



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

Decision F05-04

PROVINCIAL HEALTH SERVICES AUTHORITY

David Loukidelis, Information and Privacy Commissioner
May 27, 2005

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Summary: The public body's request that an inquiry under Part 5 of the Act not be held is rejected. Without holding an inquiry under Part 5, it is not plain and obvious the PHSA's claim of solicitor-client privilege for a letter written by a representative of a non-profit society to an executive with a public body will succeed. An inquiry under Part 5 will therefore be held.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 56.

Authorities Considered: B.C.: Order 02-57, [2002] B.C.I.P.C.D. No. 59, Order 01-03, [2001] B.C.I.P.C.D. No. 3.

Cases Considered: *College of Physicians & Surgeons v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 2779 (C.A.).

1.0 INTRODUCTION

[1] This decision deals with the PHSA's request that I decline, under s. 56 of the Act, to proceed with an inquiry under Part 5 of the Act in relation to an access to information request, described further below, that the respondent applicant ("respondent") made to the PHSA under the *Freedom of Information and Protection of Privacy Act* ("Act").

[2] For the reasons given below, I have decided to reject the PHSA's request and direct that this matter proceed to inquiry under s. 56 of the Act.

2.0 DISCUSSION

The access request

[3] On December 23, 2004, the respondent made an access request to the PHSA under the Act. The relevant part of the request reads as follows:

- copy of the letter of April 27, 2000 between the Children's and Women's Health Centre and Ms. Janice Markin of the BC Health Care Risk Management Society. I ask for this letter given that the Commissioner's Office has indicated in Order 04-38 that the letter was not an issue before that Inquiry.

[4] The PHSA responded to the applicant on January 6, 2005, denying access to information under s. 14 of the Act:

The letter you have requested is a confidential communication prepared for the purpose of providing legal advice to the Children's & Women's Health Centre and is therefore protected by solicitor-client privilege. The PHSA and the Children's & Women's Health Centre have exercised their discretion under section 14 of the *Act* to refuse to disclose this letter to you.

[5] The Applicant requested a review of the PHSA's response under Part 5 of the Act and this office referred the matter for attempted settlement under s. 55. These attempts were not successful and the applicant requested that the matter proceed to an inquiry.

[6] On April 5, 2005, the PHSA wrote to this office and asked me to exercise my discretion under s. 56 of the Act to decline to hold an inquiry. The request reads, in part, as follows:

The request in this matter is for disclosure of a letter dated April 27, 2000 from Ms. Janice Markin of the BC Health Care Risk Management Society to Ron McKerrow of the Children's & Women's Health Centre of British Columbia, an agency of the PHSA. The PHSA has refused to disclose the letter on the grounds that it is protected by a solicitor/client privilege. We attach a copy of an Affidavit sworn by Janice Markin, the author of the letter, that was filed in the Inquiry that led to Order 04-38, which dealt with the Children's & Women's Health Centre of British Columbia and the BC Health Care Risk Management Society. Please note that Exhibit "A" to the Affidavit is the document in question and is provided in camera.

It is the position of the PHSA and the position of the BC Health Care Risk Management Society that the letter is subject to solicitor/client privilege and is therefore protected from disclosure under Section 14 of the *Act*. We ask that the Commissioner exercise his discretion under Section 56(1) of the *Act* and refuse to proceed with an inquiry in this matter.

[7] The PHSA and the respondent both provided further submissions. With his submission, the respondent provided me with a June 27, 2001 letter marked "without prejudice". I have not considered that letter in addressing the issue before me.

Parties' arguments

[8] In her affidavit, Janice Markin deposed that the British Columbia Health Care Risk Management Society (“BCHCRMS”) was a non-profit society “established to provide risk management services and liability coverage to hospitals in British Columbia” (para. 2). It was dissolved in 2003 (para. 3).

[9] In para. 4 of her affidavit, Janice Markin deposed that she had reviewed the file of the BCHCRMS in relations to claims that the respondent had advanced against a variety of parties and identified the letter in dispute here. She characterized it as “regarding” the respondent’s claim against another individual and acknowledged that it was addressed to an executive with Children’s & Women’s Health Centre of British Columbia. In para. 6 of her affidavit, she deposed that the letter “was created after legal proceedings had been commenced” by the respondent against the other individual and that it “is a confidential communication between the Health Centre and the BCHCRMS for the purpose of providing professional legal advise for the Health Centre.”

[10] In its May 9, 2005 response to the respondent’s submission, the PHSA says that legal proceedings involving the respondent are still ongoing (para. 2). It said its April 5, 2005 request under s. 56 and the affidavit of Janice Markin are a sufficient basis to decide that an inquiry is not to be held.

Discussion

[11] Section 56(1) of the Act reads as follows:

Inquiry by Commissioner

56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[12] As several previous decisions have indicated, s. 56 confers discretion as to whether to hold a Part 5 inquiry respecting a request for review. As I have noted in earlier decisions, there may be a variety of reasons why this discretion might be exercised in favour of not holding an inquiry. These include the factors expressed in Order 02-57¹ and Order 01-03².

[13] Section 14 of the Act authorizes a public body to refuse to disclose “information that is subject to solicitor-client privilege”. It is well-established that s. 14 incorporates

¹ [2002] B.C.I.P.C.D. No. 59.

² [2001] B.C.I.P.C.D. No. 3.

both branches of solicitor-client privilege. See, for example, *College of Physicians & Surgeons v. British Columbia (Information and Privacy Commissioner)*.³ The first branch of privilege, legal professional privilege, protects confidential communications between a lawyer and client related to the seeking or giving of legal advice. The second kind of privilege, litigation privilege, protects information in records where the dominant purpose for creation of the records was to prepare for or conduct litigation under way or in reasonable prospect at the time the records were created.

[14] It is not clear from the material before me which branch of privilege the PHSA relies on.

[15] The material indicates that litigation was under way between the respondent and various others when the disputed letter was written. There is also evidence that the letter was confidential and written for the purpose of “providing professional legal advice for the [Children’s and Women’s] Health Centre” (para. 6, Markin affidavit).

[16] The fact that litigation was under way involving the respondent and others does not, of course, suffice to establish legal professional privilege. There is no indication in the material provided that either the author or recipient of the letter, sent by the BCHCRMS to the Health Centre, was a lawyer acting in a professional capacity as such. Without more than this, it is not apparent how the letter’s contents constitute the type of confidential communication between a lawyer and a client that is protected by legal professional privilege. Nor, on the face of the letter alone, is it evident that it either contains or discloses such privileged communications.

[17] Turning to litigation privilege, there is an insufficient basis at this time to conclude that the letter’s contents are protected by litigation privilege. As with legal professional privilege, more is needed than the fact that litigation was under way between the respondent and others at the time the letter was written. The evidence at hand is that the letter’s purpose was to provide legal advice for the Children’s and Women’s Health Centre. The test for litigation privilege is whether the record was created for the dominant purpose of preparing for or conducting litigation under way or in reasonable prospect at the time the records were created. Without more than the material now before me, it is not possible to conclude that litigation privilege applies.

3.0 CONCLUSION

[18] Given the nature of the disputed record, and the material at hand, it is not plain and obvious that the disputed record is protected under s. 14 of the Act. I have therefore decided this is not an appropriate case in which to decline to hold an inquiry under Part 5 of the Act. This matter will proceed to an inquiry.

³ [2002] B.C.J. No. 2779 (C.A.).

[19] For clarity, I make no finding and express no view as to whether the disputed record's contents are in fact in whole or in part protected under s. 14 of the Act. That issue remains to be decided and will be decided in the Part 5 inquiry, which I will not conduct, on the basis of the evidence and argument submitted by the PHSA and the respondent.

May 27, 2005

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia