Order F22-58

MINISTRY OF ATTORNEY GENERAL

David S. Adams
Adjudicator

November 15, 2022

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Summary: An applicant requested information about the total legal fees incurred by the Ministry of Attorney General (the Ministry) in defending two specified disputes with her. The Ministry withheld the information under s. 14 of FIPPA (solicitor-client privilege). The adjudicator determined that the Ministry was authorized to refuse to disclose the information under s. 14.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, s. 14.

INTRODUCTION

[1] The applicant requested a summary of the money spent by the Ministry of Attorney General (the Ministry) on legal fees in order to defend itself and several of its employees in two disputes with the applicant from January 2, 2017 to October 8, 2020. In response to the applicant's request, the Ministry created the disputed record but withheld it in its entirety under s. 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the OIPC to review the Ministry's decision. Mediation did not resolve the issue and the matter proceeded to this inquiry.

PRELIMINARY MATTER

[3] In her response submission, the applicant argues that even if s. 14 applies to the disputed record, the Ministry should disclose it because doing so is in the public interest.[1] This raises the application of s. 25 of FIPPA. Section 25 requires

[1] She refers to the refers to the prosecution of Vice Admiral Mark Norman, which she says demonstrates that governments ought to be transparent about the amounts they spend on legal

public bodies to disclose information when it is in the public interest. The OIPC investigator's fact report and the Notice of Inquiry do not include s. 25 as an issue.

[4] The notice of inquiry said that s. 14 was the issue to be decided in this inquiry. It also said that the parties may not add new exceptions or issues into the inquiry without the OIPC's prior consent. Previous OIPC orders have consistently reinforced this point.[2] In this case, the applicant does not explain why she did not seek permission to add s. 25 into the inquiry. Further, there is nothing in the nature of the disputed information to suggest that it relates to a matter that engages the public interest in the way that s. 25 requires.

[5] The s. 25 duty to disclose exists only in the "clearest and most serious of situations" and the disclosure must be "not just arguably in the public interest, but *clearly* (i.e*.,* unmistakably) in the public interest."[3] The information in dispute in this case is about legal fees related only to the applicant's legal matters. I see no compelling reason to consider the application of s. 25 in this inquiry.

ISSUE

[6] The sole issue to be decided in this inquiry is whether the Ministry is authorized to refuse to disclose the record in dispute under s. 14 of FIPPA. Pursuant to s. 57(1) of FIPPA, the burden is on the Ministry to prove that the record in dispute is privileged.

DISCUSSION

Background

[7] The applicant is a former employee of the Ministry. In 2017, she filed a complaint with the BC Human Rights Tribunal (the HRT Complaint) against the Ministry and several of its employees, alleging that they had discriminated against her because of a disability.[4]

[8] In 2019, the applicant filed two labour grievances (the Grievances), one alleging undue delay in returning her to work, and the other alleging wrongful dismissal. Both Grievances were referred to arbitration. The Grievance captured by the applicant's access request is the one related to wrongful dismissal, but the Ministry Lawyer's affidavit says that the Grievances are similar in that they

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fees. In that case, the federal government disclosed to the public the total amount it spent on its prosecution in response to a question in the House of Commons.

[2] For example, F21-01, 2021 BCIPC 01 at para 8; Order F20-37, 2020 BCIPC 43 at paras 3-9; and Order F11-28, 2011 BCIPC 34 at para 11.

[3] Order 02-38, 2002 CanLII 42472 (BC IPC) at para 45, italics in original. See also *Tromp v. Privacy Commissioner*, 2000 BCSC 598 at paras 16-19.

[4] Affidavit of Ministry Lawyer at paras 4-5; Applicant's response submission at 1-2.

involve allegations of discrimination in the area of employment on the ground of mental disability.[5]

[9] In 2021, the parties settled the remaining issues in the HRT Complaint and the Grievances.[6]

Records at issue

[10] The Ministry did not provide the records for my review. However, it provided an affidavit affirmed by a supervisor and legal counsel with the Ministry's Legal Services Branch (the Ministry Lawyer). That affidavit provides, and I accept, that the sole responsive record is a two-page spreadsheet setting out the amounts billed by Ministry lawyers and paralegals between January 2, 2017 and October 8, 2020 for their work on the defence of the Ministry and several of its employees in the HRT Complaint and the Grievances.[7]

[11] Neither party argued that it is necessary for me to see the record in order to decide whether solicitor-client privilege applies to it. The evidence makes it clear that the disputed information consists of fee information reflecting work done for the Ministry and its employees by its lawyers and paralegals during a specified time. I am satisfied that this evidence is sufficient for me to decide whether solicitor-client privilege applies, keeping in mind that my task "is not to get to the bottom of the matter and [that] some deference is owed to the lawyer claiming the privilege".[8]

Solicitor-client privilege – s. 14

[12] Section 14 of FIPPA provides that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. Solicitor-client privilege has been described by the Supreme Court of Canada as fundamental to the legal system.[9] Section 14 encompasses both legal advice privilege and litigation privilege.[10] The Ministry is withholding the disputed record under legal advice privilege only.

[13] Legal advice privilege applies to confidential communications between solicitor and client that entail the seeking or giving of legal advice.[11]

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[5] Affidavit of Ministry Lawyer at para 4.
[6] *Ibid*; Applicant's response submission at 2.
[7] Affidavit of Ministry Lawyer at para 13.
[8] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para 86.
[9] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para 20.
[10] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 26.
[11] *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at 837.

[14] Legal billing information, including fees and disbursements, is presumptively privileged.[12] This is because the information reflects work done for the client and is capable of revealing privileged information about the lawyer-client relationship.[13]

[15] The BC Court of Appeal in *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 [*CCF*] has described what would have to be established to rebut the presumption of privilege:

> It seems to me that what needs to be established is that there is no reasonable possibility of revealing privileged communications by disclosing the total amount of legal costs. That is an appropriately high threshold…[14]

Presumption of privilege over amount of legal fees

[16] The Ministry says, and I accept, that the "client" for the purposes of its claim for solicitor-client privilege is the Province, of which the Ministry is a part. It says that the disputed record is presumptively privileged because it reflects work done by lawyers and paralegals in relation to the HRT Complaint and the Grievance based on client instructions.[15]

[17] The applicant takes a different approach, focusing her submissions on the propriety of the amounts spent and the merits of her disputes with the Ministry. She says that the Ministry should be transparent and accountable in the way it manages public resources.[16] She also says that the amount of legal fees itself cannot be privileged information because it is not a communication between solicitor and client. She accepts that solicitor-client privilege allows clients to "communicate candidly and in confidence with their lawyers knowing that these communications are protected from disclosure".[17]

[18] Courts and the OIPC have consistently held that information setting out the amount of legal fees spent by a party is itself presumptively privileged. The BC Court of Appeal said in *CCF*:

> In short, the [Supreme Court of Canada] in *Maranda* is articulating the proposition that information about amounts of legal fees is presumptively privileged because it arises out of the solicitor-client relationship and is capable of disclosing privileged information about communications

[12] *Maranda v. Richer*, 2003 SCC 67 at paras 32-33; *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 at paras 60-61 [*CCF*].
[13] *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at paras 35 and 42.
[14] *CCF*, *supra* note 12 at para 83.
[15] Ministry's initial submission at paras 53-57 and 67-69.
[16] Applicant's response submission at 1-2.
[17] *Ibid* at 2-3 and 6.

> between solicitor and client. The Court is defining the scope of solicitor-client privilege.
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> Accordingly, in my view, *Maranda* stands for a general proposition that information about the total amounts of legal fees is presumptively privileged. The presumption may be displaced, but the onus of doing so rests with the party attempting to displace it. This is as it should be in my opinion. Placing the onus on the party who seeks the protection of the privilege risks forcing the disclosure of the very communications the privilege is intended to protect. It follows that the [chambers] judge did not err in her conclusions on this point, and was right to say that it was important to keep the onus clearly in mind in deciding whether the presumption had been displaced.[18]

[19] Keeping these principles in mind, I find that the record is presumptively privileged because it comprises information about the legal fees incurred by the Ministry, and the amount of legal fees is, by itself, capable of revealing privileged communications between solicitor and client. It will therefore be up to the applicant to attempt to overcome the "high threshold" and rebut this presumption.

Has the applicant rebutted the presumption of privilege?

[20] The Ministry says that disclosure of the disputed record could allow the applicant to draw inferences about its state of preparation for the disputes, the amount it was willing to spend to defend itself, its legal strategy, and other privileged information. The Ministry says that the applicant could combine her own knowledge with the information in publicly available records, such as an interim decision in the HRT Complaint, in order to make these inferences.[19]

[21] The Ministry also says that disclosure of the disputed record could reveal information about other ongoing human rights proceedings and labour grievances, which would prejudice the Ministry's ability to defend those matters.[20]

[22] The applicant does not, as far as I am able to tell, say anything about the rebuttal of the presumption.

[23] In *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner*, 2012 BCSC 427, the BC Supreme Court clarified the nature of the burden on a party seeking to rebut the presumption of privilege:

> While the presumption will not create an evidentiary burden in every case, it may do so where either the context of the information or a review of the records satisfied the adjudicator that the document does contain billing information relating to litigation expenditures. Where that is the case, the

[18] At paras 60-61.
[19] Ministry's initial submission at paras 75-78.
[20] *Ibid* at para 79.

> presumption of privilege will prevail unless it is rebutted by evidence or argument that is sufficient to satisfy the adjudicator that there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege and that an assiduous inquirer, aware of background information, could not use the information requested to deduce or otherwise acquire privileged communications.[21]

[24] In that case, the Court concluded that since the access applicant had not provided any evidence or argument to rebut the presumption of privilege, it had not been rebutted.[22]

[25] In *CCF*, the Court of Appeal concluded that "a fully informed assiduous observer" could deduce privileged information about the government's litigation strategy, and so the presumption had not been rebutted.[23]

[26] As the adjudicator in a recent order applying *CCF* pointed out, "*CCF* does not require the [public body] to establish that specific inferences about privileged information are reasonably possible; the burden is on the [applicant] to establish that there is no reasonable possibility that disclosing the dates and amounts [of legal fees] would reveal privileged information".[24]

[27] In Order F19-47, the adjudicator reviewed the jurisprudence on the rebuttal of the presumption of privilege. He identified several factors that courts and the OIPC have found relevant in determining whether there was no reasonable possibility that disclosure of the amount of legal fees could reveal privileged information. These factors include the nature of the legal matters to which the fee information applies, the stage of the litigation (if any), the applicant's involvement in the legal matters, and the nature of the billing information. In that case, the adjudicator considered the most relevant factor, "outweigh[ing] all others", to be the fact that the applicant was a party to the litigation.[25]

[28] Although in that case the litigation was ongoing, whereas here it has been settled, an applicant's status as a party carries significant weight in the analysis of whether the presumption of privilege has been rebutted. In *Richmond (City) v. Campbell*, 2017 BCSC 331, the BC Supreme Court considered that for the purpose of deciding whether the presumption of privilege had been rebutted, whether the litigation had been concluded or not was "an unimportant distinction"

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[21] At para 122.
[22] *Ibid* at para 139.
[23] *CCF*, *supra* note 12 at paras 79-83.
[24] Order F21-52, 2021 BCIPC 60 (CanLII) at para 47.
[25] 2019 BCIPC 53 (CanLII) at paras 18-20.

since an observer could still deduce how much a public body was willing to spend to defend itself.[26]

[29] In my view, the applicant has not provided any evidence or argument that could overcome the "high threshold" imposed by the presumption. It is apparent to me that the applicant is a highly assiduous observer. She has made her own estimate of the amount spent defending the HRT Complaint and the Grievances, based on publicly available information about Ministry lawyers' salaries and years of call.[27] She has also provided me with a document that "lists every person who has been involved in [her] case in some form".[28] She has not addressed the arguments or authorities provided by the Ministry in any substantive way. Most significantly, the applicant is a party to the disputes, and although they have now concluded, I am not satisfied that there is no reasonable possibility that disclosure of the disputed record could reveal privileged information. I conclude that the applicant has not rebutted the presumption of privilege over the disputed record.

Applicant's other arguments

[30] The applicant refers to *Francis v. BC Ministry of Justice (No. 3)*, 2019 BCHRT 136, a workplace discrimination case decided by the BC Human Rights Tribunal, but she does not explain the relevance of it. The excerpts she provided deal mainly with the tribunal member's assessment of the credibility of witnesses. That case did not deal with solicitor-client privilege in any way, and I am unable to draw any conclusions from it that are relevant to this inquiry.

[31] The applicant also refers to the *Justice Reform and Transparency Act*, SBC 2013 c 7, but the applicant does not explain, and I am unable to tell, how that Act relates to this inquiry.

Conclusion on s. 14

[32] I conclude that the Ministry has discharged its burden of proving that the disputed record is presumptively privileged. I also find that the applicant has not met the high threshold required to rebut that presumption, having failed to satisfy me that there is no reasonable possibility that disclosure of the record will reveal, or allow her to deduce, communications protected by legal advice privilege. The Ministry is therefore authorized under s. 14 to refuse to disclose the record.

[26] At paras 81-88.
[27] Applicant's response submission at 4-5; the Ministry disputes this estimate.
[28] Applicant's response submission at 6.

CONCLUSION

[33] For the reasons given above, under s. 58(2)(b) of FIPPA, I confirm the Ministry's decision that it is authorized to refuse to disclose the disputed record to the applicant under s. 14.

November 15, 2022

ORIGINAL SIGNED BY

David S. Adams, Adjudicator

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