it necessary to order production of the records?

[11] The applicant submits it is necessary in this case to order production of the responsive records to "permit a fair and unbiased process for this inquiry."[6] The applicant argues that it is "inappropriate" for the public body to ask the OIPC to simply trust that all the documents are privileged.[7] Specifically, the applicant objects to the Ministry withholding all the records in their entirety because he says it is "not reasonable or realistic" for solicitor-client privilege to apply to every aspect of the responsive records.[8] The applicant accepts that some parts of the records may be subject to solicitor-client privilege and should, therefore, be redacted. However, the applicant submits that the records should be produced to the OIPC for an independent review on what parts of the records are properly subject to privilege.

[12] In response, the Ministry submits that it has provided sufficient evidence to prove its claim of privilege and it is not obligated to disclose privileged records to the OIPC for inspection if sufficient evidence has been presented establishing that the documents are subject to solicitor-client privilege.[9]

[13] The Commissioner has the power, under s. 44 of FIPPA, to order production of records over which solicitor-client privilege is claimed.[10] However, the Commissioner exercises this authority cautiously and with restraint given the clear direction by the courts that a reviewing body's decision to examine privileged documents must never be made lightly or as a matter of course.[11] Therefore, given the importance of solicitor-client privilege, and in order

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[5] K.K.'s affidavit at para. 8.
[6] Applicant's submission at p. 5.
[7] *Ibid* at pp. 4-5.
[8] *Ibid* at p. 4.
[9] Ministry's submission dated March 18, 2022 at para. 10.
[10] Section 44(1)(b) of FIPPA states the Commissioner may order the production of a record, and s. 44(2.1) reinforces that such a production order may apply to a record that is subject to solicitor-client privilege.
[11] Order F19-21, 2019 BCIPC 23 (CanLII) at para. 46, citing *GWL Properties Ltd. v. WR Grace & Co. of Canada Ltd.,* 1992 CanLII 182 (BCSC) at pp. 11-12.

to minimally infringe on that privilege, the Commissioner will only order production of records being withheld under s. 14 when it is absolutely necessary to decide the issues in dispute.[12]

[14] As to when it would be appropriate to order production of records withheld under s. 14, prior jurisprudence has found it may be necessary and appropriate for the Commissioner to exercise their discretion under s. 44 in the following circumstances:

- Where there is some evidence that the party claiming privilege has done so "falsely"[13] or inappropriately.[14]

- When the party claiming privilege cannot provide the information required to establish privilege, such as affidavit evidence, without revealing the privileged information itself.[15]

- When the evidence describing the records is not sufficient to adjudicate the privilege claim.[16]

[15] Applying these criteria, I find there is no evidence that the Ministry has applied s. 14 inappropriately or falsely claimed privilege. It is an uncontested fact that the Law Firm defended the Respondents in the Tribunal Proceedings and charged for those services. It is also well-established that s. 14 may apply to legal billing information and there are a number of OIPC orders that have considered this issue.[17] As a result, I do not find the Ministry acted inappropriately by applying s. 14 to the legal invoices at issue here.

[16] I also conclude this is not a situation where the Ministry is saying that it is unable to establish privilege without revealing the privileged information itself. The Ministry has in fact provided submissions and evidence to support its claim of privilege over the disputed records.

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[12] Order F19-14, 2019 BCIPC 16 (CanLII) at para. 10; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para. 17; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII) at para. 68.
[13] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII) at para. 70.
[14] Order F17-43, 2017 BCIPC 47 at para. 33; Order F19-21, 2019 BCIPC 23 (CanLII) at para 61.
[15] *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (CanLII) at para. 43; *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et. al*., 2006 BCSC 1180 at para. 75; Order F19-21, 2019 BCIPC 23 (CanLII) at paras. 47 and 118.
[16] Order F17-42, 2017 BCIPC 46 (CanLII) at para. 11; Order F19-21, 2019 BCIPC 23 (CanLII) at para. 121.
[17] For example, Order 03-28, 2003 CanLII 49207 (BCIPC).

[17] The remaining question is whether the Ministry provided sufficient evidence for me to determine whether s. 14 applies to the records. Where a public body declines to provide the information or records withheld under s. 14, it is expected to provide a description of the information or records in a manner that, without revealing privileged information, enables the other party and the adjudicator to assess the validity of the claim of privilege.[18] Where affidavit evidence is relied upon to support a claim of solicitor-client privilege, the evidence should specifically address the documents subject to the privilege claim.[19]

[18] Given the nature of the records, I find the Ministry's evidence sufficiently addresses and describes the information at issue. The Ministry provided a description of the withheld information in its submissions. It also provided an affirmed affidavit from K.K., a lawyer with direct knowledge of the events in question. K.K. describes the content of the invoices and deposes that he corresponded with and provided instructions to various lawyers at the Law Firm in regards to the defence of the Respondents.[20]

[19] As a result, I conclude the Ministry's description of the information at issue and its affidavit evidence is sufficient to allow me to determine whether s. 14 applies to the information in the invoices. As a result, I do not find it necessary to exercise my authority, under s. 44, to order the Ministry to produce an un-redacted version of the invoices for my review.

Overview of the s. 14 analysis

[20] The Ministry applied s. 14 to all of the information that it withheld in the responsive records. Section 14 states that a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.[21]

[21] The Ministry says the documents requested by the applicant would "disclose the legal defence strategy protected by solicitor/client and litigation privilege."[22] I infer the Ministry to be arguing that both legal advice privilege and litigation privilege apply to the information at issue. I will first address litigation privilege and then discuss whether the information at issue is protected by legal advice privilege.

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[18] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para. 78.
[19] *Ibid* at para. 91.
[20] K.K.'s affidavit at para. 5.
[21] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.
[22] Ministry submission dated February 8, 2022 at para. 29.

Litigation privilege

[22] Litigation privilege is a "form of privilege that provides a protected area in which communications and documents created for and used in the process of preparing for and engaging in litigation are free from 'adversarial interference' and 'premature disclosure.'"[23] The purpose of litigation privilege is to create a "zone of privacy in relation to pending or apprehended litigation."[24]

[23] Put another way, its purpose is to "carve out a protected space in which those engaged in the adversarial process of litigation can investigate, prepare and develop their respective positions and strategies, free from the intrusion of their adversary."[25] However, litigation privilege does not last forever and the privilege ends once the litigation is complete.[26]

[24] The party relying on litigation privilege must establish the following two facts:

(1) Litigation was ongoing or was reasonably contemplated at the time the document was created; and

(2) The dominant purpose of creating the document was to prepare or aid in the conduct of that litigation.[27]

[25] The onus is on the party claiming privilege to establish on a balance of probabilities that both parts of the test are met for each document over which privilege is claimed.[28] Despite its assertion that litigation privilege applies, the Ministry did not make any submissions or arguments about how the information at issue is protected by litigation privilege.

[26] As well, based on the materials and evidence before me, it is not clear to me how litigation privilege would apply to the legal invoices at issue. For instance, it seems to me that the Law Firm's dominant purpose in creating the invoices was to be paid for its legal services rather than a document that it created or used to assist with its defence of the Respondents in the Tribunal proceedings. As a result, I am not persuaded that litigation privilege applies to the information at issue here.

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[23] *Raj v. Khosravi*, 2015 BCCA 49 at para. 7.
[24] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 27.
[25] *Raj v. Khosravi*, 2015 BCCA 49 at para. 7.
[26] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paras. 34-36.
[27] *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (CanLII) at para. 32; *Raj v. Khosravi*, 2015 BCCA 49 at paras. 12 and 20.
[28] *Raj v. Khosravi*, 2015 BCCA 49 at para. 9, citing *Hamalainen v. Sippola*, 1991 CanLII 440 (BC CA) at para. 19.

Legal advice privilege

[27] Legal advice privilege protects communications between a solicitor and client which entails the seeking or giving of legal advice and which is intended by the parties to be confidential.[29] The Supreme Court of Canada explained that "without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive."[30] Therefore, the privilege has been characterized as "fundamental to the proper functioning of our legal system." Given its importance, the Supreme Court of Canada has said the privilege "should only be set aside in the most unusual circumstances."[31]

[28] As I will explain further below, in determining whether legal advice privilege applies to the information at issue in this inquiry, I must consider the following questions:

1. Are the legal invoices at issue communications between a solicitor and client?

2. Does a presumption of privilege apply to the information at issue?

3. If so, is the presumption rebutted for any of the information at issue?

[29] I find it necessary to first determine whether there was a solicitor-client relationship between the lawyers of the Law Firm and the Branch since legal advice privilege protects communications between a solicitor and client. As set out below, the parties disagree on this issue.

[30] The applicant contends that the legal invoices issued by the Law Firm to the Branch for payment are not communications between a solicitor and a client. The applicant argues the Branch is not the client, but a "third-party funder."[32] The applicant says third-party funders can influence how a case proceeds due to their own stake in the litigation, but that they are "not a party in the litigation."[33] As a result, the applicant submits that privilege does not apply to communications involving third-party funders or their "accounts."[34]

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[29] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 838, [1980] 1 SCR 821 at p. 13.
[30] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII) at para. 34.
[31] *Ibid* at para. 34, citing *Pritchard v. Ontario (Human Rights Commission*, 2004 SCC 31 (CanLII) at para. 17.
[32] Applicant's submission at p. 3.
[33] *Ibid* at p. 3.
[34] *Ibid* at p. 3.

[31] The Ministry confirms that all the legal invoices were issued directly to the Branch for payment, but it disputes the applicant's argument that this makes the Branch a third-party funder.[35] The Ministry submits a third-party funder is better understood as an "investor" who agrees to pay some or all of another party's litigation costs in exchange for a portion of the litigating party's recovery in damages or costs.[36]

[32] The Ministry submits that it was not an "investor" and did not "fund" the Respondents' defence.[37] Rather, the Ministry says that it was statutorily authorized to enter into an agreement for the benefit of the Respondents "respecting insurance and risk management" under the Program.[38] As a result, the Ministry submits that it was effectively the "insurer" who covered the Respondents' legal defence and any damages awarded against them.[39]

[33] Considering that relationship, the Ministry submits the Law Firm was jointly retained by the Respondents and the Branch, with the Branch and K.K. as the "instructing client in this relationship."[40] Therefore, the Ministry submits the legal invoices at issue, which the Law Firm sent directly to the Branch, are between a solicitor and a client "pursuant to the tripartite relationship between a lawyer, an insured and the insurer."[41] It says the OIPC has previously considered this tripartite relationship and confirmed "that the communication between a lawyer and the instructing insurer is covered under s. 14 of FIPPA."[42]

[34] For the reasons to follow, I am satisfied there was a solicitor-client relationship between the lawyers in the Law Firm and the Branch. Previous OIPC orders and court decisions have determined that "when a lawyer is hired to represent an insured and an insurer, the lawyer is regarded as being jointly retained to represent both parties."[43] In this situation, the relationship between the insured, the insurer and the lawyer is referred to as a "tripartite relationship."[44] The courts accept that this tripartite relationship qualifies as a solicitor-client relationship "by virtue of the special responsibilities and duties created when insurers retain solicitors to represent and advise insureds, and

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[35] Ministry's submission dated March 18, 2022 at paras. 3 and 12.
[36] *Ibid* at para. 3, citing *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10 (CanLII) at para. 93.
[37] Ministry's submission dated March 18, 2022 at para. 4.
[38] *Ibid* at para. 4.
[39] *Ibid* at para. 4.
[40] *Ibid* at para. 5.
[41] *Ibid* at para. 5.
[42] *Ibid* at para. 5, citing Order F18-33, 2018 BCIPC 36 (CanLII) at paras. 20-22.
[43] Order F18-33, 2018 BCIPC 36 (CanLII) at para. 20, citing *Chersinoff v. Allstate Insurance Co*., 1968 CanLII 671 (BC SC) [I note that the court discusses the principle of joint retainer at pp. 658-661].
[44] Order F18-33, 2018 BCIPC 36 (CanLII) at para. 20.

then necessarily deal with those solicitors in certain aspects as principal, in others as agent for the insured."[45]

[35] The question, therefore, is whether there was a tripartite relationship between the Branch, the Law Firm's lawyers and the Respondents. As noted previously, the Program provides insurance and professional risk management services to BC public health care agencies. The Branch is a part of the Ministry and it administers and delivers the Program. As part of the Program's services, the Branch may retain external counsel to assist entities insured under the Program.[46] The Respondents are insured under the Program and the Branch retained the Law Firm to represent them in the Tribunal proceedings.[47]

[36] Taking all of this into account, I am satisfied that there was a tripartite relationship between the relevant parties. I accept that the Branch occupied the role of insurer to the Respondents and not a third-party funder as argued by the applicant. The evidence indicates the Respondents' legal defence was covered under the Program based on an insurance model. I find this arrangement different from the investment model associated with third-party litigation funding where the third-party funder provides and invests the funds in exchange for a potential "share of the proceeds of any successful litigation or settlement."[48]

[37] I also accept that K.K., in his role as the Branch's legal counsel, acted as the agent and representative of the Respondents and the Branch in his interactions with the Law Firm's lawyers.[49] K.K. affirms that he dealt directly with the lawyers in the Law Firm regarding the defence of the Respondents.[50] Therefore, consistent with prior jurisprudence, I conclude there was a solicitor-client relationship between the relevant parties since the Law Firm's lawyers were retained to represent both the Branch as the insurer and the Respondents as the insured in the Tribunal proceedings.

[38] Having found there was a solicitor-client relationship, the next step is to determine whether disclosing the information at issue in the legal invoices would reveal privileged information or communications between the solicitor and client. When it comes to legal billing information, it is well-established that the analysis

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[45] *Corp. of the District of North Vancouver v. BC (The Information and Privacy Commissioner),* 1996 CanLII 521 (BC SC) at para. 22.
[46] K.K.'s affidavit at para. 2.
[47] Ministry's submission dated March 18, 2022 at para. 3. Internal counsel affidavit at para. 4.
[48] *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10 at para. 93.
[49] I note that the Ministry refers to both the Branch and K.K. as the "instructing client"; however, there is no evidence that K.K. retained the law firm in his own personal capacity so that he was a client of the Law Firm. Therefore, I conclude the Ministry means K.K. was the agent and representative of the Respondents and the Branch.
[50] K.K.'s affidavit at para. 5.

involves considering whether the rebuttable presumption of privilege applies to the information at issue and if so, whether that presumption has been rebutted.[51]

Does a presumption apply to the information at issue?

[39] Previous OIPC orders and court decisions have established there is a rebuttable presumption that billing information, such as legal fees and disbursements, in a lawyer's statements of account or other documents are subject to solicitor-client privilege.[52] This presumption recognizes that a lawyer's bill flows out of privileged communications between the solicitor and client and typically reflects work done on behalf of the client or at the instruction of the client.[53]

[40] For instance, the BC Court of Appeal has determined that "a lawyer's bills are presumptively privileged because they are ordinarily descriptive; by recording the work done by the solicitor, they disclose the client's instructions, which the client cannot be compelled to divulge and the confidentiality of which the solicitor is obliged to protect."[54] The Court of Appeal has also found the presumption "does not depend on the specific details included or not included in a particular bill", but that it "arises from the connection between billing information and the nature of the relationship between lawyers and clients."[55]

[41] Further, in *Maranda v. Richer* [*Maranda*], the Supreme Court of Canada noted that this presumption reflects the importance of privilege, as well as the inherent difficulties in determining the extent to which the information contained in a lawyer's bill of account discloses communications protected by privilege as opposed to "neutral information" (i.e. information that does not reveal anything in the nature of a privileged communication).[56] *Maranda* has been characterized as "the origin of the principle that information about the total amount of legal costs is presumptively privileged."[57]

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[51] *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at paras. 34-50 (whether the presumption applies) and 51-63 (whether the presumption is rebutted).
[52] *Maranda v. Richer*, 2003 SCC 67; *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at paras. 34-50; *Richmond (City) v. British Columbia (Office of the Information and Privacy Commissioner)*, 2017 BCSC 331 at para. 78; *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 [*Central Coast*]; Order 03-28, 2003 CanLII 49207 (BCIPC) at para. 15.
[53] *Donell v. GJB Enterprises Inc*., 2012 BCCA 135 at para. 55; *Wong v. Luu*, 2015 BCCA 159 at para. 38; *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at paras. 35 and 42.
[54] *Wong v. Luu*, 2015 BCCA 159 at para. 38.
[55] *British Columbia (Attorney General) v. Canadian Constitution Foundation* [*Constitution*], 2020 BCCA 238 (CanLII) at para. 67.
[56] *Maranda v. Richer*, 2003 SCC 67 at paras. 32-33.
[57] *Constitution*, *supra* note 55 at para. 24.

[42] The applicant disputes the applicability of those decisions to the records at issue here. In particular, the applicant submits that *Maranda* is "not the deciding and all-encompassing decision regarding privilege" because it deals with a criminal matter.[58] The applicant contends "the facts of that *Maranda* case do not apply here" because "this is not a criminal matter" and "there is no concern with the perceived loss of presumption of innocence."[59] I understand the applicant to be arguing that the presumption of privilege only applies where there is a criminal matter or proceeding since *Maranda* was decided in the criminal law context.

[43] In response, the Ministry submits that the BC Court of Appeal has determined that the legal principles outlined in *Maranda* apply to the civil context and are applicable to the facts here.[60] Taking into account those principles, the Ministry says disclosing the information in the requested legal invoices would reveal privileged information such as strategic communications and instructions, the timing and frequency of the invoices and the amount of legal services provided at various times throughout the Tribunal proceedings.[61]

[44] I am satisfied that the legal principles in *Maranda* apply here. In *British Columbia (Attorney General) v.* Canadian *Constitution Foundation* [*Constitution*], the BC Court of Appeal confirmed that the conclusion and analysis in *Maranda* extends to the civil context.[62] The Court of Appeal was clear that the presumption of privilege attached to a lawyer's bill, specifically the total amount of legal fees, is engaged in any context.[63] Considering the clear direction by the Court of Appeal on this matter, I conclude the principle established in *Maranda* that legal billing information is presumptively subject to solicitor-client privilege applies to the facts here and it is not limited to the criminal law context.

[45] Turning now to determining whether the presumption applies, the rebuttable presumption will apply where either the context of the information or a review of the records satisfies the adjudicator that the document does contain legal billing information.[64] In this case, the Ministry's evidence indicates that the withheld information consists of the following information:

- The dates and dollar amounts of the invoices;
- Time entries that reveal detailed steps taken by the Law Firm's lawyers in defence of the Respondents;

[58] Applicant's submission at p. 2.
[59] Applicant's submission at p. 3.
[60] Ministry submissions dated February 8, 2022 at paras. 18-19 and March 18, 2022 at paras. 17-18.
[61] *Ibid* at paras. 31-32.
[62] *Constitution*, *supra* note 55 at paras. 48-67.
[63] *Ibid* at para. 50.
[64] *Central Coast*, *supra* note 52 at para. 122.

- Time entries that reveal the details of communications between K.K. and the Law Firm's lawyers;
- Hourly rates, disbursements and document production costs; and
- Whether the invoices have been paid.[65]

[46] Furthermore, as previously noted, it is an uncontested fact that the Law Firm's lawyers defended the Respondents in the Tribunal proceedings. The Ministry identified and cited the Tribunal's decision which allows me to review that decision to confirm the relevant parties and understand the context of the withheld information.

[47] Taking all of this into account, I find the information at issue is presumptively privileged since it would reveal billing and payment information between a lawyer and a client for legal services. Based on the Ministry's evidence, I accept that the legal invoices at issue contain detailed information that reflects the solicitor-client relationship and what transpires within it such as communications made in confidence between a lawyer and their client. At a minimum, the amount of legal fees indicates the level of activity and work carried out by the Law Firm's lawyers on behalf of the Branch and the Respondents.[66] As a result, I conclude the presumption applies to the information withheld in the legal invoices issued by the Law Firm to the Branch.

Is the presumption of privilege rebutted?

[48] Having found the withheld information is presumptively privileged, the next question is whether there is sufficient evidence or argument to rebut the presumption. The presumption may be rebutted if it is determined that disclosure of the information at issue will not violate the confidentiality of the solicitor-client relationship by directly or indirectly revealing any communication protected by privilege. If there is a reasonable possibility that an "assiduous inquirer", aware of background information, could use the requested information to deduce or otherwise acquire privileged communications, then the information is protected by privilege and cannot be disclosed.[67]

[49] The burden is on the party seeking the release of the information to prove through evidence or argument that there is no reasonable possibility that disclosure of the withheld information would reveal privileged communications or information.[68] The BC Court of Appeal has identified this burden as an

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[65] Ministry's submission dated February 8, 2022 at paras. 2, 6 and 30.
[66] *Luu Bankruptcy (Re)*, 2013 BCSC 1374 at para. 43.
[67] *Central Coast*, *supra* note 52 at para 104; *Legal Services Society v. Information and Privacy Commissioner of British Columbia*, 2003 BCCA 278 (CanLII); *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at para. 51.
[68] *Constitution*, *supra* note 55 at para. 83. *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at para. 58.

"appropriately high threshold."[69] Further, the nature of the information and the circumstances and context of the case may be considered to determine whether the presumption is rebutted as this information may have evidentiary value when considering claims of privilege.[70]

[50] Whether the presumption is rebutted will always depend on the facts and circumstances of each case. However, previous decision-makers have considered some of the following non-exhaustive factors to determine whether the privilege was rebutted:

- The stage of the litigation, if applicable;
- The level of detail in the billing information;
- Whether the billing information is about one or more legal matters;
- The applicant's involvement in the legal matter;
- The applicant's pre-existing knowledge about the legal matter; and
- The amount of publicly-available information about the legal matter.[71]

The parties' submissions on the rebuttal of the presumption

[51] The Ministry submits the presumption is not rebutted in this case because the invoices relate to an ongoing, rather than a completed proceeding. The Ministry contends that any litigation is not complete where there is an outstanding appeal or judicial review.[72] As a result, the Ministry submits the applicant's petition for a judicial review of the Tribunal decision means the legal matter is still ongoing.

[52] The Ministry also says the legal invoices are about a single legal matter and contain detailed billing information which would reveal confidential discussions, legal strategy, client instructions and how much effort and money the Branch was willing to expend on defending the Respondents. Therefore, the Ministry submits the disclosure of the disputed records could allow the applicant to infer privileged information about the specific legal matter and likely gain an advantage in the outstanding litigation.

[53] Furthermore, the Ministry argues the applicant has first-hand knowledge of the litigation since he was the one that initiated the human rights complaint and participated in the Tribunal proceedings. Therefore, the Ministry submits the applicant has the necessary context and background information to draw accurate inferences about privileged information.

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[69] *Constitution*, *supra* note 55 at para. 83.
[70] *Central Coast*, *supra* note 52 at para. 113.
[71] Order F21-52, 2021 BCIPC 60 (CanLII) at paras. 24-30 (and the cases cited therein) and Order F19-47, 2019 BCIPC 53 at para. 18.
[72] Ministry's submission dated February 8, 2022 at paras. 22-23 and 33, citing Order F16-35, 2016 BCIPC 39 (CanLII) at paras. 17-18.

[54] On the other hand, the applicant submits the presumption is rebutted in this case because the Tribunal proceeding is complete with a written decision having been issued. The applicant contends that any possible litigation strategy or privileged communications that could be discerned from the invoices is about a past and completed legal matter.

[55] Regarding the judicial review, the applicant argues the pending judicial review should have no impact as to whether the presumption is rebutted for the legal invoices issued for the Tribunal proceeding. The applicant submits the judicial review would be a separate and different proceeding because he says it is a review based on "errors in law" and there is no ability "to raise new arguments or reinterpret evidence."[73]

[56] The applicant also questions what legal strategy can be obtained from the invoices since he says there were no expert witnesses or consultants and there were multiple lawyers defending the Respondents. Furthermore, the applicant says he is not a lawyer and would be unable, therefore, to deduce any legal strategy from the invoices.

[57] The applicant also contends that some of the information in the invoices is already publicly known such as the names of the lawyers and the Law Firm and the dates of the hearing since that information is publicly available online.

[58] Lastly, the applicant argues disclosure is in the public interest since it is important for the public to know how public funds are spent. The applicant says the public knows that tax dollars were spent on the Tribunal proceeding; therefore, the public has a right to know the exact amounts.

[59] In response, the Ministry says the judicial review is not limited to errors of law. The Ministry emphasizes that, in the judicial review, the applicant seeks a declaration that the Tribunal erred in dismissing the complaint and for the decision to be quashed and remitted back to the Tribunal for a new hearing with directions. The Ministry notes the applicant has alleged the Tribunal made errors in its factual findings and breached the principles of procedural fairness and natural justice.[74] As a result, the Ministry contends the applicant's human rights complaint is far from over.

[60] The Ministry also argues the legal sophistication of the applicant is not a relevant factor as to whether the presumption is rebutted. However, if it is relevant, then the Ministry says it should be noted that the applicant is not a "lay litigant" since he is represented in the judicial review by "expert human rights/labour relations" legal counsel.[75]

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[73] Applicant's submission at p. 3.
[74] Ministry submission dated March 18, 2022 at para. 14.
[75] *Ibid* at para. 18.

Analysis and findings on the rebuttal of the presumption

[61] Based on the Ministry's evidence, I am satisfied the invoices contain detailed information that would reveal conversations and instructions between the Branch and the lawyers it hired to defend the Respondents. K.K. affirms that he corresponded with and provided instructions to various lawyers in the Law Firm regarding the applicant's human rights complaint.[76] I, therefore, conclude the descriptive portions of the invoices would reveal communications protected by legal advice privilege.

[62] Regarding the other parts of the invoices such as billing dates, hours billed, each lawyer's hourly rates, payment status and the breakdown and total amount of the fees, the applicant has requested billing information related to a single, specific legal dispute that he was personally involved in as the complainant. I, therefore, find the applicant is a knowledgeable person that is better placed than most to use this billing information to draw accurate inferences about privileged communications that took place between the Branch and the Law Firm's lawyers.

[63] For example, with his detailed knowledge of the Tribunal proceedings, the applicant could make inferences about activities or strategies discussed during the dates covered by each of the invoices. The applicant could compare what he knows of the steps and progress of the Tribunal proceedings with the dates covered by each of the invoices along with the number of hours spent by legal counsel during each period to make inferences about the approach that the Branch instructed the lawyers to take and how much effort and money it was willing to expend on certain aspects of the proceedings.

[64] The applicant disputes his ability to deduce any privileged communications from the withheld information since he is not a lawyer. However, no legal training is needed to determine from the billing information what expenses the Branch approved, how much the Branch spent on legal fees during identifiable time periods and the timing and frequency of the invoices. All of this information arises out of privileged conversations between the Branch and the Law Firm's lawyers.

[65] It is also clear that the stage of the litigation is a relevant factor in this case. It is important to remember that the focus is on protecting the solicitor-client relationship, specifically the communications arising out of that relationship. Therefore, as set out below, the purpose of considering the stage of the litigation is to reduce the risk that an assiduous inquirer would infer privileged communications that is not evident or had not been disclosed during the hearing or proceeding.

[76] K.K.'s affidavit at para. 5.

[66] Typically during litigation, there may be communications between the lawyer and their client about litigation strategy, admissions of fact, witnesses, document production, trial preparation, the retention of experts, how much the client is willing to spend on the litigation and "decisions about waiving privilege and other matters."[77] Those types of decisions usually reflect instructions and communications between a client and lawyer; therefore, knowing this information could allow someone to infer what was discussed between the client and the lawyer. It is this potential inference or deduction that is of concern since it may reveal communications made in confidence between a client and their lawyer.

[67] During the early stages of a trial, the parties have yet to reveal those trial tactics or legal strategy so it would be harder to infer those type of privileged communications, but the disclosure of legal billing information could make it easier to do so. However, over the course of the litigation, those many decisions regarding trial tactics and legal strategy become evident to all the litigating parties. Therefore, at this late stage, there is less of a concern with what inferences can be drawn since the parties have already played their hands. In other words, "what may have been privileged early in a case may not remain so throughout the trial" as it is inevitable that a party's legal strategy and other matters are revealed.[78]

[68] In the present case, the applicant submits the litigation is complete since a decision was made and issued regarding his human rights complaint and that any legal strategy or privileged information would already be evident from the Tribunal proceeding and decision. However, as noted by the Ministry, the remedy sought after by the applicant in the pending judicial review is a re-hearing of the Tribunal decision. As a result, I conclude the litigation is still ongoing since the applicant is seeking to overturn the Tribunal decision and the parties may have to re-litigate the same matter.

[69] Therefore, considering the detailed nature of the billing information, the fact that the litigation is ongoing and the applicant's personal knowledge of the Tribunal proceedings, I find the disclosure of the billing information at this time creates a reasonable possibility that the applicant could infer privileged communications. The applicant could use what he knows about the various steps in the Tribunal proceedings along with the billing information to determine strategies or activities that were not evident or disclosed during those proceedings or that would need to be revisited between the Branch and the Law Firm's lawyers.[79]

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[77] *Constitution*, *supra* note 55, at paras. 73-74.
[78] *Constitution*, *supra* note 55, at para. 74.
[79] At para. 11 of its submission dated February 8, 2022, the Ministry confirmed that the Law Firm was retained to defend against the applicant's petition for a judicial review.

[70] I considered whether the presumption was rebutted for the name of the Law Firm, the dates of the hearing and the name of the lawyers who acted in the hearing since this information is well-known to the parties and publicly available online. Specifically, the applicant says this information was published and marketed online by one of the Law Firm's lawyers. Therefore, the applicant contends that anywhere this information appears in the invoices should be disclosed since it is not privileged information.

[71] The courts have emphasized that severance of a record can only occur when there is no risk of revealing any privileged communications between the lawyer and the client.[80] Based on the facts of this case, I am not confident that this publicly-available information can be reasonably severed from the other information in the invoices so there is no risk of revealing privileged information.

[72] For instance, I find it likely that the names of the lawyers and the hearing dates would be included in a description about the work the lawyers performed on the legal matter, including any communications they had with the Branch as the instructing client. Therefore, I am unable to conclude severance of the lawyers' names and the hearing dates is possible in this case without disclosing privileged information. As a result, I find the presumption is not rebutted for this publicly-available information.

[73] I understand the applicant is sceptical about what possible inferences could be drawn from a legal invoice about privileged communications between a lawyer and client. However, given the importance of the solicitor-client relationship to our legal system, the BC Court of Appeal has determined that the person seeking to rebut the presumption has the high burden of demonstrating that no possible inferences could reasonably be drawn by an assiduous observer.[81] Based on the circumstances and evidence before me, I do not have the necessary degree of assurance; therefore, the information at issue must be withheld.

[74] To conclude, I am satisfied that there is a reasonable possibility that disclosure of the information in dispute will reveal to the applicant, or allow him to deduce, communications protected by legal advice privilege. Therefore, I find the presumption that the information at issue is protected by legal advice privilege has not been rebutted.

Waiver of privilege under s. 14

[75] As set out below, the applicant submits the Ministry has waived privilege over the information at issue. Typically, when a client shares or allows legal

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[80] *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 51.
[81] *Constitution*, *supra* note 55 at para. 85.

advice to be shared with others who are not part of the solicitor-client relationship, this disclosure may amount to a waiver of privilege.

[76] Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege, and (2) voluntarily demonstrates an intention to waive that privilege.[82] In the case of voluntary waiver, the privilege holder actually discloses or authorizes the disclosure of the privileged information to someone who is not a part of the solicitor-client relationship.[83]

[77] However, waiver may also occur in the absence of an express intention based on fairness and consistency. In the cases where there is a finding of an implied waiver, there is always some manifestation of a voluntary intention to waive the privilege.[84] For instance, implied waiver occurs where the possessor of the privilege, at least to a limited extent, takes some action or position that is inconsistent with maintaining the privilege. In such cases, the law then says that in fairness and consistency it must be entirely waived.[85]

[78] Once privilege is established, the onus of showing it has been waived is on the party seeking to displace it.[86] In this case, the applicant bears the burden and submits the Ministry waived privilege since Emergency Services provided him with copies of an email chain and a legal invoice from another access request. The applicant provided a copy of a partially severed invoice issued to Emergency Services that he describes as "an invoice in this matter."[87]

[79] The applicant also provided a partially severed email chain between a lawyer of the Law Firm and employees of the Health Authority and Emergency Services. The applicant relies on this email chain to show that "they had either no s. 14 concerns or were waiving those in this case."[88]

[80] The Ministry disputes the applicant's assertions that it waived privilege over the information at issue. The Ministry notes that the invoice the applicant relies on to establish waiver is unrelated to the applicant's human right complaint which was filed in 2017. It points out that this invoice was not issued by the Law Firm, but relates to legal costs incurred by a different law firm in 2013 for another employment matter. Therefore, the Ministry submits that "prior disclosure of invoices in an unrelated proceeding with a different set of circumstances does

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[82] *S&K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* [*S&K Processors*], 1983 CanLII 407 (BCSC) at para. 6.
[83] *PetroFrontier Corp v Macquarie Capital Markets Canada Ltd*., 2022 ABCA 136 (CanLII) at para. 16.
[84] *S&K Processors*, *supra* note 81 at para. 10.
[85] *Huang v. Silvercorp Metals Inc*., 2017 BCSC 795 at para. 92.
[86] *S&K Processors*, *supra* note 81 at para. 6.
[87] Applicant's submission at p. 4.
[88] *Ibid* at p. 2.

not suggest that it is appropriate to waive solicitor-client privilege over invoices in all matters concerning a law firm and a public body."[89]

[81] The Ministry also submits a named lawyer did not waive privilege by including information on the Law Firm's website that he acted as legal counsel for the Health Authority in the Tribunal proceedings. The Ministry says this public information does not disclose any confidential information between this lawyer and his clients related to legal advice.

[82] Regarding the email chain, the Ministry describes its contents as "regarding the hearing of the Complaint", but submits the disclosure was "inadvertent" due to an administrative error.[90] The Ministry submits there was no conscious decision to waive privilege over this email chain. The Ministry says the Attorney General and the Deputy Attorney General are the only people with authority to waive privilege over legal advice provided to government and they did not waive privilege for this set of emails.

[83] After carefully considering the parties' arguments and evidence, I am not satisfied the Ministry waived privilege over the invoices at issue in this inquiry. I conclude the invoice relied on by the applicant to establish waiver is about a different employment matter that occurred in 2013, whereas, the events underpinning the applicant's human rights complaint occurred later in 2015. I draw this conclusion based on my own review of that invoice and of the Tribunal decision. Therefore, the fact that the applicant obtained a copy of an unrelated invoice through another access request does not persuade me that the Ministry intended to waive privilege for the invoices at issue here.

[84] As for the email chain, I do not find that the fact that this email chain was disclosed to the applicant means that the Ministry has waived privilege. Whether or not privilege was waived over this email chain does not persuade me that the Ministry intended to waive privilege over the legal invoices at issue in this inquiry. There is nothing in these emails that refer to the invoices at issue here or that shows an intention to waive privilege over those invoices.

[85] Given the importance of solicitor-client privilege, there must be a clear intention to forego the privilege or that intention may be implied where there is some manifestation of a voluntary intention to waive the privilege. Based on the materials before me, I am not persuaded the Ministry intentionally or by implication waived privilege over the invoices at issue in this inquiry.

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[89] Ministry's submission dated March 18, 2022 at para. 8.
[90] Ministry's submission dated March 18, 2022 at para. 11.

CONCLUSION

[86] For the reasons given above, under s. 58 of FIPPA, I confirm the Ministry's decision to refuse access since it is authorized to withhold the information at issue under s. 14.

May 16, 2022

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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