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Order F14-15

PRIVATE CAREER TRAINING INSTITUTIONS AGENCY

Ross Alexander
Adjudicator

June 2, 2014

CanLII Cite: 2014 BCIPC No. 18
Quicklaw Cite: [2014] B.C.I.P.C.D. No. 18

Summary: A journalist requested records relating to the Pacific Career Training Institutions Agency's procurement of legal services from Lawson Lundell for a specified legal matter. The adjudicator determined that the Agency is authorized to refuse to disclose the withheld information because it is subject to solicitor client privilege under s. 14 of FIPPA.

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

Authorities Considered: BC.: Order F14-16, 2014 BCIPC No. 19 (CanLII); Order F13-10, 2013 BCIPC 11 (CanLII); Order F13-05, 2013 BCIPC 5 (CanLII); Order F13-15, 2013 BCIPC 18 (CanLII); Order F07-05, 2007 CanLII 9596.

Cases Considered: *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC), [1983] B.C.J. No. 1499; *B. v. Canada*, 1995 CanLII 2007 (BCSC), [1995] 5 W.W.R. 374 (BCSC); *Gill v. Canada (Attorney General)*, 2012 BCSC 1807.

INTRODUCTION

[1] This inquiry relates to an applicant journalist's request to the Pacific Career Training Institutions Agency ("Agency") for records related to the Agency's procurement of legal services from Lawson Lundell for a specified legal dispute. The applicant seeks records showing the process that led to Lawson Lundell being retained.

[2] The Agency identified an email as the only record responsive to the applicant's request. The email is from the Agency's in-house counsel to a lawyer at Lawson Lundell instructing the lawyer to proceed with a legal matter. The email also confirms the legal fees for providing the specified services.

[3] The Agency initially decided to withhold the email on the basis that solicitor client privilege applied pursuant to s. 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). However, shortly thereafter, it decided to exercise its discretion to disclose most of the email to the applicant. The Agency is only withholding the legal fee that is specified in the email.

[4] This dispute is one of two similar requests for records the applicant made to the Agency. As such, this order is being released concurrently with Order F14-16, which is an inquiry between the same parties on the same general matter as in this inquiry. The records at issue in Order F14-16¹ are legal invoices issued by Lawson Lundell in 2012, as well as accompanying cover letters and proofs of payments by the Agency, regarding the same legal matter.

ISSUE

[5] The issue in this inquiry is whether the Agency is authorized to refuse to disclose the withheld legal fee because solicitor client privilege applies pursuant to s. 14 of FIPPA.

[6] Section 57(1) of FIPPA provides that the Agency has the burden of proof to establish that s. 14 applies.

DISCUSSION

The Record

[7] The record is an email from the Agency's in-house lawyer to Lawson Lundell that instructs Lawson Lundell to provide specified legal services and confirms a previously discussed legal fee for those services. The agency has already disclosed nearly the entire email to the applicant, so the only information at issue is the legal fee.

Preliminary Matter

[8] The applicant has concerns about how and why the Agency retained Lawson Lundell, so, in his view, issues of transparency and accountability are particularly important in this case. His position is that the Agency should provide access to its records due to ss. 2(1)(a) and 6 of FIPPA, which respectively relate to the purposes of FIPPA and the duty of public bodies to assist applicants.

¹ [2014] BCIPC No. 19.

[9] While the object and purpose of FIPPA – including accountability – may assist in interpreting the legislation, the points raised by the applicant do not provide an override of solicitor client privilege, or, for that matter, other exceptions set out in FIPPA.²

Solicitor Client Privilege – s. 14

[10] Section 14 of FIPPA states:

The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[11] Legal advice privilege is a type of solicitor client privilege. The test for legal advice privilege is as follows:

[T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:

1. there must be a communication, whether oral or written;
2. the communication must be of a confidential character;
3. the communication must be between a client (or his agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

If these four conditions are satisfied then the communications (and papers relating to it) are privileged.³

[12] The email at issue consists of instructions to legal counsel, and is clearly subject to solicitor client privilege. I find that the email from the Agency to Lawson Lundell is of a confidential character between a client and a legal advisor in direct relation to the seeking, formulating or giving of legal advice.

[13] While the email is clearly subject to solicitor client privilege and exempt from disclosure under s. 14, the Agency has chosen to disclose most of it to the applicant. Although not addressed by the parties, in my view this raises the issue of whether the Agency waived privilege to the entire email. As the adjudicator

² Section 4 of FIPPA specifies information rights. This section requires public bodies to provide access to requested records, unless it is information excepted from disclosure under Division 2, Part 2 of FIPPA. Section 14 is one of the provisions in Division 2, Part 2.

³ *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC). For example, see Order F13-10, 2013 BCIPC 11 (CanLII) or Order F13-05, 2013 BCIPC 5 (CanLII).

stated in Order F13-15,⁴ citing the Supreme Court of Canada in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*:⁵

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege knows of the existence of the privilege and voluntarily demonstrates an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.⁶

[14] As stated in *Gill v. Canada (Attorney General)*, "...cases dealing with whether waiver of privilege over part of a communication will be deemed to be waiver over the entire communication are based on unfairness to the other party. They prevent a party engaging in selective and self-serving disclosure...".⁷ In the context of FIPPA, Adjudicator Austin-Olsen stated in Order F07-05:

If a public body makes partial disclosure of privileged material in an effort to follow a "policy of transparency", this should not be weighed against it in terms of assessing the public body's conduct for the purpose of determining an intention to waive privilege. In this sense, the underlying motivation of the public body for partially disclosing privileged legal advice, as opposed to its motivation for seeking it in the first place, is relevant to an assessment of whether waiver of privilege has occurred. To hold otherwise would prejudice the public body for taking action which is in fact consistent with the express purpose of FIPPA, which is "to make public bodies more accountable to the public."⁸

[15] In this case, although the Agency believed the entire email was subject to solicitor client privilege, it chose to exercise its discretion to disclose nearly the entire record to the applicant. It is clear that the Agency did not intend to waive privilege over the legal fee, and it specifically opted to sever this information before disclosing the rest of the email to the applicant. The fact that the Agency exercised its discretion to increase transparency by disclosing privileged information to the applicant should not be weighed against it in assessing its conduct for the purpose of determining an intention to waive privilege. Further, in my view, it is neither unfair nor misleading for the Agency to withhold the specified legal fee from the email. Therefore, I find that the partial disclosure of the email does not require the Agency to disclose the remainder of it. The Agency is authorized to refuse to disclose the information in dispute because it is subject to solicitor client privilege under s. 14 of FIPPA.

⁴ 2013 BCIPC 18 (CanLII).

⁵ [1983] B.C.J. No. 1499.

⁶ Order F13-15, 2013 BCIPC No. 18 (CanLII) at para. 22.

⁷ 2012 BCSC 1807 at para. 32.

⁸ Order F07-05, 2007 CanLII 9596 at para. 26.

CONCLUSION

For the reasons given above, under s. 58 of FIPPA, I order that the Agency is authorized to withhold the legal fee specified in the email under s. 14 of FIPPA.

June 2, 2014

ORIGINAL SIGNED BY

Ross Alexander
Adjudicator

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