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Order F15-41

MINISTRY OF HEALTH

Ross Alexander
Adjudicator

August 21, 2015

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Summary: An applicant requested records relating to a program about medical residency positions for international medical graduates. The Ministry of Health disclosed some information, but withheld most of it on the basis that it was exempt from disclosure under s. 13 (policy advice or recommendations) or s. 14 (legal advice) of FIPPA. The adjudicator determined that the Ministry was authorized to refuse to disclose all of the information withheld under s. 14, but not the information withheld under s. 13.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13 and 14.

Authorities Considered: B.C.: Order F14-57, 2014 BCIPC No. 61 (CanLII); Order 01-28, 2001 CanLII 21582 (BC IPC); Order 00-06, 2000 CanLII 6550 (BC IPC); Order 01-10, [2001] B.C.I.P.C.D. No. 11; **AB:** Order P2011-006, [2011] A.I.P.C.D. No. 67; **ON:** Order PO-2995, [2011] O.I.P.C. No. 126.

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36; *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Blank v. Canada (Minister of Justice)*, 2006 SCC 39; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7; *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC); *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd,* 1983 CanLII 407 (BC SC); *Stevens v. The Prime Minister of Canada (the Privy Council)*, [1997] 2 F.C. 759 (F.C.T.D.); *G.W.L. Properties v. W.K. Grace and Co. of Canada* (1992), 10 C.P.C. (3d) 165 (B.C.S.C.); *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88.

INTRODUCTION

[1] This inquiry relates to an applicant's request to the Ministry of Health (the "Ministry") for records about the International Medical Graduate – BC ("IMG") program. The IMG program provides medical residency positions for international medical graduates.

[2] The Ministry responded to the applicant's request by disclosing some information to her, but withholding most of it under s. 13 (policy advice or recommendations) or s. 14 (legal advice) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[3] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the Ministry's decision to deny access to information.[1]

[4] Mediation did not resolve the matter, and the applicant requested that it proceed to an inquiry under Part 5 of FIPPA. After the Notice of Inquiry was issued – but before the parties provided submissions – the Ministry reconsidered its decision and disclosed additional information to the applicant. However, there remains information withheld under ss. 13 or 14 of FIPPA, so the parties provided submissions with respect to the remaining information.

ISSUES

[5] The issues listed in the Notice of Inquiry are as follows:

a) Is the Ministry authorized to refuse access to information because disclosure would reveal advice or recommendations under s. 13 of FIPPA?

b) Is the Ministry authorized to refuse access to information because it is subject to solicitor client privilege under s. 14 of FIPPA?

[6] Section 57(1) of FIPPA applies to both of the issues in this inquiry, so the Ministry has the burden of proof to establish that these exceptions to disclosure apply.

DISCUSSION

[7] **Background –** Medical residency positions in Canada are posted in the Canadian Residency Matching Service, and are competed for nationally. There are two parallel streams for residency positions. The first stream is the Canadian

[1] The applicant also complained that the Ministry failed to disclose certain records. However, that issue is being addressed separately and it is not an issue in this inquiry.

Medical Graduate ("CMG") stream, which is for graduates of Canadian medical schools and Canadian citizens who graduate from accredited American medical schools. The second is the IMG stream, which is for international medical graduates of accredited schools who have passed the necessary exams for eligibility.[2]

[8] The Ministry funds IMG residency positions in exchange for residents agreeing to provide medical services in an identified BC community in need for two to three years. All IMG stream positions come with this return of service obligation.[3] No CMG stream positions have a return of service obligation.

[9] In addition to the return of service obligations, it is also otherwise advantageous for medical students to be in the CMG stream compared to the IMG stream because the CMG stream has more positions available for applicants,[4] and some of those positions relate to medical discipline areas that are not offered in the IMG stream.

[10] The applicant is affected by the IMG program.[5] She is concerned that Canadians who graduate from international medical schools (known as Canadians Studying Abroad or "CSAs") are at a disadvantage for receiving medical residency positions in BC compared to Canadian medical school graduates and Canadians who graduate from American medical schools.

[11] The 2008 and 2010 BC Government Throne speeches stated that government would increase access to medical residencies for Canadians who receive their medical undergraduate training outside Canada.[6]

[12] In 2008, the Ministry and the UBC Faculty of Medicine ("UBC") reviewed the IMG program with a view to accommodating the interests of CSAs. Several options were identified, but later dropped due to human rights concerns. It was determined that IMGs and CSAs (which are a subset of IMGs) must be treated similarly to avoid Canadian *Charter of Rights and Freedoms*, or BC Human Rights, challenges.[7]

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[2] If a residency position is unfilled after it is first posted in its respective stream, then it is posted again in a process in which CMG and IMG students compete for all unfilled positions regardless of what stream the position was originally designated.
[3] This is regardless of whether an IMG or CMG student ultimately fills the position
[4] "Doctors Today and Tomorrow: Planning British Columbia's Physician Workforce", a policy paper by the British Columbia Medical Association, July 2011 at p. 12: an appendix to the applicant's submissions.
[5] The applicant does not explain how she is affected by the IMG program.
[6] "Action Plan for Repatriating BC Medical Students Studying Abroad", a briefing document prepared for the Honourable Mike de Jong (Minister of Health Services) by Moira Stilwell, MLA, December 2011 [Stilwell Report] at p. 3: an appendix to the applicant's submissions.
[7] "International Medical Graduate Program (IMG-BC) Challenges Facing Canadians Studying Abroad", a briefing document prepared by the Ministry of Health, Ministry of Advanced Education,

[13] In response to the 2010 Throne speech, the Ministry – with the support of UBC – agreed to expand the IMG program.[8] This change increased the number of IMG positions. CSAs remained in the IMG stream.

[14] In December 2011, the Ministry, the Ministry of Advanced Education and UBC prepared a briefing document. It states in part:

> Question: Shouldn't we be giving CSAs preferential treatment over naturalized IMGs; after all, they grew up here? [bolding removed]
>
> Given that the greatest barrier for IMGs/CSAs to access postgraduate training positions in Canada is the fact that international medical school education and training is not necessarily comparable or equivalent to Canadian medical school education, there are no measures that could be introduced to privilege or otherwise treat differently CSAs who apply for postgraduate training positions in Canada or BC. CSAs must be treated in the same manner as all other IMGs. To do otherwise would breach human rights and Canadian Charter legislation.[9]

[15] Shortly thereafter, MLA Moira Stilwell sent a letter and provided a report to the Minister of Health Services recommending that the policies and regulations for CSAs be identical to those in place for Canadian and American trained medical school graduates. It states in part:

> The Ministry of Health Services and the UBC Faculty of Medicine maintain that BC medical students studying abroad must be treated the same as immigrant physicians applying to the BC IMG program because to do otherwise would be a violation of human rights and the Canadian Charter of Rights. Yet no argument to clarify the position has been provided...[10]

[16] The applicant seeks, among other things, disclosure of documents containing discussions about how the interests of CSAs could be accommodated.

[17] **Records in Dispute –** There are two types of records in dispute. One is a table entitled “Proposed Framework for IMGs” (“Proposed Framework”), which states on the face of the record that it was “Updated March 2009”. It was prepared by a Ministry employee to constitute a proposal for a new IMG

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and the UBC Faculty of Medicine, December 2011 [Ministry Briefing Document] at p. 3: an appendix to the applicant’s submissions.

[8] The Ministry Briefing Document at p. 3.

[9] The Ministry Briefing Document at p. 5.

[10] The Stilwell Report at p.10.

framework.[11] The Ministry has already disclosed most of the information in this record to the applicant, but it is withholding portions of it under s. 13 of FIPPA.

[18] The second type of records consists of memorandums from lawyers who work in the Legal Services Branch of the Ministry of Justice (the "memos"). There are five memos in dispute. Two of them are to a Ministry manager, while three of them are to other Legal Services Branch lawyers.[12] One of the memos between lawyers relates to a request for legal advice by the Ministry of Advanced Education,[13] while the other four memos relate to legal advice requested by the Ministry. These records are withheld in their entirety under s. 14 of FIPPA.

Policy advice or recommendations – s. 13

[19] The Ministry is withholding portions of the Proposed Framework under s. 13 of FIPPA. This record was drafted by a Ministry employee for consideration by senior Ministry executives and the Minister of Health.[14]

[20] Section 13 of FIPPA authorizes public bodies to refuse to disclose policy advice or recommendations, subject to specified exceptions in s. 13(2). Section 13 states in part that:

> (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
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> …
>
> (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
>
> (l) a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body,
>
> (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy,…
>
> …

[11] Affidavit of the Ministry Manager of Recruitment and Retention for the Workforce Planning and Management Branch (the "Manager") at para. 11.
[12] Affidavit of the Manager at para. 4.
[13] The full name of the ministry requesting this advice was the Ministry of Advanced Education and Labour Market Development. However, for brevity I will refer to it as the "Ministry of Advanced Education" throughout this order.
[14] Affidavit of the Manager at paras. 11 to 14.

[21] In determining whether s. 13 applies, it is first necessary to establish whether disclosing the information "would reveal advice or recommendations developed by or for a public body or a minister". If so, it is then necessary to consider whether the information at issue is excluded from s. 13(1) because it falls within any of the categories of information listed in s. 13(2) of FIPPA.

[22] As the Supreme Court of Canada stated in *John Doe v. Ontario (Finance)*, the purpose of exempting advice or recommendations from disclosure "is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice."[15] The British Colombia Court of Appeal similarly stated in the *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)* that s. 13 of FIPPA "recognizes that some degree of deliberative secrecy fosters the decision-making process."[16]

Positions of the Parties

[23] The Ministry submits that s. 13(1) of FIPPA applies to the information it is withholding under s. 13, and that none of it falls under s. 13(2). Further, it submits that it appropriately exercised its discretion in determining to withhold this information under s. 13.

[24] The applicant submits that the Ministry has failed to meet its burden to prove that s. 13 applies. She submits that s. 13 is for matters "under consideration", which she submits is not the case here because the Proposed Framework is six years old and the issue is not currently under discussion. She further submits that the underlying purpose of s. 13 does not come into play here because a determination was made and the proposals were not accepted or implemented by the Ministry. Moreover, the applicant submits that while she does not know the contents of the withheld information, she believes s. 13 does not apply because information falls under ss. 13(2)(k) to (m).

Section 13(1)

[25] Section 13(1) applies to information that would directly reveal advice or recommendations if disclosed, as well as information that would enable an individual to draw accurate inferences about advice or recommendations.[17] For s. 13(1) to apply, the information must also have been developed by or for a public body or minister.

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[15] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 43.
[16] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at para. 105.
[17] Order F14-57, 2014 BCIPC No. 61 (CanLII) at para. 14.

[26] First addressing the applicant's submission that a policy decision must still be "under consideration" for s. 13 to apply, I disagree. FIPPA provides a right of access, which is subject to specified limited exceptions. Section 13 is one of those exceptions. While s. 13 does not apply to information in a record that has been in existence for 10 or more years,[18] there is no proviso within it stating that it does not apply because the matter is no longer "under consideration" or because the decision has been made. Therefore, in my view this is not factor in determining whether information is advice or recommendations.[19]

[27] The Proposed Framework was drafted by a Ministry employee for senior Ministry executives and the Minister of Health. I therefore find that this information was developed by and for a public body.

[28] The Proposed Framework is in a table format. The table has three columns, which are entitled: "Program", "Proposed Changes" and "Comments".[20] The table contains rows, each relating to a different change to the IMG program. This continues for the entire Proposed Framework, except the topics in the rows towards the end of the record are under the heading "removed from preferred actions". The Ministry has already disclosed most of the information in this record. For some of the withheld information, the Ministry is withholding all of the information about certain specific topic (*i.e.* it is withholding all of the information in a row). For other withheld information, the Ministry is only withholding information from the "Proposed Changes" and/or the "Comments" column (*i.e.* it is only withholding some of the information in these rows).

[29] The "Program" column contains the subject headings for the changes that were being considered for the IMG program. In this case, the heading information is in the context of a table of proposed changes to the IMG program. To the extent that a topic listed in the "Program" column was not part of the IMG program at the time, disclosure would reveal that the person who drafted the Proposed Framework was advising that the listed topic become part of the IMG program. Further, to the extent the topic was already part of the program, disclosure would reveal that the person who drafted the Proposed Framework was recommending changes to that aspect of the program. Moreover, for those topics in the "removed from preferred actions" section, disclosure would reveal that those topics were considered but rejected. For these reasons, I find that

[18] Section 13(3) of FIPPA.

[19] It may, however, be a relevant factor for public bodies to consider in exercising their discretion to withhold information under s. 13(1): Order F14-17, 2014 BCIPC No. 20 at para. 52

[20] The Ministry is not withholding these column headings in the Proposed Framework from the applicant. However, the applicant states in her submissions that the columns do not have headings. I speculate that the headings may not be visible in the applicant's copy due to photocopying quality (the headings are difficult to discern from a black-and-white copy of the Proposed Framework due to the shading of colors), and/or that the applicant did not notice the column headings because of their location on the pages (there is text between the headings and the start of the table).

disclosure of the withheld information in the "Program" column would reveal advice or recommendations because disclosure would enable an individual to draw accurate inferences about advice or recommendations.

[30] Most of the withheld information in the "Proposed Changes" column is recommended changes to the IMG program. There is other information that is not an express recommendation, but disclosure of this information would reveal recommendations given its context in the "Proposed Changes" column. Further, the withheld information at the end of the record relates to possible changes to the IMG program that were not being recommended. However, even if disclosure of this information would not reveal "recommendations", the Supreme Court of Canada determined in *John Doe v. Ontario (Finance)* that the disclosure of policy options reveals "advice".[21] Therefore, I find that disclosure of these possible changes constitute policy options that would reveal advice. For the above reasons, I find that disclosure of all of the withheld information in the "Proposed Changes" column would reveal advice or recommendations.

[31] The withheld information in the "Comments" column contains additional information or reasoning in relation to the proposed changes. While the applicant does not have the benefit of knowing the contents of this information, she submits it appears that the information contains facts and determinations, not recommendations and advice.

[32] Having reviewed the withheld information in the "Comments" column, I characterize some of the information as the opinions of the person who drafted the Proposed Framework, while other portions of it are more factual. However, even for the more factual information, I find that disclosure of this information would enable an individual to draw accurate inferences about advice or recommendations. I therefore find that disclosure of the withheld information in the "Comments" column would reveal advice or recommendations.

[33] In summary, I find that disclosure of all of the information withheld under s. 13 would reveal advice or recommendations developed by or for the Ministry. I will now address s. 13(2).

Section 13(2)

[34] As stated above, the Ministry must not refuse to disclose information under s. 13(1) if s. 13(2) applies to the information. The applicant submits that ss. 13(2)(k) to (m) apply to the withheld information. Section 13(2) states in part:

> (2) The head of a public body must not refuse to disclose under subsection (1)

[21] *John Doe v. Ontario (Finance)*, [2014] S.C.J. No. 36. This decision was with respect to Ontario's legislative equivalent to s. 13(1) of BC's FIPPA.

…

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

(l) a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body,

(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, …

[35] The applicant submits that s. 13(2)(k) applies. However, the Proposed Framework is not a report of a task force, committee, council or similar body, so I therefore find that s. 13(2)(k) does not apply.

[36] Section 13(2)(l) applies to a plan or proposal to establish a new program or activity, or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body. The applicant submits that the withheld information appears to fall squarely within s. 13(2)(l) because the Proposed Framework was for the purpose of changing or modifying the IMG program. The Ministry submits that the evidence in this inquiry clearly demonstrates that s. 13(2)(l) does not apply to the records at issue. The Ministry does not elaborate on its position.

[37] The Ministry provided the following evidence regarding the Proposed Framework:

> One of the Records is entitled “Proposed Framework for IMGs”. <u>That record was prepared by [a Ministry Executive Director] and constituted a proposal for a new IMG framework.</u> That proposal was prepared for consideration by senior Ministry executive[s] and the Minister of Health.
>
> The information severed from pages [of the Proposed Framework] under s. 13 of [FIPPA] consist of proposals…in relation to the IMG program…Those proposals were ultimately not accepted or implemented by the Ministry.[22]
>
> [Underline Added]

[38] The Ministry confirms that the Proposed Framework is a proposal for a new IMG framework, which was not ultimately accepted or implemented by the Ministry. On its face, this describes a record that falls under s. 13(2)(l).

[39] In Order 01-28,[23] former Commissioner Loukidelis determined that s. 13(2)(l) did not apply to a report called “Distance-Based Vehicle Insurance Potential for Implementation in British Columbia” because it was not intended to,

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[22] Affidavit of the Manager at paras. 11 and 12.
[23] Order 01-28, 2001 CanLII 21582 (BC IPC).

and did not, either propose or lay out any plan for implementation of that kind of insurance pricing. He stated that "[t]he fact that three options are included in the report does not transform the report into a plan or proposal."[24] However, the Proposed Framework in this case is materially different than the one in Order 01-28. The Proposed Framework contains a length list of changes that the person who drafted the record is proposing for the IMG program. It is not a record that identifies a few alternative courses of action, and then recommends what alternative should be accepted.[25]

[40] In light of the Ministry's evidence, and based on my review of the Proposed Framework, I find that the Proposed Framework is a plan or proposal that has been approved or rejected. I therefore find that s. 13(2)(l) applies to the Proposed Framework, so the Ministry must not refuse to disclose it under s. 13(1).

[41] Given the finding above, it is not necessary for me to consider the applicant's submission regarding s. 13(2)(m), or the issue of whether the Ministry exercised its discretion in deciding to withhold the information in the Proposed Framework.

***Legal Advice* – s. 14**

[42] The Ministry is withholding five memos written by Ministry of Justice lawyers under s. 14 of FIPPA. Section 14 states:

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

[43] Previous orders of this office have stated that s. 14 encompasses both legal advice privilege (also referred to as solicitor-client privilege or legal professional privilege) and litigation privilege. These privileges have different legal tests for deciding whether the information is subject to privilege, and they are driven by different policy considerations and generate different legal consequences (although s. 14 of FIPPA applies to both).[26] Legal advice privilege describes the privilege that exists between a client and his or her lawyer, and for which the Supreme Court of Canada has repeatedly stated must remain as close

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[24] Order 01-28, 2001 CanLII 21582 (BC IPC) at para. 31.
[25] In stating this, I acknowledge that the end of the Proposed Framework contains potential changes that were "considered and removed from preferred actions". The reason for this section is not explained in the materials, but the Proposed Framework states that it is an "updated" document, so I infer that these changes were preferred changes at one time but were removed from the preferred changes when this record was updated in March 2009.
[26] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 33.

to absolute as possible.[27] The purpose of the litigation privilege is to create a "zone of privacy" in relation to pending or apprehended litigation.[28]

[44] The Ministry is withholding the memos on the basis that they are subject to legal advice privilege. As such, the legal test that is relevant in this case 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.[29]

[45] The applicant submits that the Ministry failed to adduce sufficient evidence to establish that privilege applies. She makes submissions with respect to the Ministry's burden of proof for this issue, and she relies on Order 00-06 in support of her position.[30] The applicant submits that the Ministry's affidavit is deficient, in part because the deponent states that the memos are legal advice, which is a matter for me (as the decision-maker) rather than the deponent to make. In the event the Ministry satisfies this test and that privilege otherwise applies, the applicant submits that the Ministry has waived privilege.

[46] I agree with the applicant that the Ministry bears the onus of establishing solicitor client privilege, and that it is for me to determine whether the withheld information is legal advice.

[47] Part of the evidence before me in this inquiry is the withheld memos themselves. These records are, simply put, legal opinions. Based on my review of these records, I find they are clearly communications that are directly related to the seeking, formulating, or giving of legal advice. I therefore find that parts 1

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[27] For example *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 at para. 44.
[28] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 34.
[29] *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC).
[30] Order 00-06, 2000 CanLII 6550 (BC IPC); I note that the applicant also quotes other cases in support of her submissions on this point. However, they relate to the test for litigation privilege, and in my view the quoted statements of law are not applicable in this case.

and 4 of the above test have been met because they are written communications that are directly related to the seeking, formulating, or giving of legal advice.

[48] The applicant submits that the evidence in this case is too vague to prove that communications are of a confidential nature. She states that the Ministry's evidence is that the records have been treated in a confidential manner, but it is the context in which the communications arose that is relevant. She further states that there was no confidentiality in this case because the opinions in the memos were extracted and publicized.

[49] Legal opinions that are written to a client, or are written to another lawyer to be provided to a client, ordinarily have a confidential character. The evidence in this inquiry is consistent with such confidentiality. Based on my review of the materials in this case – including my review of the memos themselves, the context of their creation, that they were treated confidentially and the other evidence adduced by the Ministry – I find that the communications are of a confidential character.

[50] The applicant submits that the test for legal advice privilege has not been met for three of the records because the communications were between lawyers rather than between a lawyer and client. Further, one of those three records related to a request for legal advice by the Ministry of Advanced Education, not the Ministry.

[51] The memo from the Ministry of Justice lawyer to the Ministry of Advanced Education was clearly a communication between a legal advisor and client. Further, as in Alberta Order P2011-006,[31] I find that the communications between lawyers who were working together to give legal advice to a client fall within the scope of a communication between a legal advisor and client.

[52] For the above reasons, subject to my findings below with respect to waiver of privilege, I find that the Ministry is authorized to refuse to disclose all the information withheld under s. 14 because it is subject to legal advice privilege.

Waiver

[53] The applicant submits that even if the documents were subject to solicitor client privilege, that privilege has been waived. The Ministry submits that no such waiver has occurred.

[54] The parties agree that *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd.*[32] appropriately sets out a general statement of the law of waiver

[31] Alberta Order P2011-006, [2011] A.I.P.C.D. No. 67 at para. 25; Also see Order 01-10, [2001] B.C.I.P.C.D. No. 11 at para. 67.
[32] *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd,* 1983 CanLII 407 (BC SC).

of privilege. I agree. In that case, McLachlin J. (as she was then) stated the following:

> [6] Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces 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. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost *Rogers v. Hunter*.
>
> …
>
> [10] …In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Rogers v. Hunter*, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp*, it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.[33] [citations omitted]

[55] While the parties agree about the applicable legal test, their views diverge in how the law of waiver applies in this case.

[56] The applicant submits that the Ministry waived privilege because it chose to rely on legal advice to justify denying CSAs from competing against CMG stream applicants. She specifically refers to a quote from the December 2011 briefing document, which has also been made public elsewhere, stating that "CSAs must be treated in the same manner as all other IMGs. To do otherwise would breach human rights and Canadian Charter legislation."[34] The applicant also submits that privilege has been waived because one of the memos is a legal opinion of the Ministry of Advanced Education that was released to the Ministry. She also cites legal precedent with respect to how sharing a legal opinion may waive privilege, and how fairness may require disclosure of an entire legal opinion if a portion of it has already been disclosed.

[57] The Ministry submits that it did not waive privilege in any of the records at issue in this inquiry. It states that waiver of privilege ordinarily requires evidence of intention to waive that privilege, and it submits that there is no evidence the

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[33] *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC) at paras. 6 and 10.
[34] Ministry Briefing Document at p. 5.

Ministry voluntarily intended to waive privilege of the records at issue in this inquiry. With respect to the quotation the applicant cites as evidence of waiver of privilege, the Ministry points out that the quotation does not make any reference to legal advice, and that it is merely a statement concerning the state of the law. The Ministry submits that a statement by a public body as to the state of the law cannot be taken to waive solicitor client privilege.

[58] For the legal opinion the Ministry of Advanced Education provided to the Ministry, the Ministry replies that the applicant has misconstrued the legal status of provincial ministries. It states that Her Majesty in Right of the Province of British Columbia (*i.e.* the Crown) is one indivisible legal entity, and that ministries are simply different manifestations of a single Crown. It therefore submits that when a provincial ministry shares legal advice with another Ministry it is not sharing the advice with a third party, so there can be no finding of waiver simply on this basis.

[59] With respect to the issue of disclosure of the memo from the Ministry of Advanced Education to the Ministry, the Federal Court stated in *Stevens v. Canada (Prime Minister*) [35] that disclosure within government does not ordinarily constitute waiver. This is because the disclosure is internal to the government, not to a third party.[36] I find that to be the case in this inquiry, and that privilege was not waived because the Ministry of Advanced Education provided the memo to the Ministry.

[60] For the issue of whether solicitor client privilege has been waived because of statements that favouring CSAs over other IMGs would breach human rights and the *Charter*, the applicant cites a number of cases. In general, these cases either relate to court proceedings where a party pleaded in court documents that it took a certain action because it was relying on legal advice, or cases where fairness principles required disclosure of an entire record because a party had already voluntarily disclosed part of it.

[61] It was explained in *G.W.L. Properties v. W.K. Grace and Co. of Canada* why privilege over solicitor client communications may be waived in circumstances where a party voluntarily puts the nature of the legal advice it received in issue by including it in its own pleading in a court action. In that case, Lowry J. (as he was then) stated that solicitor client privilege:

> …is waived, by implication, because the issue cannot be tried in the absence of evidence of what advice the party was given. Disclosure is absolutely necessary. But a party cannot be said to waive solicitor-client privilege only

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[35] *Stevens v. The Prime Minister of Canada (the Privy Council)*, [1997] 2 F.C. 759 (F.C.T.D.) at paras. 23 to 25, citing McNairn and Woodbury, Government Information: Access and Privacy (Scarborough, Ont.: Carswell, 1992) at page 3-36 in part; affirmed at [1998] 4 F.C. 89 (F.C.A).

[36] For a further example, see Ontario Order PO-2995, [2011] O.I.P.C. No. 126.

> because it is faced with allegations made by another that put knowledge, which is the subject of its solicitors' advice, in issue.[37]

[62] In this case, the Ministry is not relying on legal advice it received in relation to court pleadings. Further, the reasoning for why privilege was waived in the cases cited by the applicant does not apply here. I therefore find that the cases cited by the applicant on this point are not applicable.

[63] Further, I do not find on the evidence before me that the Ministry has partially disclosed privileged correspondence, or, in any event, that fairness principles require disclosure of the records at issue. While the applicant may infer that the Ministry received legal advice based on the Ministry's statement that CSAs must be treated in the same manner as all other IMGs to not breach human rights laws and the *Charter*, this does not mean that the Ministry waived privilege over correspondence related to this general topic. This statement is an assertion about the state of the law, which does not even reference a legal opinion.

[64] In summary, I find that the Ministry has not waived privilege regarding the memos, and that the Ministry is authorized to refuse to disclose them pursuant to s. 14 of FIPPA.

CONCLUSION

[65] For the reasons given above, under s. 58 of FIPPA, I order that the Ministry is:

a) authorized to refuse to disclose all of the information it is withholding under s. 14 of FIPPA; and

b) required to give the applicant access to the information it is withholding under s. 13 of FIPPA, by **October 5, 2015**, pursuant to s. 59 of FIPPA. The Ministry must copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records it provides to the applicant.

August 21, 2015

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

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[37] *G.W.L. Properties v. W.K. Grace and Co. of Canada* (1992), 10 C.P.C. (3d) 165 (B.C.S.C.) at 169 to 170; Also see *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88.