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Order F16-34

CITY OF PENTICTON

Elizabeth Barker
Senior Adjudicator

July 13, 2016

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Summary: A journalist requested access to an invoice for legal services that was submitted by a law firm to the City of Penticton. Penticton refused to disclose the requested information under s. 14 of FIPPA on the grounds that it was subject to solicitor client privilege. The adjudicator confirmed Penticton's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14 and 25.

Authorities Considered: B.C.: Order 02-38, 2002 CanLII 42472 (BC IPC).

Cases Considered: *Maranda v. Richer*, 2003 SCC 67; *School District No. 49 (Central Coast); v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427 (CanLII).

INTRODUCTION

[1] This inquiry concerns a journalist's request for access to the total amount the City of Penticton ("Penticton") paid to a certain law firm for specific legal services. Penticton identified one invoice submitted by the law firm as the responsive record. Penticton refused to disclose any information in the invoice on the basis it is protected by solicitor client privilege, so s. 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") applies.

[2] The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review Penticton's decision. Mediation did not resolve the matter and the applicant requested that it proceed to inquiry under Part 5 of FIPPA. Both parties provided submissions for this inquiry.

ISSUE

[3] The issue in this inquiry is whether Penticton is authorized to refuse access to information under s. 14 of FIPPA. Under s. 57(1) of FIPPA, the burden of proving that the applicant has no right to access the information in the record rests with Penticton.

DISCUSSION

[4] **Background –** In 2014, a resident of Penticton circulated correspondence she wrote questioning the integrity and competence of a number of Penticton's employees. She copied the correspondence to the applicant who is the managing editor of a newspaper. The newspaper published the correspondence. As a result, Penticton retained a law firm which sent a letter to the resident informing her that Penticton believed her correspondence to be defamatory.

[5] The applicant's request was initially for copies of all letters from lawyers sent on behalf of Penticton "warning of possible defamation" as well as the total amount Penticton had spent on legal fees related to those matters. By the time of this inquiry, he had narrowed his request by explaining that he only wants the dollar value of legal fees associated with producing the letter that was sent to the resident.[1]

[6] **Record in dispute –** The record in dispute is a two page invoice for legal services the law firm provided to Penticton. It contains specific detail about the hours worked, the various services provided and the fees payable. Penticton is withholding all of it under s. 14.

[7] Penticton says there is no record containing just the discrete information that the applicant is seeking, namely a record with a specific breakdown of time spent and fees attributed solely to the letter sent to the resident.[2] It states that there is only the two page legal invoice, which is a bill for time spent by the law firm on all matters within the scope of its retainer.

[8] **Preliminary matter -** In his initial submissions, the applicant raises a new issue that was not in the Notice of Inquiry. He submits that s. 25 of FIPPA applies because disclosure of the information in dispute is in the public interest. He says that Penticton sent the letter to the resident to try and scare her from exercising

[1] Applicant's submissions at paras. 6 and 10.
[2] Penticton's reply submission at para. 2

her right to free speech. The applicant also points out that s. 14 is a discretionary exception to disclosure, so Penticton is not required by s. 14 to withhold the information. Therefore, he submits, it should be compelled to release the information because to do so is in the public interest. Penticton makes no submissions regarding s. 25.

[9] Past orders have said parties may only introduce new issues at the inquiry stage if they request and receive permission from the OIPC to do so. In this case, the applicant did not request permission to add s. 25, and he does not explain why he did not raise the issue at an earlier stage. Therefore, I have decided not to permit him to add s. 25 as an issue in this inquiry.

[10] Furthermore, even if the s. 25 issue was properly before me, I would have no difficulty concluding that it would not have any application here. Section 25 overrides all of FIPPA's exceptions to disclosure, and consequently there is a high threshold before it applies. Section 25(1)(a) applies where there is an imminent "risk of significant harm" to the environment or to human health or safety. The information in dispute here is plainly not about the matters described in s. 25(1)(a). Further, s. 25(1)(b) only applies where disclosure is clearly in the public interest and the information concerns a matter justifying mandatory disclosure. As former Commissioner Denham said in Investigation Report F16-02: "There must be an issue of objectively material, even significant, public importance, and in many cases it will have been the subject of public discussion…disclosure must be plainly and obviously required based on a disinterested, reasonable, assessment of the circumstances."[3] In my view, the information at issue here does not approach that level of magnitude or broader public significance.

[11] **Solicitor client privilege –** Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[12] As stated by the Supreme Court of Canada in *Maranda v. Richer* [*Maranda*],[4] there is a presumption that lawyers' billing information is privileged. LeBel, J. said:

> The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements… Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such

[3] Investigation Report F16-02, 2016 BCIPC 36, at p. 36.
[4] *Maranda v. Richer*, 2003 SCC 67, at paras. 32-33.

> information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved.

[13] The presumption that such information is privileged may be rebutted. In *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)* [*Central Coast*][5] the BC Supreme Court said that the correct approach to determining whether the presumption has been rebutted is to consider the following two questions:

1. Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege?
2. Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

[14] I will follow the approach set out in *Maranda* and *Central Coast*.

Penticton's submissions

[15] Penticton submits that the presumption that a lawyer's invoices and billing information is protected by solicitor client privilege applies in this case. It also submits that the onus is on the applicant to rebut that presumption.

[16] Penticton states that the information relates to an ongoing legal dispute regarding a single individual or legal issue. It says the legal issue is ongoing because the limitation period has not expired on the allegedly defamatory conduct of the resident, and she continues to make statements and allegations about the integrity and competency of various municipal employees.[6] Penticton says:

> As in *Central Coast*, revealing the sum of the legal bill to the Applicant would allow the assiduous inquirer, aware of background information, to make some reasonably educated conclusions as to detail of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated.
>
> Disclosure of the legal fees would indicate whether there was minimal effort and expense involved, indicating that the City was capitulating, and considered the matter resolved, or if they were preparing for litigation against [resident].

[5] *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427 (CanLII), at para. 104.
[6] Affidavit of Penticton's corporate officer at para. 6.

> In effect, disclosing the legal fees in this issue would reveal the City's legal strategy in dealing with an ongoing legal issue.[7]

Applicant's submissions

[17] The applicant disputes that the dollar value of legal fees charged to produce the specific letter is protected by solicitor client privilege. He also submits that disclosing the information in dispute would not reveal any communication protected by solicitor client privilege, and it would not allow an assiduous inquirer, aware of background information, to deduce or otherwise acquire privileged communications. The reason, he says, is because the existence of the letter sent to the resident is already known to the public.

[18] He also disputes Penticton's assertion that the information relates to an ongoing legal dispute. He says the legal fees relate to services provided two years ago.

Analysis

[19] The record in dispute is a two page invoice from the law firm to Penticton. It unmistakably reveals details of their communications related to seeking, formulating and providing legal advice and services. As set out in *Maranda*, this is the type of information that is presumed to be protected by solicitor client privilege.

[20] I have also considered the two questions posed in *Central Coast* to determine whether the presumption has been rebutted in this case. I have reviewed the contents of the record at issue and, in my view, it is abundantly clear that disclosure would reveal communication protected by solicitor client privilege. Further, it would be a simple matter for anyone who is aware of background information - which the applicant acknowledges is publicly known - to use the information requested to deduce or otherwise acquire privileged communications.

[21] In summary, I find that the presumption that the information in dispute is protected by solicitor client privilege has not been rebutted. I conclude that Penticton is authorized under s. 14 of FIPPA to refuse to disclose the information in dispute to the applicant.

[7] Penticton's initial submissions at paras. 13-15.

CONCLUSION

[21] For the reasons above, under s. 58(2) of FIPPA, I confirm Penticton's decision to refuse to give the applicant access to information under s. 14 of FIPPA.

July 13, 2016

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F14-60052