



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

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Order F17-12

## MINISTRY OF FINANCE

Carol Whittome  
Adjudicator

March 29, 2017

CanLII Cite: 2017 BCIPC 13  
Quicklaw Cite: [2017] B.C.I.P.C.D. No. 13

**Summary:** An applicant requested records related to a workplace investigation. The Ministry of Finance disclosed the responsive records but severed the contents of one email pursuant to ss. 13 (advice and recommendations) and 14 (legal advice) of FIPPA. The adjudicator found that the Ministry was authorized to withhold the information under s. 14, and therefore did not need to consider s. 13.

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

**Authorities Considered: B.C.:** Order F15-52, 2015 BCIPC 55 (CanLII); Order F15-67, 2015 BCIPC 73 (CanLII); Order F10-20, 2010 BCIPC 31 (CanLII); Order 00-06, 2000 CanLII 6550 (BC IPC); Order 04-25, 2004 CanLII 45535 (BC IPC); Order F13-29, 2013 BCIPC 38 (CanLII); Order F16-26, 2016 BCIPC 28 (CanLII).

**Cases Considered:** *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *R. v. B.*, 1995 CanLII 2007 (BC SC); *R. v. Campbell*, 1999 CanLII 676 (SCC).

## INTRODUCTION

[1] This inquiry involves an applicant's request for records relating to a workplace bullying investigation. The Public Service Agency, which is part of the Ministry of Finance (the "Ministry"), disclosed some records to the applicant after severing information from them under ss. 13 (policy advice), 14 (solicitor

client privilege) and 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the Ministry’s decision to withhold information from the records. During mediation, the Ministry released additional information to the applicant but continued to withhold some information pursuant to ss. 13, 14 and 22. Further mediation did not resolve the issue and the applicant requested to proceed to a written inquiry.

[3] In his request for an inquiry, the applicant advised that he only wanted access to one record.<sup>1</sup> This sole record is an email between multiple provincial government employees. It was not clear from the submissions whether the Ministry applied s. 14 to the entire material, or whether s. 14 applied to only some of the material, with s. 13 applied to the remainder. The Ministry clarified that s. 14 is applied to all of the material in dispute.<sup>2</sup>

## ISSUES

[4] The issue to be decided in this inquiry is as follows:

1. Is the Ministry authorized to refuse to disclose the information at issue under section 13 of FIPPA because disclosure would reveal advice or recommendations?
2. Is the Ministry authorized to refuse to disclose the information at issue under section 14 of FIPPA because the information is subject to solicitor client privilege?

[5] Pursuant to section 57 of FIPPA, the Ministry has the burden of proving that the applicant has no right of access to the information it is refusing to disclose under ss. 13 and 14.

## DISCUSSION

### *Record*

[6] The record at issue in this inquiry is an email that is related to a workplace investigation regarding bullying allegations. This one-page email is from one Ministry employee to another, and it is copied to two Public Service Agency employees, two other Ministry employees and legal counsel at the Ministry of Justice, Legal Services Branch.

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<sup>1</sup> Investigator’s Fact Report, para. 6; Ministry submissions, para. 7.

<sup>2</sup> Email from legal counsel to the Ministry to the OIPC Registrar, dated March 9, 2017

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### **Solicitor Client Privilege – Section 14**

[7] The Ministry focuses its submissions on s. 14 of FIPPA, so I will begin with that analysis.

[8] 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.

[9] Section 14 includes both types of solicitor client privilege found at common law: legal advice privilege and litigation privilege.<sup>3</sup> The Ministry is claiming legal advice privilege over the information it has withheld under s. 14.

[10] The test for legal advice privilege has been articulated 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.<sup>4</sup>

[11] The above criteria have been consistently applied in OIPC orders, and I will consider the same criteria here.<sup>5</sup>

### ***Parties' Positions***

[12] The Ministry did not provide me with copies of the records to which it applied s. 14. However, the Ministry submits that the content of an affidavit sworn by the Ministry's legal counsel (who is the same legal counsel copied on

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<sup>3</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 26.

<sup>4</sup> *R. v. B.*, 1995 CanLII 2007 (BC SC), para. 22.

<sup>5</sup> See, for example, Order F15-52, 2015 BCIPC 55 (CanLII), para. 10; Order F15-67, 2015 BCIPC 73 (CanLII), para. 12.

the email) establishes that the four criteria are met in this case, and it is therefore authorized to withhold the information.

[13] In that affidavit, legal counsel describes the record at issue and states that he has reviewed it.<sup>6</sup> He further states that he was copied on the email because of his role as legal counsel to the Ministry and his involvement in providing legal advice on the specific issue addressed in the record.<sup>7</sup>

[14] Legal counsel also deposes that the information withheld consists of confidential email communications between the government employees and that it contains a summary of legal advice that he provided to the Ministry as part of his role as government legal counsel.<sup>8</sup> He further states that he believes the email sender created the record as a result of the legal advice he provided and, to the best of his knowledge, this email has not been shared with anyone outside of the provincial government.<sup>9</sup>

[15] The applicant agrees that the record is a communication that appears to be of a “confidential character” but submits that it is neither communication between a client and legal advisor, nor is it directly related to the seeking, formulating or giving of legal advice.<sup>10</sup> He states that the sender and recipient are not legal advisors, and that the communication is not part of an email thread where the sender or the receiver are legal advisors, and therefore the email “cannot possibly be interpreted as anything other than a communication between two public servants.”<sup>11</sup>

[16] The applicant makes further submissions on s. 14 but they focus on the possible violation of internal Ministry and government policies or standards of conduct. I have determined that they are not relevant, as they do not pertain to whether the Ministry is authorized to withhold the information under s. 14 of FIPPA. I therefore do not give any weight to the applicant’s assertions regarding this extraneous information.

### *Analysis and Conclusion*

[17] I am satisfied that the communication was of a confidential nature, and the applicant does not dispute this. Therefore, the remaining questions are whether it is communication between a client and lawyer and whether it is directly related to the seeking, formulating, or giving of legal advice.

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<sup>6</sup> Macphee Affidavit, paras. 4 and 5.

<sup>7</sup> Macphee Affidavit, paras. 5 and 7.

<sup>8</sup> Macphee Affidavit, paras. 6 and 8.

<sup>9</sup> Macphee Affidavit, paras. 8 and 9.

<sup>10</sup> Applicant submissions, p. 1.

<sup>11</sup> Applicant submissions, pp. 1 and 2.

[18] Solicitor client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency.<sup>12</sup> As the applicant points out, the government's legal counsel is copied on the email but he is not the sender of the email and he is also not the direct recipient of the email.

[19] Numerous decisions have noted that a communication (even if it is confidential), addressed by a client to someone and also copied to the client's lawyer does not, without more, mean that the communication is privileged.<sup>13</sup> However, in this case, the affidavit evidence is that the email contains a summary of legal advice previously provided to the client by the lawyer copied on the email. I accept the Ministry's affidavit evidence. I find that disclosing this information would clearly reveal the substance of the legal advice rendered, which would reveal confidential communications between a client and lawyer for the purpose of seeking, formulating, or giving legal advice. Therefore, I find that the Ministry is authorized to refuse the applicant access to the information at issue under s. 14, as it is subject to solicitor client privilege.

[20] This finding is consistent with previous orders that have found that internal discussions about legal advice are protected by solicitor client privilege because they are related to the seeking, formulating or giving of the legal advice.<sup>14</sup>

### **Section 13 – Advice or Recommendations**

[21] I have already determined that the Ministry is authorized to refuse to disclose the information pursuant to s. 14; therefore, I do not have to consider whether s. 13 applies to the withheld information.

### **CONCLUSION**

[22] I confirm the Ministry's decision to refuse to disclose the information withheld pursuant to s. 14 of FIPPA.

March 29, 2017

### **ORIGINAL SIGNED BY**

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Carol Whittome, Adjudicator

OIPC File No.: F15-61581

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<sup>12</sup> *R. v. Campbell*, 1999 CanLII 676 (SCC), para. 49.

<sup>13</sup> See, for example, Order F10-20, 2010 BCIPC 31 (CanLII), para. 14, citing Order 00-06, 2000 CanLII 6550 (BC IPC).

<sup>14</sup> See, for example, Order 04-25, 2004 CanLII 45535 (BC IPC), para. 104; Order F13-29, 2013 BCIPC 38 (CanLII), para. 18; Order F16-26, 2016 BCIPC 28 (CanLII), para. 32.