Order F19-47

MINISTRY OF ATTORNEY GENERAL

Ian C. Davis
Adjudicator

December 18, 2019

CanLII Cite: 2019 BCIPC 53
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Summary: The applicant requested access to a record that contains the total legal costs incurred by the Province in ongoing litigation to which the applicant is a party. The Ministry refused to disclose the information on the basis of solicitor-client privilege under s. 14 of FIPPA. The adjudicator confirmed the Ministry's decision.

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

INTRODUCTION

[1] The applicant requested from the Ministry of Attorney General (Ministry) the total legal costs spent by the Province in litigation during a roughly four-year period ending in January 2018 (Litigation).[1] The Litigation concerns a decision of the Director of Child, Family and Community Services to place a child[2] under the care of a family in another province.[3] The undisputed facts are that the applicant is a party to the Litigation,[4] the Litigation is ongoing and it involves proceedings in British Columbia and two other jurisdictions.[5]

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[1] Access request dated January 4, 2018; letter from the applicant to OIPC dated July 22, 2018.
[2] The personal circumstances of the child are relevant to some of the applicant's arguments in this inquiry. However, for the reasons set out below, I have determined that I can resolve the issues in this inquiry without disclosing that information. Accordingly, in the interests of protecting personal privacy and respecting sealing orders and publication bans in the Litigation, I have deliberately omitted from this order details about the child's personal circumstances. By doing so, I intend no disrespect to the applicant or the child.
[3] Affidavit of TN at paras. 7-9.
[4] *Ibid* at para. 9; access request submitted January 4, 2018 at p. 2.
[5] Affidavit of TN at para. 9; Ministry's written reply submissions dated June 7, 2019 at para. 5; applicant's written submissions dated May 24, 2019 at paras. 15-16.

[2] The Ministry created a one-page record in response to the applicant's request (Record).[6] The Ministry refused to disclose the Record to the applicant on the basis of solicitor-client privilege under s. 14 of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation failed to resolve the matter, and the applicant requested an inquiry.

[4] After initial written submissions in this inquiry were completed, the Supreme Court of British Columbia released *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132, which quashed OIPC Order F18-35.[7] Order F18-35 held that a one-page record summarizing the legal fees and disbursements incurred by the Province to defend ongoing constitutional litigation was not protected by solicitor-client privilege. Since the access applicant in the inquiry resulting in Order F18-35 was the Canadian Constitution Foundation, I will refer to the BC Supreme Court decision as "*CCF*".

[5] I offered the parties an opportunity to make submissions about the impact of *CCF* on this inquiry. I received further written submissions from both parties.

PRELIMINARY MATTER

[6] The applicant raised s. 25 of FIPPA for the first time in his initial written submissions.[8] Sections 25(1)-(2) state:

> (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[7] Section 25 is not stated as an issue in the notice of written inquiry or the OIPC investigator's fact report.

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[6] Affidavit of TN at para. 6.
[7] Order F18-35, 2018 BCIPC 38 (CanLII).
[8] Applicant's written submissions dated May 24, 2019 at paras. 3-4.

[8] The Ministry submits that I should decline to consider the s. 25 argument at this late stage.[9] In the alternative, the Ministry requests an opportunity to make further submissions if I find it appropriate to consider s. 25.

[9] A new issue will be considered at the inquiry stage only in "exceptional circumstances and only after receiving permission from the Commissioner to do so."[10] The applicant did not seek permission to add s. 25 as an issue, despite being informed in the notice of written inquiry that "in general, the adjudicator will not consider issues…not in the Investigator's Fact Report."[11] Further, the applicant did not offer an explanation for why he did not seek approval to add s. 25 late.

[10] I find, as other OIPC adjudicators have,[12] that it would undermine the effectiveness of the mediation process to add s. 25 as an issue now. Moreover, I do not see any way in which the numerical information in the Record engages the public interest in the way that previous orders have said is required under s. 25.[13] Accordingly, I decline to consider s. 25.[14]

ISSUE

[11] The only issue to be decided in this inquiry is whether the Ministry may refuse to disclose to the applicant the information in the Record on the basis of solicitor-client privilege under s. 14 of FIPPA. Section 57(1) of FIPPA places the burden on the Ministry to prove that s. 14 applies.

SOLICITOR-CLIENT PRIVILEGE

[12] The Ministry submits that solicitor-client privilege applies to the Record. Section 14 of FIPPA states that "[t]he 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 and litigation privilege.[15] The Ministry argues that both forms of privilege apply to the Record.[16]

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[9] Ministry's written reply submissions dated June 7, 2019 at paras. 13-16.
[10] Order F19-01, 2019 BCIPC 1 at para. 5.
[11] Notice of written inquiry dated April 2, 2019 at p. 1.
[12] See e.g. Order F08-02, 2008 CanLII 1647 (BC IPC) at paras. 27-30; Order F18-11, 2018 BCIPC 14 at paras. 7-8.
[13] See e.g. Order F16-34, 2016 BCIPC 38 (CanLII) at para. 10; Investigation Report F16-02, [2016] B.C.I.P.C.D. No. 36 at p. 36.
[14] For orders that came to similar conclusions regarding s. 25, see e.g. Order F16-30, 2016 BCIPC 33 (CanLII) at paras. 12-14; Order F16-34, 2016 BCIPC 38 (CanLII) at paras. 8-10.
[15] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.
[16] Ministry's written submissions dated May 2, 2019 at para. 48.

Privilege and Legal Billing Information

[13] Legal billing information, including fees and disbursements, is subject to a presumption that solicitor-client privilege applies.[17] This is because billing information reflects work done by the lawyer for the client based on the client's instructions and it "arises out of the solicitor-client relationship and of what transpires within it."[18]

[14] However, the presumption may be rebutted if there is no reasonable possibility, from the perspective of an assiduous inquirer, that disclosure of the amount of the legal fees would directly or indirectly reveal privileged communications.[19] The onus is on the applicant "to rebut the presumption of privilege by way of evidence or argument".[20] There is no onus on the Ministry to establish that there is a reasonable possibility, by way of any particular inference, that the Record would reveal privileged communications related to the Litigation.[21]

Does the presumption of privilege apply?

[15] I accept the sworn evidence of the Ministry that the Record contains legal billing information recording the total legal costs incurred by the Province in the Litigation during the time period requested by the applicant.[22] This is billing information arising out of the solicitor-client relationship between Ministry lawyers and their client, the Province. Therefore, the Record is subject to a presumption that it is protected by solicitor-client privilege.

Has the presumption been rebutted?

[16] The applicant submits that the presumption of privilege has been rebutted. The applicant says the "deduction or acquisition of privileged information is impossible through the disclosure of a single figure."[23] The Ministry argues that disclosing the total amount of the legal fees would allow an assiduous inquirer to infer privileged information about "trial strategy, preparation, workload, the importance of the case to the client, and the resources the Ministry is willing to expend."[24]

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[17] *Maranda v. Richer*, 2003 SCC 67 at para. 32-33; *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at paras. 34-50 [*CCF*]; *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 at para. 100 [*Central Coast*].
[18] *Maranda*, *ibid*.
[19] *CCF*, *supra* note 17 at para. 55; *Central Coast*, *supra* note 17 at para. 123.
[20] *Ibid* at para. 55 citing *Central Coast*, *supra* note 17 at para. 121.
[21] *Ibid* at para. 58.
[22] Affidavit of TN at para. 6.
[23] Applicant's submissions dated May 24, 2019 at para. 46.
[24] Ministry's submissions dated May 2, 2019 at para. 42.

[17] With respect to the impact of *CCF* on this inquiry, the applicant notes the decision is under appeal and submits that "strict reliance" on the decision is "premature".[25] The applicant argues that *CCF* is distinguishable from this inquiry in terms of both the nature of the access request and the nature of the underlying litigation. The Ministry argues that *CCF* is dispositive of this inquiry because there is "no material distinction" between this inquiry and *CCF*.[26]

[18] In determining whether the presumption of privilege has been rebutted, courts and OIPC adjudicators have considered:

1) the nature of the legal matters to which the billing information applies, and the background giving rise to those matters;[27]

2) if the legal matters involve litigation, the stage of the litigation;[28]

3) the inquirer's involvement in the legal matters, including:

   i. the inquirer's level of background knowledge;[29]
   ii. whether the inquirer is a party to the litigation;[30] and
   iii. whether disclosure would prejudice an opposing party to the litigation;[31]

4) the nature of the billing information, including:

   i. whether the information pertains to one or multiple legal matters;[32] and
   ii. whether the information is a summary of total costs or a detailed breakdown;[33] and

5) the length of time covered by the billing information.[34]

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[25] Applicant's submissions dated November 25, 2019 at p. 1.
[26] Ministry's submissions dated November 24, 2019 at p. 1.
[27] See e.g. *Richmond (City) v. Campbell*, 2017 BCSC 331 at paras. 81-93.
[28] See e.g. *CCF*, *supra* note 17 at para. 62; *Central Coast*, *supra* note 17 at para. 132; Order F15-16, 2015 BCIPC 17 (CanLII) at para. 24; Order F16-35, 2016 BCIPC 39 (CanLII) at paras. 17-18.
[29] See e.g. Order F17-55, 2017 BCIPC 60 (CanLII) at para. 36.
[30] See e.g. *Central Coast*, *supra* note 17 at para. 134.
[31] See e.g. *Central Coast*, *ibid*; *Corp. of the District of North Vancouver v. B.C. (The Information and Privacy Commissioner*), [1996] B.C.J. No. 2534, 1996 CanLII 521 at paras. 47-52 (S.C.).
[32] See e.g. Order F15-64, 2015 BCIPC 70 (CanLII) at para. 25; Order F15-16, *supra* note 28 at para. 36; Order F16-35, *supra* note 28 at para. 18.
[33] See e.g. Order F15-16, *supra* note 28 at para. 23; Order F17-55, *supra* note 29 at para. 36; Order F18-04, 2018 BCIPC 04 (CanLII) at para. 29.
[34] See e.g. Order F15-64, *supra* note 32; Order F15-16, *supra* note 28 at para. 32; Order F16-35, *supra* note 28 at para. 18.

[19] In my view, the consideration that outweighs all others is that the applicant is a party to the Litigation, which is ongoing. The applicant has (or has access to) detailed and reliable information about the Litigation. Although the applicant states that sealing orders and publication bans are in place in the Litigation,[35] he did not provide evidence to establish that such orders preclude the parties to the Litigation from accessing the court files. Such orders have not prevented parties from accessing a sealed court file in other cases including, for example, a recent case involving the Director of Child, Family and Community Services.[36]

[20] Given these circumstances, I find there is a reasonable possibility that disclosure of the Record would allow the applicant to deduce privileged communications between the Province and its lawyers. As a party to ongoing litigation, the applicant is a particularly well-informed assiduous inquirer. The applicant has access to detailed information about the Litigation that would enable him to make informed inferences about matters relating to the Province's litigation strategy and preparation. In my view, the comments of Mr. Justice Butler in *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)* apply:

> [134] If the access applicant is also a litigant in the proceeding in question, there is no question that any insight they might gain into these matters [about an opposing party's trial preparation and strategy] could be prejudicial to the public body's interests in the litigation and would therefore operate to undermine the sanctity of the solicitor-client relationship.[37]

[21] Further, I find *CCF* supports the conclusion in this inquiry that the presumption of privilege has not been rebutted. In *CCF*, the Canadian Constitution Foundation sought disclosure from the Province of the total cost incurred by the Province from January 1, 2009 to January 18, 2017 to litigate the *Cambie Surgeries* case. That case involves a landmark constitutional challenge to healthcare legislation. The Canadian Constitution Foundation provided financial support to the plaintiffs in the litigation.

[22] In the inquiry before the OIPC, the adjudicator held that the presumption of privilege applied but was rebutted. The OIPC inquiry was adjudicated while the litigation was ongoing. The adjudicator reasoned that disclosing the total legal costs would only reveal what would be obvious to anyone knowledgeable about the litigation, i.e. that the Province was vigorously defending the case and the legal fees were substantial. According to the adjudicator, knowing the exact amount of the fees would not allow an assiduous inquirer to infer anything beyond what was already evident from the facts publicly available.

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[35] Applicant's written submissions dated November 25, 2019 at p. 2-3.
[36] *The Director, Child, Family and Community Services Act v. Registrar General of the Vital Statistics Agency of the Province of British Columbia*, 2019 BCSC 1859 at para. 35.
[37] *Central Coast*, *supra* note 17 at para. 134.

[23] On judicial review, the Court quashed the adjudicator's order. Madam Justice Ross reasoned:

> [62] In my view this line of reasoning is not sufficient to discharge the onus of proof to rebut the presumption of privilege, particularly in circumstances of ongoing litigation. I agree that the Cambie Litigation is an important constitutional case, that it is hard fought on both sides and that the amount of legal cost is undoubtedly substantial. However, in my view, an assiduous inquirer, aware of the background available to the public (which would include how many court days had been occupied both at trial and in chambers applications, the nature of those applications, the issues disclosed in the pleadings, and the stage of the litigation for the period covered by the request), would, by learning the legal cost of the litigation, be able to draw inferences about matters of instruction to counsel, strategies being employed or contemplated, the likely involvement of experts, and the Province's state of preparation. To use the CCF submission quoted by the Adjudicator, the difference between an $8 million expenditure and a $20 million expenditure would be telling to the assiduous inquirer and would in my view permit that inquirer to deduce matters of privileged communication.[38]

[24] The Ministry submits that *CCF* is dispositive. The applicant disagrees and submits that strict reliance on *CCF* is premature given that it is under appeal. The applicant, however, did not seek an adjournment pending the outcome of the appeal.

[25] What *CCF* says regarding the rebuttable presumption applicable to legal fees is the most current statement of the law and I am bound to follow it to the extent that it applies to the facts of this inquiry.[39] I have not, however, placed strict reliance on *CCF*. While the facts in *CCF* and this case share similarities, I concluded above that the presumption of privilege has not been rebutted based on the facts in this case.

[26] In my view, the facts in the present case are even stronger in favour of the presumption not being rebutted than those in *CCF*. The applicant is a party of record as opposed to being only a financial supporter of the party of record, as in *CCF*. In this inquiry, the applicant's request covers a time period roughly half as long as that involved in *CCF*. Further, the Court in *CCF* held that the total, undifferentiated nature of the amount of legal fees was no barrier to the assiduous inquirer inferring privileged information. The same reasoning applies here.

[27] In the result, I conclude that the presumption of privilege has not been rebutted. The Record is privileged.

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[38] *CCF*, *supra* note 17 at para. 62.
[39] See e.g. *Azzam v. Canada (Citizenship and Immigration)*, 2019 FC 549 at para. 11.

EXCEPTIONS TO PRIVILEGE

[28] The applicant's submissions cite the "future crimes and fraud" and the "public safety" exceptions to solicitor-client privilege.[40] The burden is on the applicant to prove any exception to privilege.[41] I understand the applicant to be alleging that the Litigation involves intentionally unlawful conduct on the part of the Province and that the decision of the Director in the Litigation places the child at risk of serious harm. The applicant cites several reports of the Representative for Children and Youth regarding critical injuries and deaths involving children in government care.

[29] The "future crimes and fraud" exception states that solicitor-client communications which are in themselves intentionally unlawful or contemplate intentional unlawful conduct are not privileged.[42] The "public safety" exception says that if a client communicates to a lawyer information which raises a clear and imminent risk to an identifiable person or group of persons, the information is not privileged.[43] I find that neither exception applies in this case because the information in dispute is dollar figures. The applicant does not explain, or provide evidence to show, how these figures could conceivably be an unlawful communication or raise a clear and imminent risk to anyone.

[30] I find that solicitor-client privilege applies to the information in dispute and the Ministry may refuse to disclose it under s. 14. Given this conclusion, I need not address the Ministry's alternative argument that litigation privilege applies to the Record.

CONCLUSION

[31] For the reasons given above, under s. 58(2) of FIPPA, I confirm the Ministry's decision that it is authorized under s. 14 of FIPPA to refuse the applicant access to the Record.

December 18, 2019

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F18-74257

[40] Applicant's written submissions dated May 24, 2019 at paras. 47, 55-56, 66, and 69.
[41] *Jones v. Smith*, [1999] 1 S.C.R. 455 at para. 46.
[42] *Descoteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 22-29.
[43] *Jones*, *supra* note 41 at para. 77.