



Order F23-84

THOMPSON RIVERS UNIVERSITY

D. Hans Hwang
Adjudicator

October 4, 2023

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Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to Thompson Rivers University (TRU) for all emails a former vice-president at TRU sent and received relating to a workplace complaint involving the applicant. TRU withheld most of the responsive records under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege) and 22 (unreasonable invasion of privacy) of FIPPA. The adjudicator found that TRU was authorized to withhold the records it withheld under s. 14. As a result, the adjudicator did not need to consider ss. 13 and 22.

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

INTRODUCTION

[1] A faculty member (applicant) at Thompson Rivers University (TRU) asked TRU for access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to emails sent and received by a former vice-president at TRU in relation to TRU's workplace conduct investigation involving the applicant.

[2] TRU withheld the records in dispute under ss.13(1) (advice or recommendations), 14 (solicitor-client privilege) and 22 (unreasonable invasion of privacy) of FIPPA. The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review TRU's decision. Mediation by the OIPC did not resolve the matter and it proceeded to this inquiry.

[3] Some of the records in dispute in this case overlap with some of the responsive records in Order F23-85 which is being issued concurrently with this order.

ISSUES

[4] The issues I must decide in this inquiry are:

1. Is TRU authorized to withhold the information at issue under s. 13(1)?
2. Is TRU authorized to withhold the information at issue under s. 14?
3. Is TRU required to withhold the information at issue under s. 22?

[5] Section 57(1) places burden on TRU, as the public body in this case,¹ to prove the applicant has no right to access all or part of the records in dispute under ss. 13(1) and 14.

[6] Under s. 57(2), the applicant bears the burden of proving that disclosure of the personal information withheld under s. 22 would not be an unreasonable invasion of third-party personal privacy. However, TRU first has the initial burden of proving the information at issue qualifies as personal information under s. 22(1).²

DISCUSSION

*Background*³

[7] TRU is a post-secondary institution that provides educational services to approximately 25,000 students. TRU employs around 2,000 faculty and staff.

[8] The applicant is a TRU faculty member and has filed requests for access to records relating to TRU's investigations and his employment.

Information at issue

[9] The responsive records total 35 pages, with 24 pages containing the information at issue. The information consists of several email chains. TRU has almost completely withheld the 24 pages, but in a few instances, it disclosed the email's date, subject line, sender and recipient names, signature blocks and greetings.⁴

¹ Schedule 1 of FIPPA.

² Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.

³ The information in this background section is based on TRU's initial submission at paras 12-19.

⁴ TRU disclosed the senders and recipients but withheld the body of the emails in pages 22-24 of the records in dispute.

Solicitor-client privilege, s. 14

[10] Section 14 permits a public body to refuse to disclose information that is subject to solicitor-client privilege. This section encompasses both legal advice privilege and litigation privilege.⁵ TRU is relying on legal advice privilege to withhold the records in dispute.⁶

[11] In order for legal advice privilege to apply, there must be:

1. a communication between solicitor and client (or their agent);
2. that entails the seeking or giving of legal advice; and
3. that is intended by the solicitor and client to be confidential.⁷

[12] Courts have found that solicitor-client privilege extends beyond the actual requesting or giving of legal advice to the “continuum of communications” between a lawyer and client, which includes the necessary exchange of information for the purpose of providing legal advice.⁸

[13] Legal advice privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information. For example, legal advice privilege extends to internal client communications that discuss legal advice and its implications.⁹

Evidentiary basis for solicitor-client privilege

[14] TRU did not provide me with access to the information it withheld under s. 14. To support its claim of privilege over the responsive records, TRU provided affidavit evidence from an in-house lawyer at TRU (SDB).

[15] Section 44(1)(b) gives me, as the Commissioner’s delegate, the power to order production of records to review them during the inquiry. However, given the importance of solicitor-client privilege, and in order to minimally infringe on that privilege, I would only order production of records being withheld under s. 14 when it is absolutely necessary to decide the issues in dispute.¹⁰

⁵ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para 26.

⁶ TRU’s Initial submission at para 22.

⁷ *Solosky v The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 [Solosky] at p 837.

⁸ *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para 83. See also *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [Camp Developments] at paras. 40-46.

⁹ See for example Order F22-34, 2022 BCIPC 38 at para 41, Order F22-53, 2022 BCIPC 60 at para 13, and Order F23-07, 2023 BCIPC 8 at para 25.

¹⁰ Order F19-14, 2019 BCIPC 16 (CanLII) at para 10; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 17; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 68.

[16] After reviewing TRU's submissions and evidence, I determined that I did not have enough information to decide if s. 14 applies to the disputed records. I offered TRU an opportunity to provide additional evidence in support of its privilege claim.¹¹ TRU provided an affidavit sworn by its privacy and access officer who is also legal counsel for TRU (Privacy and Access Officer). The applicant responded to TRU's additional evidence.

[17] Considering the supplemental evidence provided by TRU, I am now satisfied that I have sufficient detail to make an informed decision on whether s. 14 applies and it is not necessary to order production of the records under s. 44.

Analysis and findings

Role of an external lawyer

[18] Before I consider the specific records in dispute, I will first address the parties' arguments about the role of an external lawyer (SC) who was retained by TRU to conduct the workplace investigation.

[19] As outlined above, legal advice privilege only arises where a solicitor is acting as a lawyer.¹² For instance, when a lawyer is hired as an investigator only, solicitor-client privilege does not apply to the communications between the lawyer and client. However, where a lawyer is conducting an investigation for the purposes of giving legal advice, privilege will attach to those communications.¹³

[20] TRU explains that TRU's past practice has been to hire a lawyer to investigate workplace complaints and provide legal advice concerning the investigations and allegations. TRU says it retained SC, as an external lawyer, to investigate the workplace complaint involving the applicant and provide legal advice to TRU.¹⁴ TRU says that while it did not ultimately proceed with the investigation in this case, it does not change the fact that TRU engaged SC for the purpose of seeking her legal advice as a lawyer.¹⁵ SDB deposes that although it was not reflected in the terms of reference for retaining SC, TRU hired her to act as a legal advisor to provide legal advice in relation to the proposed investigation.¹⁶

[21] The applicant disputes that SC provided TRU with legal advice. The applicant says that SC's involvement was limited to conducting an investigation into the workplace complaint and that the terms of reference for SC do not imply

¹¹ OIPC's letter dated August 22, 2023.

¹² *College* at para 32.

¹³ *Ibid* at para 32; *Gower v Tolko Manitoba Inc.*, 2001 MBCA 11 at paras 37-38.

¹⁴ TRU's initial submission at para 18.

¹⁵ TRU's initial submission at para 45.

¹⁶ Affidavit #1 of SDB at para 12.

a solicitor-client relationship. To support this, the applicant has attached a copy of terms of reference that were signed by TRU and JH, a different external investigator.¹⁷ The applicant says the role of an investigator described in the JH's terms of reference was not to provide legal advice.

[22] In response, TRU says that even if it was not reflected in the terms of reference for SC, she was engaged to provide legal advice and that fact was reflected in TRU's communications with her. TRU says that given the early stage of the investigation and the fact that it ultimately did not proceed, the terms of reference for SC are not determinative of the question. Had the investigation proceeded, the terms of reference may have been amended to clarify TRU's expectations.¹⁸ TRU also says that the terms of reference for JH relate to a different investigation, and they were subsequently amended for that investigation.

[23] SC deposes that she had an initial consultation with TRU's vice-president about the workplace complaint and in that consultation, she provided legal advice about whether the allegations merited investigation and the scope of the investigation. SC also deposes the disputed information contains communications that were part of the initial consultation.¹⁹

[24] TRU's evidence satisfies me that SC provided an initial consultation to TRU in her capacity as a lawyer and communications between TRU and SC during the consultation were made within the context of a solicitor-client relationship.

[25] I will now consider whether the records in dispute are subject to legal advice privilege. The records consist of several email chains between TRU staff and lawyers.

*SC Email*²⁰

[26] The Privacy and Access Officer deposes that there is an email between TRU's vice president (Vice President) and SC in which TRU shared with SC a legal opinion from an external legal counsel (JDW). The Privacy and Access Officer deposes that the SC Email attached several email communications between TRU's in-house lawyer (JS), JDW and the Vice President for the purpose of seeking and providing legal advice. Specifically, she deposes that these communications are all concerned with the workplace investigation involving the applicant and forwarding the lawyers' legal opinions. The Privacy and Access Officer further deposes that these communications are confidential in

¹⁷ Applicant's response submission, Exhibit G "Terms of reference for JH".

¹⁸ TRU's reply submission at para 18.

¹⁹ Affidavit #1 of SC at paras 5-8.

²⁰ Pages 1-8 of the record in dispute.

nature and some of the emails (e.g., emails dated April 11 and March 23, 2021) have the notation “privileged and confidential” on them.²¹

[27] I am satisfied that the email between the Vice President and SC is a written communication between a client and its solicitor. TRU, as the client, forwarded the information in the email, including the attachments, to SC for the purposes of SC providing legal advice to TRU.²² I accept the Privacy and Access Officer’s evidence that the SC Email and its attachments have been treated as confidential communications by TRU. She deposes the only individuals included in the emails are TRU’s lawyers and TRU staff. As such, I am satisfied that the SC Email, including its attachments, is a communication that did not include anyone outside of the solicitor-client relationship and it was intended to be confidential. Therefore, I find that legal advice privilege applies to the SC Email and its attachments.

*Vice President emails*²³

[28] TRU is withholding several emails the Vice President sent and received. The Access and Privacy Officer explains that these emails were between the Vice President and a director at TRU. She further explains these emails provide the director with a legal opinion the Vice President received from JS about ongoing legal proceedings in which TRU has been a party.²⁴ I am satisfied that these emails are confidential communications between solicitor and client for the purpose of seeking or giving legal advice and, therefore, legal advice privilege applies to the Vice President emails.

*Associate Director email*²⁵

[29] The Privacy and Access Officer explains that TRU is withholding the body of an email between an associate director and a former interim president at TRU.²⁶ She deposes this email refers to communications in which JSR, another of TRU’s external lawyers, summarized legal advice and opinion for TRU. Further, SDB deposes that disclosing the withheld communications would permit the content or subject matter of the legal advice to be inferred.²⁷

[30] Given the sworn evidence from the Privacy and Access Officer and SDB, I accept that the email between the associate director and the former interim president contains communications made within the context of the solicitor-client

²¹ Affidavit #1 of Privacy and Access Officer at paras 13a-g.

²² Emails dated April 20, 2021 and April 26, 2021. For similar reasoning, *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 [Lee] at paras 33-35.

²³ Pages 20-21 of the record in dispute.

²⁴ Affidavit #1 of Privacy and Access Officer at paras 15a-b.

²⁵ Pages 22-23 of the record in dispute. This email is also in issue in Order F23-85.

²⁶ Affidavit #1 of Privacy and Access Officer at para 16.

²⁷ Affidavit #1 of SDB at para 17f.

relationship for the purpose of providing legal advice to TRU. The Privacy and Access Officer deposes that the email begins with the notation “Privileged and Confidential”.²⁸ Therefore, I am satisfied that the sender and recipient of the email did not intend to disclose the confidential email to anyone outside of the solicitor-client relationship.

*In-house lawyer SDB’s email chain*²⁹

[31] The Privacy and Access Officer explains that this is an email chain involving SDB, JS and the Vice President. She explains that the email chain includes legal advice JS provided as well as a summary of legal advice from JDW, and it has the notation “privileged and confidential” written on it.³⁰ I accept the communications in this email chain were for the purpose of providing legal advice and were made within the context of a solicitor-client relationship. I also accept the communications were confidential. I am satisfied this email chain is subject to solicitor-client privilege because it would reveal or allow accurate inference to be made about JDW’s legal advice.

*External Lawyer emails*³¹

[32] The Privacy and Access Officer deposes that these emails contain communications between TRU and JDW regarding the legal advice several in-house lawyers provided to TRU. She deposes that the emails between JDW and JS were for the purpose of requesting and providing legal advice. She also deposes these emails would reveal confidential communications between TRU and the lawyers.³² I am satisfied that these communications set out confidential communications between solicitor and client for the purpose of seeking or giving legal advice, and therefore, legal advice privilege applies to them.

Waiver

[33] The applicant asserts that TRU has waived solicitor-client privilege as TRU has previously disclosed some parts of the communications it claimed are privileged.³³ TRU says the applicant’s statement about “waiver of privilege” is not accurate. TRU further says that it released some communications, but they did not contain privileged content and TRU never waived solicitor-client privilege.³⁴

[34] Solicitor-client privilege may be waived in either of the following scenarios:

²⁸ Affidavit #1 of Privacy and Access Officer at para 16a.

²⁹ Pages 24-27 of the record in dispute.

³⁰ Affidavit #1 of Privacy and Access Officer at paras 17a-c.

³¹ Pages 28-30 of the record in dispute.

³² Affidavit #1 of Privacy and Access Officer at paras 18a-d.

³³ Applicant’s response submission.

³⁴ TRU’s reply submission at paras 25-28.

1. The possessor of the privilege knows of the existence of the privilege and has demonstrated a clear intention to waive that privilege (i.e. express waiver); or
2. In the absence of an intention to waive privilege, where fairness and consistency require disclosure (i.e. implied waiver).³⁵

[35] Given the importance of solicitor-client privilege in the functioning of the legal system, evidence justifying a finding of waiver, whether express or implied, must be clear and free of ambiguity.³⁶ The party asserting waiver has the burden of showing that there has been a waiver.³⁷

[36] I am not persuaded that TRU waived its privilege. The applicant did not provide any evidence to demonstrate that TRU waived the legal advice privilege it claims applies to the information at issue. Also, there is nothing before me suggesting that there was an express or implied waiver of privilege. Accordingly, I find the applicant has failed to establish there was a waiver.

Summary, s. 14

[37] I am satisfied that TRU's sworn evidence described the nature of the disputed records and the context in which they were prepared in sufficient detail. I am also satisfied that TRU's evidence sufficiently demonstrated that SC, who was the lawyer retained to investigate, provided legal advice to TRU in her capacity as a lawyer.

[38] I find that all three parts of the test for legal advice privilege are met for all the information in dispute. Disclosing the withheld information would reveal TRU's confidential communications with its lawyers about legal advice TRU sought and received from them. As a result, I conclude the information withheld from the emails is protected by legal advice privilege, and it may be withheld under s. 14.

[39] Since I found that s. 14 applies to all of the information in dispute, it is not necessary to consider whether ss. 13 or 22 also apply.

CONCLUSION

[40] For the reasons given above, under s. 58 of FIPPA, I confirm TRU's decision that it is authorized to withhold the records in dispute under s. 14.

³⁵ Order F23-53 at para 71, citing *S & K Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at para 6.

³⁶ *Maximum Ventures Inc. v de Graaf et al.*, 2007 BCSC 1215 at para 40.

³⁷ *Le Soleil Hotel & Suites Ltd. v Le Soleil Management Inc.*, 2007 BCSC 1420 at para 22.

October 4, 2023

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File No.: F21-87179