Order F22-24

BRITISH COLUMBIA INSTITUTE OF TECHNOLOGY

Ian C. Davis
Adjudicator

May 18, 2022

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Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the British Columbia Institute of Technology (BCIT) for access to records relating to his employee group benefits plan. BCIT withheld information in the responsive records under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege) and 21(1) (harm to business interests of a third party). The adjudicator confirmed BCIT's decision under s. 14. Regarding ss. 13(1) and 21(1), the adjudicator confirmed BCIT's decisions in part and ordered it to disclose some of the information in dispute.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2), 14, and 21(1).

INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the British Columbia Institute of Technology (BCIT) for access to records relating to his employee group benefits plan. The Manufacturers Life Insurance Company (Manulife) and its subcontractors administer the plan on BCIT's behalf. The applicant specifically requested access to emails BCIT sent to Manulife that contain information about him or that in any way relate to him.

[2] BCIT disclosed the responsive records to the applicant with some information withheld under various FIPPA exceptions to disclosure. Specifically, BCIT withheld information under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege), 17(1) (harm to financial or economic interests of a public body), 21(1) (harm to business interests of a third party) and 22(1) (unreasonable invasion of a third party's personal privacy).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review BCIT's decision. During mediation, the applicant confirmed that he is not contesting BCIT's application of s. 22(1),[1] so that section is not an issue in this inquiry. Mediation did not resolve the remaining issues and the matter proceeded to inquiry. In its submissions, BCIT says it is no longer relying on s. 17(1),[2] so that section is also not in issue.

[4] Pursuant to s. 54 of FIPPA, the OIPC invited Manulife to participate in this inquiry and it made submissions regarding s. 21(1).

ISSUES AND BURDEN OF PROOF

[5] The issues I will decide in this inquiry are whether BCIT is authorized under ss. 13(1) and 14, and required under s. 21(1), to refuse access to the information it is withholding under those sections. The burden is on BCIT to prove that the applicant has no right of access to the information in dispute under ss. 13(1), 14 and 21(1).[3]

BACKGROUND

[6] BCIT is a post-secondary educational institution.[4] Manulife is an insurance company and group benefits provider. Manulife provides health and welfare benefits to BCIT employees under the terms of a contract between it and BCIT (benefits plan). The applicant is a BCIT employee and holds a position with the union operating at BCIT, the British Columbia Government Employees Union (Union).

[7] Between 2016 and 2018, the applicant expressed numerous concerns to BCIT about Manulife's administration of employee benefits. Since March 2016, the applicant or the Union filed fourteen separate grievances under the collective agreement in connection with complaints brought forward by the applicant. During this period, the applicant also started making inquiries and raising privacy concerns about the handling of his personal information by Manulife and its subcontractors.

RECORDS IN DISPUTE

[8] The records in dispute are emails exchanged between BCIT and Manulife. There are 625 pages of responsive records.[5] BCIT provided most of those pages

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[1] Investigator's fact report at para. 4.
[2] BCIT's initial submissions at paras. 20 and 50.
[3] FIPPA, s. 57(1).
[4] The information in this background section is based on the evidence in Affidavit #1 of CK at paras. 2-7 and Affidavit #1 of KC at paras. 7-11, which I accept.
[5] Affidavit #1 of CK at para. 28. Following CK's evidence, I will refer in these footnotes to: (1) the "Original Severed Records" (409 pages); (2) the "Grievance Records" (95 pages); (3) the "Privacy

for my review. However, BCIT chose not to provide the information it claims is privileged under s. 14.[6]

SECTION 13 – ADVICE OR RECOMMENDATIONS

[9] BCIT is withholding some of the disputed information under s. 13(1),[7] which states that the head of a public body may refuse to disclose to an applicant information that "would reveal advice or recommendations developed by or for a public body or a minister."

[10] The purpose of s. 13(1) is "to ensure that a public body may engage in full and frank deliberations, including requesting and receiving advice, in confidence and free of disruption from requests from outside parties for disclosure."[8] Section 13(1) prevents the harm that would occur if a public body's deliberative process were subject to excessive scrutiny.

[11] The principles that apply to the s. 13(1) analysis are well-established and include the following:

- Section 13(1) applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.[9]
- Recommendations involve "a suggested course of action that will ultimately be accepted or rejected by the person being advised" and can be express or inferred.[10]
- "Advice" has a broader meaning than "recommendations".[11] Advice includes providing an evaluative analysis of options or an opinion that involves exercising judgment and skill, even if the opinion does not include a communication about future action.[12]

Records" (52 pages); and (4) the "Supplemental Severed Records" (69 pages). These records are listed and described in Exhibit "I" and "J" to Affidavit #1 of CK, which are also Appendices A and B to BCIT's initial submissions.

[6] BCIT's initial submissions at para. 25.

[7] The information in dispute under s. 13(1) is in the Grievance Records and the Supplemental Severed Records on the pages indicated in the table at Exhibit "I" to Affidavit #1 of CK and in BCIT's severed records. BCIT also says it is withholding some information under s. 13(1) in the Grievance Records and the Privacy Records; however, because it is also withholding that information under s. 14, it did not indicate precisely which information it severed under s. 13(1).

[8] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 29 [*Automotive Retailers Association*]. See also *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 43-44 [*John Doe*].

[9] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135.

[10] *John Doe*, *supra* note 8 at paras. 23-24.

[11] *John Doe*, *ibid* at para. 24.

[12] *John Doe*, *ibid* at para. 26; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at paras. 103 and 113 [*College*].

- The compilation of factual information and weighing the significance of matters of fact is an integral component of an expert's advice and informs the decision-making process. Thus, s. 13(1) applies to factual information compiled and selected by the expert using his or her expertise, judgment and skill to provide explanations necessary to the public body's deliberative process.[13]

[12] The first step in the s. 13 analysis is to consider whether the disputed information reveals advice or recommendations under s. 13(1). The second step is to consider whether the disputed information falls within s. 13(2), which sets out various kinds of records and information that the head of a public body must not refuse to disclose under s. 13(1).

[13] Section 13(3) says that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years. In this case, the disputed information is not that old, so s. 13(3) does not apply.

Would the information in dispute under s. 13(1) reveal advice or recommendations developed by or for BCIT?

[14] BCIT submits that all of the information it is withholding under s. 13(1) would reveal advice or recommendations developed by or for BCIT.[14] It says the disputed information is part of a "sensitive, confidential and ongoing dialogue about how to evaluate and respond to concerns raised by the Applicant, and also how to manage these communications."[15] BCIT argues that the applicant is particularly well-informed and well-positioned to draw accurate inferences about advice or recommendations.

[15] The applicant submits that, since he cannot see the disputed information, he must rely on me to assess BCIT's application of s. 13(1).[16] The applicant notes that past orders have found that certain kinds of information do not fall within s. 13(1), including factual information, administrative details and directions, general topics of advice, action items, requests for advice or recommendations and information about decisions already made.[17]

[16] I make the following findings based on BCIT's sworn evidence and the contents of the emails I can see.[18] In 2017 and 2018, the applicant raised various complaints and concerns with BCIT regarding privacy matters and benefits plan

[13] *College*, *ibid* at para. 111; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94; *Automotive Retailers Association*, *supra* note 8 at paras. 52-53.
[14] BCIT's initial submissions at paras. 95-102; BCIT's response submissions at para. 47.
[15] BCIT's initial submissions at para. 97.
[16] Applicant's submissions at para. 59.
[17] Applicant's submissions at para. 60.
[18] Affidavit #1 of KC at paras. 18-19.

issues relating to the adjudication of benefits claims, dental coverage and whether Manulife's benefits booklet could be amended without consultation with the Union. The responsive emails generally relate to the collective efforts of BCIT's labour relations team to deal with these concerns. In the course of deliberating about and ultimately deciding how to proceed, BCIT sought information and opinions from Manulife.

[17] Considering this context, I accept that most of the disputed information would reveal advice or recommendations within the meaning of s. 13(1).[19] In my view, the disputed information is clearly part of BCIT's investigation and gathering of the facts and information necessary to the consideration of options for dealing with the applicant's complaints. I can see that BCIT and Manulife staff exercised judgment and skill to gather and interpret information and develop options for how to respond. Some of the information is factual in nature, but I find it is integral to and inextricable from Manulife's advice to BCIT, formed part of the deliberative process and would reveal through inference advice developed for BCIT.

[18] However, I find that some of the disputed information would not reveal advice or recommendations developed by or for BCIT. This information includes non-substantive factual statements, pleasantries, directions or requests, and information already known by the applicant or disclosed elsewhere in the records, none of which would reveal advice or recommendations.[20] In other words, I accept that some of the information falls into some of the categories of information the applicant identified, which past orders have said do not attract the protection of s. 13(1). This information is minimal and seems to me inconsequential, but the applicant is still entitled to it since it can reasonably be severed from the records in accordance with s. 4(2) of FIPPA.[21]

Do any of the exceptions in s. 13(2) apply?

[19] The parties did not make submissions specifically about the exceptions in s. 13(2). However, I reviewed the disputed information with s. 13(2) in mind and find that none of the exceptions apply. For example, s. 13(2)(a) refers to "factual

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[19] That is, I accept that all of the information BCIT severed under s. 13(1) (and not also s. 14) in the Original and Supplemental Severed Records would reveal advice or recommendations, except for the information specified below in note 20. The information in dispute under s. 13(1) is set out in Appendix A to BCIT's initial submissions and is identified in BCIT's severing.

[20] The information I have highlighted in a copy of the Original Severed Records that the OIPC will provide to BCIT with this order at pp. 2, 20-21, 23, 25-26, 28-29, 31, 39-40, 43-44, 51-52, 55-56, 67-68, 77, 86-87, 93, 95, 106, 109-110, 114, 118, 121-122 (information already disclosed at 309-310 and 317-318), 153, 195, 210, 250, 260-262, 274, 293, 302, 309, 316, 331, 333, 366-367, 379, 381-384, 387, 389 and 399-400. If there are any discrepancies, I intend for my highlighting to apply to any exact duplicates of information.

[21] Section 4(2) states that the right of access to a record does not extend to information that is excepted from disclosure, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

material", which the courts have interpreted as "background facts in isolation" that are not necessary to advice provided.[22] As I found above, I find that any disputed information of a factual nature was compiled by Manulife using its knowledge and expertise and was integral to the advice it provided to BCIT, so it is not "factual material" under s. 13(2)(a).

[20] As a result, I conclude that BCIT is authorized under s. 13(1) to withhold the disputed information that I found above would reveal advice or recommendations developed by or for BCIT. However, BCIT is not authorized under s. 13(1) to withhold the fairly minimal amount of disputed information that I found above would not reveal advice or recommendations developed by or for BCIT.

SECTION 21 – HARM TO THIRD-PARTY BUSINESS INTERESTS

[21] BCIT is withholding some information under both ss. 13(1) and 21(1). Based on my review of BCIT's submissions and severing, it is not withholding any information only on the basis of s. 21(1). I found above that s. 13(1) does not apply to a fairly minimal amount of this information,[23] so now I must consider whether s. 21(1) applies.

[22] The relevant parts of s. 21(1) provide as follows:

> (1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal …
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party, …
>
> (iii) result in undue financial loss or gain to any person or organization ….

[23] The first step is to determine whether the information in dispute is the kind of information listed in s. 21(1)(a). The information in dispute here is some of the information that I found above would not reveal advice or recommendations under s. 13(1). As mentioned, this information is non-substantive factual statements, pleasantries and directions or requests.

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[22] *Automotive Retailers Association*, *supra* note 8 at para. 52.
[23] Original Severed Records at pp. 20-21, 23, 25, 28, 93, 95, 122, 195, 379 and 382-383.

[24] The information in dispute here relates to Manulife, a third party. Manulife submits that all of the information BCIT is withholding under s. 21(1) is commercial or technical information, supplied in confidence, the disclosure of which could reasonably be expected to cause the harms described in ss. 21(1)(c)(i) and (iii).[24] However, Manulife's submissions focus on disputed information other than the specific non-substantive information that is now in dispute under s. 21(1) as a result of my findings under s. 13(1).

[25] In general, the applicant questions the application of s. 21(1) and, since he cannot see the information, says he has to trust that I will review the information and scrutinize whether it meets the requirements of s. 21(1).[25]

[26] Having reviewed the information, I am satisfied it is clearly not "commercial, financial, labour relations, scientific or technical information" of or about Manulife. As a result, s. 21(1) does not apply.

SECTION 14 – LEGAL ADVICE PRIVILEGE

[27] BCIT is withholding some information under s. 14, which says the head of a public body "may refuse to disclose to an applicant information that is subject to solicitor client privilege." Section 14 encompasses both legal advice privilege (also commonly known as "solicitor-client privilege") and litigation privilege.[26]

[28] BCIT relies on both legal advice privilege and litigation privilege to withhold some information and, with respect to other information, it only relies on litigation privilege. I will first address the information BCIT is withholding under legal advice privilege.[27]

[29] Legal advice privilege protects confidential communications between a lawyer and their client that entail the seeking or giving of legal advice.[28] It allows clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better assist their clients.[29] Given its function, the privilege is so important to the legal system that it should apply broadly and be as close to absolute as possible.[30]

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[24] Manulife's submissions (F19-77904) at paras. 6-46. BCIT's initial submissions at paras. 122-135 are to the same effect.
[25] Applicant's submissions at paras. 69-75 and response to third party at paras. 1-14.
[26] *College*, *supra* note 12 at para. 26.
[27] Grievance Records at pp. 1-18 and 91-95; Original Severed Records at pp. 26, 40, 52, 372 and 384-385 (Affidavit #1 of SL at para. 22 and Exhibit "A").
[28] *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837.
[29] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34. For more on the rationale behind solicitor-client privilege, see *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA) per Doherty J.A.
[30] *R. v. McClure*, 2001 SCC 14 at para. 35; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 10 and 13.

[30] BCIT did not provide the information in dispute under s. 14 for my review. Instead, it relies on affidavit evidence from two of its staff labour relations lawyers, KC and SL, who reviewed the disputed records and were personally involved in BCIT's response to the applicant's concerns and complaints.

[31] Neither party argued that it is necessary for me to see the information in dispute in order to adjudicate BCIT's privilege claims and I am satisfied I can decide the matter based on the affidavit evidence BCIT presented. I take this approach recognizing that my task "is not to get to the bottom of the matter and some deference is owed to the lawyer claiming the privilege."[31]

Would the disputed information reveal privileged information?

[32] BCIT says,[32] and I find, that no lawyers are involved in the disputed emails. The emails are between BCIT and Manulife staff[33] acting in non-legal capacities. BCIT submits that the disputed information is privileged because it is derived from and would reveal legal advice that it received from its external legal counsel.[34]

[33] Even though the information in dispute here is in a communication between BCIT and Manulife, a third party, that does not mean the information cannot be privileged.[35] The information may still be privileged if it would reveal privileged information between BCIT and its lawyer and, as I discuss in more detail below, was then shared with Manulife in circumstances that preserve the privilege. Accordingly, in this case, the first question is whether the disputed information would reveal privileged information.

[34] I accept that the disputed information would reveal privileged legal advice between BCIT and its external lawyer. KC reviewed the records and was involved in the background circumstances. She deposes, and I accept, that the disputed communications discuss legal advice that BCIT obtained from its external lawyer and other information that would reveal the external counsel's legal advice.[36] In my view, this evidence is sufficient to establish on a balance of probabilities that the disputed information would reveal privileged information.

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[31] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para. 86.
[32] BCIT's initial submissions at para. 110.
[33] Some of the individuals involved in the emails are employees of a company called "Mercer", but BCIT describes the emails as only between it and Manulife. Although BCIT does not mention Mercer, I am satisfied from the parts of the emails I can see that Mercer is acting in essentially the same or a similar capacity as Manulife so their presence does not alter my analysis.
[34] BCIT's initial submissions at paras. 104-113; Affidavit #1 of KC at paras. 44-47; BCIT's reply submissions at paras. 48-55; Affidavit #1 of SL at para. 22 and Exhibit "A".
[35] For example, internal client communications with no lawyer involved are privileged if they reveal legal advice: *Bank of Montreal v. Tortora*, 2010 BCSC 1430 at paras. 11-12.
[36] Affidavit #1 of KC at para. 45.

Did BCIT waive privilege?

[35] Disclosure of privileged information to a third party (i.e., anyone other than the client and their lawyer, or their agents) generally constitutes waiver.[37] In this case, BCIT disclosed privileged information to Manulife, a third party.[38] As a result, the next question is whether BCIT waived privilege. BCIT suggests that waiver need not be considered in this case.[39] However, in my view, the question of waiver clearly arises as a result of BCIT disclosing privileged information to Manulife. At any rate, as I set out below, BCIT relies on an exception to waiver, so it must accept that waiver is an issue.

[36] Privilege belongs to, and can only be waived by, the client.[40] To establish waiver, the party asserting it must show:

1. the privilege-holder knew of the existence of the privilege and voluntarily evinced an intention to waive it; or
2. in the absence of an intention to waive, fairness and consistency require disclosure.[41]

[37] However, there is no waiver when privileged information is provided to a party outside the solicitor-client relationship "on the understanding that it will be held in confidence and not disclosed to others".[42] This is because an understanding that the document is to be treated in confidence negates an intention to waive the privilege. There is also no waiver where a client discloses privileged information to a third party intending confidentiality and the third party has a common interest with the client sufficient to preserve the privilege (common interest exception to waiver).[43]

[38] BCIT argues that waiver does not apply because it shared the legal advice with Manulife on a confidential basis and BCIT and Manulife shared a common interest in the advice.[44]

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[37] *Malimon v. Kwok*, 2019 BCSC 1972 at para. 20.
[38] Manulife is a third party to the solicitor-client relationship even though it performs services for BCIT under a contract and is, therefore, BCIT's "service provider" as defined in Schedule 1 of FIPPA. A public body's privacy obligations under FIPPA, for example, may flow down to its service provider, but that does not make the service provider the same as or part of the public body client for the purposes of a solicitor-client relationship.
[39] BCIT's reply submissions at para. 48.
[40] *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 39.
[41] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 1983 CanLII 407 (BC SC), 45 B.C.L.R. 218 (S.C.) at para. 6.
[42] *Malimon*, *supra* note 37 at para. 21, citing *Kamengo Systems Inc. v. Seabulk Systems Inc. et al*, 1998 CanLII 4548 (BC SC) at paras. 19-20.
[43] *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510.
[44] BCIT's initial submissions at para. 111; BCIT's reply submissions at paras. 48-55.

[39] The applicant submits that the common interest exception does not apply because BCIT and Manulife do not share a joint interest in litigation against a common adversary.[45]

[40] In my view, the evidence does not establish that BCIT voluntarily evinced an intention to waive privilege. To the contrary, KC deposes that BCIT shared the legal advice with Manulife on a confidential basis.[46] I can also see that some of the emails are expressly marked in the header as confidential (although I cannot see the body of the emails). This satisfies me that BCIT shared the legal advice with Manulife on the understanding that the advice would be held in confidence.

[41] Further, to the extent it is necessary, I am also satisfied that the common interest exception to waiver applies.

[42] Firstly, the exception is not limited, as the applicant claims, to situations where the client and third party are parties to litigation against a common adversary.[47] For example, the exception may apply to legal advice shared between parties jointly interested in completing a commercial transaction, and to parties in certain fiduciary, contractual or agency relations.[48]

[43] In this case, it is clear to me from the records and BCIT's affidavit evidence that BCIT and Manulife were working together toward a common goal of dealing appropriately with, and defending against, the applicant's complaints and concerns. In this context, it makes sense to me that BCIT would have shared legal advice confidentially with Manulife and that Manulife would also have had an interest in that advice. In my view, in these particular circumstances, BCIT and Manulife did have a common interest sufficient to preserve the privilege.

[44] Finally, as noted above, waiver may also occur, in the absence of an intention to waive, where fairness and consistency require disclosure. Implied waiver occurs where "a party does not explicitly waive the privilege but takes some action that is inconsistent with maintaining the privilege."[49] For example, a party may impliedly waive privilege by putting legal advice in issue in a proceeding or by making selective disclosure of evidence.[50]

[45] I find no implied waiver based on fairness and consistency in this case. I am not persuaded that BCIT took any actions that were inconsistent with

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[45] Applicant's submissions at paras. 61-67.
[46] Affidavit #1 of KC at para. 45.
[47] See, for example, Order F21-23, 2021 BCIPC 28 at para. 73 and the cases cited there.
[48] *Pitney Bowes of Canada Ltd. v. Canada*, 2003 FCT 214**;** *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 24.
[49] Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014) at s. 7.104, cited in *Nova Scotia (Attorney General) v. Cameron*, 2019 NSCA 38 at para. 50, leave to appeal ref'd 2020 CanLII 13153 (SCC).
[50] *Graham v. Canada (Minister of Justice)*, 2021 BCCA 118 at para. 50.

maintaining confidentiality over the disputed information. The applicant, who has the burden here, does not point to any such actions. For example, there is no evidence to suggest that BCIT and the applicant were involved in litigation where BCIT made selective, inconsistent or otherwise unfair disclosure of the disputed emails.

Conclusion regarding legal advice privilege

[46] To summarize, I conclude, for the reasons provided, that s. 14 applies to the information BCIT is withholding on the basis of legal advice privilege because it would reveal confidential legal advice between BCIT and its external lawyer, and BCIT did not waive privilege by disclosing the legal advice to Manulife.

SECTION 14 – LITIGATION PRIVILEGE

[47] BCIT is withholding the balance of the information in dispute under s. 14 on the basis of litigation privilege.

[48] Litigation privilege protects a party's ability to effectively conduct litigation. Its purpose is to ensure the efficacy of the adversarial process.[51] It does so by creating a protected area in which parties to pending or anticipated litigation are free to investigate, develop and prepare their contending positions in private, without adversarial interference into their thoughts or work product and without fear of premature disclosure.[52]

[49] Litigation privilege protects a record from disclosure if the party asserting the privilege establishes that, at the time the record was produced:

1. litigation was "in reasonable prospect"; and
2. the "dominant purpose" of producing the record "was to obtain legal advice or to conduct or aid in the conduct of litigation".[53]

[50] Litigation privilege expires "with the litigation of which it was born", unless related litigation remains pending or may reasonably be apprehended.[54]

Overview of the parties' positions

[51] The applicant submits that litigation privilege does not apply because "there is no current or anticipated litigation".[55] He says the matters in question either never resulted in litigation or they did and have now been "settled". He emphasizes that litigation privilege does not extend in perpetuity.

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[51] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 27.
[52] *Ibid*. See also *Raj v. Khosravi*, 2015 BCCA 49 at paras. 7-20.
[53] *Raj*, *ibid* at para. 20.
[54] *Blank*, *supra* note 51 at paras. 8 and 34-41.
[55] Applicant's submissions at para. 68.

[52] BCIT submits that litigation privilege applies to the information it is withholding on that basis.[56] It says the information relates to active or anticipated grievances under the collective agreement between it and the Union regarding benefits plan issues, as well as to a privacy complaint the applicant made to the OIPC. KC and SL (BCIT's staff lawyers) both depose that, in their view, the disputed information was produced for the dominant purpose of litigation when litigation was in reasonable prospect, so litigation privilege applies.[57] I discuss BCIT's evidence and arguments in more detail below.

Information in dispute

[53] There is no dispute that, as mentioned in the background above, the applicant raised various concerns and complaints with BCIT in 2016 to 2018 regarding the benefits plan and FIPPA compliance issues. Based on BCIT's affidavit evidence, I accept that the information it is withholding on the basis of litigation privilege relates, in general, to issues the applicant raised concerning:[58]

- the adjudication of a certain kind of benefits claim (claims adjudication information),[59]
- dental coverage (dental coverage information),[60]
- the accuracy of statements in Manulife's benefits booklet and whether it can be amended without consultation with the Union (benefits booklet information),[61] and
- whether Manulife and its subcontractors complied with FIPPA's data security and foreign access and storage requirements (FIPPA compliance information).[62]

[54] I will refer below to the information relating to claims adjudication, dental coverage and the benefits booklet collectively as the "benefits plan information", since it all relates to issues the applicant raised about the benefits plan.

Does litigation privilege apply to the benefits plan information?

[55] BCIT says the "litigation" giving rise to litigation privilege over the benefits plan information is grievance proceedings under the collective agreement

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[56] BCIT's initial submissions at paras. 114-120; BCIT's further submissions dated April 19, 2022; Affidavit #1 of SL; Affidavit #1 of KC at paras. 21-43.
[57] Affidavit #1 of SL at para. 15 and Exhibit "A"; Affidavit #1 of KC at paras. 21-23 and Exhibit "C".
[58] Affidavit #1 of KC at paras. 24-42.
[59] Grievance Records at pp. 84-90; Original Severed Records at pp. 127, 129-130 and 191.
[60] Grievance Records at pp. 19-79; Original Severed Records at pp. 250-251, 260 and 262-263.
[61] Grievance Records at pp. 80-83; Original Severed Records at pp. 144-147. KC says the long-term disability benefits issue discussed in Original Severed Records at pp. 144-147 relates to the benefits booklet information and related grievance: Affidavit #1 of KC at paras. 34-35.
[62] Privacy Records at pp. 1-52; Original Severed Records at pp. 226, 234, 241 and 339.

between BCIT and the Union. Grievance proceedings are not typical court litigation, so the first question is whether they even qualify as "litigation".

[56] In my view, grievance proceedings under the collective agreement do qualify as "litigation". BCIT provided sworn evidence, which I accept, that unresolved grievances under the collective agreement may proceed to arbitration, which is a form of dispute resolution resulting in a legally binding decision of an independent arbitrator.[63] I accept that this process is adversarial and adjudicative, so it qualifies as "litigation". Past OIPC orders have come to a similar conclusion.[64]

[57] Having found that grievance proceedings qualify as litigation, I turn now to whether such litigation was in reasonable prospect when the benefits plan information was produced.

[58] Litigation is in "reasonable prospect" when a reasonable person, fully informed, would conclude it is unlikely that the claim in question will be resolved without litigation.[65] Litigation may be in reasonable prospect "at any point along the continuum between the information-gathering and litigation stages of an inquiry."[66] To satisfy this part of the test, litigation need not be a certainty, but it must be more than mere speculation.[67] This sets a "low" threshold, which the courts have not considered particularly difficult to meet.[68]

[59] Based on KC's and SL's evidence, I find that most of the benefits plan information[69] was produced after the applicant or the Union had formally filed grievances, so litigation was not only in reasonable prospect but had commenced. I am satisfied by BCIT's evidence that the information was produced in response to and following the filing of grievances and that some of the emails expressly state this.[70] Further, using one of the grievances as an example, the dates of the records clearly indicate that the disputed information was produced after the grievance was originally filed.[71]

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[63] Affidavit #1 of KC at para. 4.
[64] See, for example, Order P06-02, 2006 CanLII 32980 (BC IPC) at paras. 33-37 (and the cases cited therein); Order F10-02, 2010 BCIPC 10 at para. 30.
[65] *Raj*, *supra* note 52 at paras. 10-11, citing *Hamalainen (Committee of) v. Sippola*, 1991 CanLII 440 (BC CA) at para. 20 and *Sauvé v. ICBC*, 2010 BCSC 763 at para. 30.
[66] *Raj*, *ibid* at para. 50.
[67] *Raj*, *ibid* at para. 10.
[68] *Raj*, *ibid*.
[69] Grievance Records at pp. 19-90; Original Severed Records at pp. 144-147, 250-251, 260 and 262-263.
[70] Affidavit #1 of SL at para. 16; Affidavit #1 of KC at paras. 28-35; BCIT's initial submissions at para. 120.
[71] This is the dental coverage information (Grievance Records at pp. 19-79; Original Severed Records at pp. 250-251, 260 and 262-263). The original filing date is set out in para. 31 of Affidavit #1 of KC and predates the disputed information.

[60] For the other benefits plan information, BCIT says it was produced when a related grievance was "threatened" or "anticipated".[72] With respect to this information, KC deposes:

> While grievances related to the specific matters canvassed in some of the records had not yet been filed at the time the records were prepared, given the tone and tenor of the Applicant's communications, including communications in which he openly threatened litigation, I can attest to the fact that BCIT reasonably expected that grievances would be filed in respect of all of the matters canvassed [in the disputed records].[73]

[61] I accept KC's evidence. In my view, the evidence as a whole supports it and establishes a history of disputes and litigation between BCIT and the applicant. I find that the applicant or the Union filed grievances relating to the benefits plan at least as early as June and September 2017.[74] The applicant then sent an email regarding benefits issues in December 2017 threatening litigation; he said union members were "out looking for blood" and that "arbitration is but one of a vast many fields where our champions will meet".[75] The access request is for records from October 1, 2017 to March 31, 2018. Viewed in this context and given the timeline, I am satisfied that litigation was in reasonable prospect when the disputed information was produced.

[62] The next question is whether the dominant purpose of producing the benefits plan information was to obtain legal advice or to conduct or aid in the conduct of litigation.

[63] Courts have noted that this second part of the litigation privilege test is more challenging to meet. It requires a factual determination based on all of the circumstances and the context in which the document was produced.[76] The inquiry involves determining "whether, and if so when, the focus of the investigation/inquiry shifted to litigation."[77] Litigation privilege may apply to a document created for more than one purpose, but only if the dominant purpose is litigation.

[64] Based on KC's review and personal involvement, she deposes that the benefits plan information was created for the dominant purposes of litigation, specifically to "evaluate, investigate and respond to" actual or reasonably contemplated grievances.[78] SL's evidence is to the same effect.[79]

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[72] Original Severed Records at pp. 127, 129-130, 144-147, 191, 250-251, 260 and 262-263.
[73] Affidavit #1 of KC at para. 23. SL provides evidence to the same effect in Exhibit "A" of her affidavit.
[74] Affidavit #1 of KC at paras. 31 and 34.
[75] Affidavit #1 of KC at Exhibit "A", p. 3.
[76] *Raj*, *supra* note 52 at para. 17.
[77] *Raj*, *ibid*.
[78] Affidavit #1 of KC at paras. 22, 28, 32 and 36.
[79] Affidavit #1 of SL at paras. 15-16, 18, 22 and Exhibit "A".

[65] In my view, BCIT's evidence is sufficient to establish that the disputed information was created for the dominant purposes of grievance litigation. I find BCIT's evidence persuasive given the context. The applicant raised benefits plan issues relating to Manulife, so it makes sense to me that BCIT gathered information and evidence from Manulife, and drew on its expertise, in order to understand and develop its legal position and prepare for grievance arbitration.

[66] I recognize, as BCIT acknowledges, that some or all of the benefits plan information was also produced for the purpose of responding to the applicant. However, given the adversarial nature of the relationship between BCIT and the Union at the time, as evidenced by the applicant's December 2017 email, I find that BCIT's responses were more in the nature of defending a position in response to a legal claim rather than simply providing an informational response to the applicant. In other words, I am satisfied that the benefits plan information was produced for the dominant purpose of litigation and not just for investigative or informational purposes.

Does litigation privilege apply to the FIPPA compliance information?

[67] I turn now to the FIPPA compliance information. BCIT says the "litigation" giving rise to litigation privilege over this information is OIPC complaint proceedings. As with grievance proceedings, a complaint filed with and handled by the OIPC is not typical court litigation, so the first question is whether such complaint proceedings even qualify as "litigation".

[68] BCIT submits that they do. BCIT says that courts and previous orders have accepted that litigation extends beyond court proceedings, to encompass other regulatory proceedings such as OIPC complaint proceedings.[80] For example, in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, the Court of Appeal accepted that investigation by a regulatory agency constitutes litigation and that the "target" of the investigation may claim litigation privilege over documents produced for the dominant purpose of responding to the investigation.[81]

[69] In my view, the OIPC complaints process does qualify as "litigation". In this process, BCIT would be the "target" of an OIPC investigation resulting from a complaint filed by the applicant. BCIT's interests are clearly adversarial to the applicant's. Further, the matter may result in formal adjudication by the OIPC or the court in an adversarial proceeding. This process may result in enforceable orders against BCIT requiring it to do certain things. In these circumstances, I am satisfied the rationale for litigation privilege is engaged. It would undermine a

[80] BCIT's initial submissions at para. 117, citing *College*, *supra* note 12; *TransAlta Corporation v. Market Surveillance Administrator*, 2014 ABCA 196 at para. 40; Order F06-16, 2006 CanLII 25576.
[81] *College*, *ibid* at paras. 74-79.

party's ability to effectively argue for or defend against a complaint if the opposing party had access to information disclosing its investigations, preparations and legal strategy.

[70] Having found that OIPC complaint proceedings qualify as "litigation", I turn now to whether the FIPPA compliance information meets the two-part test for litigation privilege.

[71] I am satisfied that the FIPPA compliance information was produced when OIPC litigation was in reasonable prospect. BCIT provided evidence, which I accept, that the applicant began raising privacy compliance issues relating to Manulife in early 2018.[82] KC and SL depose that the disputed information was produced in response to the privacy complaint BCIT anticipated the applicant would file, and did later file, at a time when the applicant had threatened litigation generally.[83] In my view, this evidence establishes that OIPC complaint litigation was more than mere speculation when the disputed information was produced. In other words, given the overall context, I am satisfied on a balance of probabilities that the applicant's complaints would not likely have been resolved without the applicant filing a formal complaint with the OIPC.

[72] The next question is whether the FIPPA compliance information was produced for the dominant purpose of litigation. KC states that while the FIPPA compliance information "was, in part, compiled for the purposes of responding to the Applicant's questions and concerns, [its] primary and dominant purpose and focus was to prepare BCIT" for litigation, if it arose.[84]

[73] In my view, BCIT's evidence is sufficient to establish that the FIPPA compliance information was produced for the dominant purpose of litigation. The applicant's privacy compliance complaints concerned the privacy practices of Manulife and its subcontractors, who are BCIT's service providers. It makes sense to me that BCIT would have had to gather information and evidence from Manulife to develop its legal position and defend against reasonably anticipated complaints. As with the benefits plan information, given the context of disputes between BCIT and the applicant, I am satisfied the information was produced for litigation purposes and not just to investigate the applicant's concerns and provide an informational response.

[74] To conclude, two BCIT staff lawyers with personal involvement in the background facts reviewed the disputed information, which is not before me, and provided sworn opinions that the information is subject to litigation privilege. In my view, their opinions are supported by the evidence as a whole. Therefore,

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[82] Affidavit #1 of KC at paras. 38-39; Affidavit #1 of SL at para. 18.
[83] Affidavit #1 of KC at paras. 38-43; Affidavit #1 of SL at paras. 17-21 and Exhibit "A".
[84] Affidavit #1 of KC at para. 43.

I conclude that the disputed information meets the two-part test for litigation privilege. The final question is whether litigation privilege has expired.

Has litigation privilege expired?

[75] As noted above, litigation privilege ceases to apply when the litigation from which it was born concludes, unless related litigation remains pending or may reasonably be apprehended. This is because the privilege loses its purpose when there is no longer any litigation to conduct. As the Supreme Court of Canada put it in *Blank v. Canada (Minister of Justice)*, litigation is "not over until it is over: It cannot be said to have 'terminated', in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat."[85]

[76] In *Blank*, the Court set out factors to consider in deciding whether litigation is "related", including whether the other litigation involves the same or related parties, the same underlying issues, the same "essential purpose" and the same or a related cause of action (or "juridical source").[86] The Court stated that the extended meaning of "litigation" is limited, as a matter of principle, by the purpose of the privilege.[87]

[77] To be clear, "related" litigation is not limited to an extension of the original litigation, such as an appeal. For example, in a recent decision, the BC Supreme Court found that two separate civil actions for damages, commenced years apart, were "related" for the purposes of litigation privilege.[88]

Overview of the parties' positions

[78] The applicant says that certain grievances he filed have now "settled",[89] but he does not elaborate.

[79] BCIT acknowledges that certain grievances have now been "resolved, dismissed or withdrawn".[90] However, it submits that further litigation is still possible and related litigation persists. BCIT says the applicant's legal claims against it are "part of a unified and related legal strategy" that must be viewed as a whole and not in isolation.[91] BCIT says the litigation matters raise common issues, share a factual and legal context, and were filed within a similar time period. According to BCIT, it would be premature to conclude that litigation privilege has expired.

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[85] *Blank*, *supra* note 51 at para. 34.
[86] *Blank*, *ibid* at para. 39.
[87] *Blank*, *ibid* at para. 40.
[88] *Insurance Corporation of British Columbia v. Teck Metals Ltd.*, 2021 BCSC 1477.
[89] Applicant's submissions at para. 68.
[90] Affidavit #1 of SL at para. 15; BCIT's further submissions dated April 19, 2022 at pp. 3-4.
[91] BCIT's further submissions dated April 19, 2022 at p. 3.

[80] The benefits plan information relates to various proceedings that all have their own history and trajectory. As a result, at this stage of the analysis, I will address the various different categories of information that make up the benefits plan information separately (i.e., the claims adjudication information, the dental coverage information and the benefits booklet information). I will then discuss the FIPPA compliance information. The factual findings I make below are based on BCIT's affidavit evidence, which, in general, I accept.

Does privilege still apply to the benefits booklet information?

[81] The applicant filed a grievance setting out complaints relating to Manulife's benefits booklet on June 7, 2017 and, despite the lengthy passage of time, SL deposes and I accept that this grievance remains "outstanding", which I take to means it is still proceeding towards arbitration.[92] As a result, I conclude that litigation relating to the benefits booklet is still active and litigation privilege continues to apply to the benefits booklet information.

Does privilege still apply to the claims adjudication information?

[82] The applicant filed grievances relating to claims adjudication and those grievances were dismissed in an arbitration decision dated June 22, 2021.[93] I see no evidence that any action has been taken in this litigation subsequent to the arbitration decision. As a result, I conclude that the grievance litigation itself has concluded.

[83] However, BCIT submits that related litigation persists. SL deposes that there remains a separate outstanding grievance relating to claims adjudication that raises issues in common with the concluded litigation, including the interpretation of terms in the collective agreement such as "reasonable and customary" charge and "medically necessary".[94]

[84] In my view, litigation privilege still applies to the claims adjudication information because related litigation remains pending. I accept SL's evidence that a separate grievance relating to claims adjudication is outstanding and raises common issues with the grievances that concluded with the June 22, 2021 arbitration decision. The grievances share the same parties (BCIT and the Union), some common issues and a "cause of action" (or "juridical source"), namely alleged breach of the collective agreement. Accordingly, I find that the outstanding grievance is "related" litigation within the meaning of *Blank*. In other words, I am satisfied that BCIT and the Union remain locked in what is essentially the same legal combat over the adjudication of certain kinds of benefits claims.

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[92] Affidavit #1 of KC at para. 34; Affidavit #1 of SL at para. 9(a).
[93] Affidavit #1 of SL at para. 11.
[94] Affidavit #1 of SL at paras. 8, 9(c), 15, 16(d) and Exhibit "A".

Does privilege still apply to the dental coverage information?

[85] The applicant filed a grievance setting out complaints relating to dental coverage, withdrew it, refiled it and then withdrew it again on a without prejudice basis on November 1, 2021.[95] The applicant says the grievance has been "settled", but he does not elaborate.[96]

[86] BCIT says the grievance has been filed and withdrawn twice on a conditional basis, so the applicant may still re-file it, which means grievance litigation is still pending or in reasonable prospect.[97] Further, BCIT submits that related litigation remains pending. SL deposes that the dental coverage information contains discussion between BCIT and Manulife about broader issues, threshold tests and policy language that are still in dispute in the outstanding claims adjudication grievance, including the interpretation of language such as "reasonable and customary" charges.[98]

[87] In my view, litigation privilege still applies to the dental coverage information. I am not persuaded that the litigation has "settled", as the applicant claims. I accept that the grievance was withdrawn conditionally, so it could still be refiled, which is a reasonable prospect given that it has already been refiled once. At any rate, I am satisfied that related litigation remains pending. SL's evidence satisfies me that BCIT and the Union are still engaged in a legal battle over the adjudication of benefits claims and the proper interpretation of key language in the collective agreement. I find that disclosing the dental coverage information would hinder BCIT's ability to effectively litigate the common issues in the grievances, so the purpose of litigation privilege is still engaged.

Does privilege still apply to the FIPPA compliance information?

[88] Starting in 2018, the applicant began making complaints and allegations about the extent to which Manulife's practices were compliant with FIPPA and appropriate privacy practices. The applicant filed a complaint with the OIPC alleging that Manulife, or its subcontractors, were not acting in compliance with s. 30.1 of FIPPA, which then required public bodies and their service providers to store personal information only within Canada. The complaint was dismissed following reconsideration on February 2, 2022.[99]

[89] BCIT says that, as of April 2022, it has not been informed of whether the applicant intends to challenge the reconsideration decision by way of judicial review.[100]

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[95] Affidavit #1 of SL at para. 10.
[96] Applicant's submissions at para. 68.
[97] BCIT's further submissions dated April 19, 2022 at p. 2.
[98] Affidavit #1 of SL at para. 10 and 16(b).
[99] This paragraph is based on the evidence in Affidavit #1 of SL at paras. 18-19, which I accept.
[100] BCIT's further submissions dated April 19, 2022 at p. 2

[90] There is no strict limitation period to file for judicial review.[101] A few months have elapsed since the reconsideration decision, but in the world of litigation I do not consider that to be an unreasonably lengthy period of time. The applicant had an opportunity to respond to BCIT's statement regarding whether he intends to file for judicial review, but chose not to.[102] In the circumstances, I find that the applicant could still file for judicial review of the reconsideration decision, extending the litigation between the parties. I recognize that s. 30.1 of FIPPA has been repealed, but it is not clear to me whether that is the only issue in the complaint. Neither the applicant's complaint nor the OIPC reconsideration decision are before me in evidence. I am not persuaded that there is nothing left to litigate.

[91] Ultimately, I conclude that, while close to the line, this litigation has not come to a final resolution and litigation privilege still applies for now.

Conclusions regarding whether litigation privilege has expired

[92] For the reasons provided above, I conclude that litigation privilege continues to apply to the benefits plan information and the FIPPA compliance information, at least as the matters stand today.

CONCLUSION

[93] For the reasons given above, I make the following orders under s. 58(2) of FIPPA:

1. I confirm BCIT's decision that it is authorized to refuse access to the information it is withholding under s. 14.

2. I confirm, in part, BCIT's decision that it is authorized or required to refuse access to the information it is withholding under ss. 13(1) and 21(1).

3. I require BCIT to give the applicant access to the information I have highlighted in a copy of the records that the OIPC will provide to BCIT with this order.[103] BCIT must concurrently copy the OIPC registrar of

[101] See the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 11. For discussion, see *Lowe v. Diebolt*, 2014 BCCA 280.
[102] Email from the applicant to the OIPC and parties dated May 3, 2022.
[103] *Supra* note 20.

inquiries on its cover letter to the applicant, together with a copy of the records.

Pursuant to s. 59(1) of FIPPA, BCIT is required to comply with this order by **June 30, 2022.**

May 18, 2022

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F19-77904