Order F20-16

MINISTRY OF ATTORNEY GENERAL

Frank DeVries
Adjudicator

April 23, 2020

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Summary: The applicant requested access to records held by the Ministry of Attorney General relating to an identified land deal. The Ministry denied access to the responsive emails, email strings and their attachments on the basis that s. 14 (solicitor client privilege) of FIPPA applied. The adjudicator found that s. 14 applied to all of the information in dispute, as the emails and their attachments all related to the seeking, formulating, or giving of legal advice.

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

INTRODUCTION

[1] A media outlet (the applicant), through one of its journalists, made an access request to the Ministry of Attorney General (the Ministry or MAG), under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The request was for any internal briefing notes, emails or other communications, along with any primary source documents, regarding an identified land deal involving the City of Vancouver and two named individuals.[1] The request covered the time period from March 1, 2017 to December 24, 2017.[2]

[2] The Ministry withheld all of the records pursuant to ss. 12 (cabinet confidences) and 14 (solicitor client privilege) of FIPPA. The Ministry later withdrew its reliance on s. 12.[3]

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation did not resolve the issues in dispute and the matter proceeded to inquiry.

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[1] As set out in the Investigator's Fact Report sent to the parties on February 5, 2019.
[2] Email from the applicant to the Ministry dated December 27, 2017.
[3] Ministry's initial submissions at para. 7.

ISSUE

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

1. Is the Ministry authorized to refuse to disclose the information at issue under s. 14?

[5] Section 57 of FIPPA governs the burden of proof in an inquiry. The Ministry has the burden of proving that the applicant has no right of access to the information it is refusing to disclose under s. 14.

DISCUSSION

Preliminary issue: Sufficiency of evidence to substantiate the section 14 claim

[6] The records in dispute are seven emails or email strings, six of which include attachments. They are described in more detail below.

[7] The Ministry did not provide the OIPC with any of the records it withheld under s. 14.

General Principles

[8] Where a party has not provided copies of records to this office in the course of an inquiry, the Commissioner has the power to order that the records be produced to this office.[4] However, given the importance of solicitor client privilege, and in order to minimally infringe on that privilege, this office will only order production of records being withheld under s. 14 when it is absolutely necessary to adjudicate the issues in dispute.[5]

[9] Where records for which s. 14 are claimed are not provided to the Commissioner, the courts have suggested that the laws and practice in civil litigation for claiming solicitor client privilege govern the standard of proof that the Commissioner can require when conducting an inquiry as to whether a public body has properly claimed the privilege.[6] In British Columbia, a party claiming privilege over a record must list each document separately and provide the date and a brief description of the document.[7] A party must "describe the documents for which privilege is claimed in a manner that, without revealing privileged

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[4] See section 44 of FIPPA.
[5] See Order F19-14, 2019 BCIPC 16 at para. 10.
[6]See *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 [*University of Calgary*] at para. 70 (majority) and paras. 127 and 137 (separate reasons of Cromwell J and Abella J both concurring on this point); *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA at para. 75.
[7] Supreme Court Civil Rules, Rules 7-1(1) and (2) and Form 22.

information, enables its opponent to assess the claim of privilege."[8] To assess the validity of a claim of privilege the courts have indicated that the description of privileged documents should include the date it was created or sent, the nature of the communication (such as "email" or "memorandum") and the author and recipient.[9] However, there are no steadfast rules and the answer depends on the nature of the case and the nature of the document.[10]

[10] In addition to a proper description of the records, public bodies must provide evidence to substantiate the privilege claim. It is not enough to merely assert that privilege applies.[11] The evidence may include the very records in dispute, with or without affidavit evidence, or it may be that only affidavit evidence is provided.[12] It is also open to the parties to seek the OIPC's consent to submit evidence *in camera*. While the OIPC has a broad discretion to accept hearsay evidence, ideally, evidence about the communications should come from those with direct knowledge of the communications, who can provide the proper contextual information about the communication, as well as the intentions of the parties to the communication. This makes the evidence more reliable. In addition, it is helpful to have evidence from a lawyer, who as an officer of the court, has a professional duty to ensure that privilege is properly claimed.[13]

Sufficiency of evidence provided in this inquiry

[11] As noted above, the Ministry did not provide the OIPC with any of the records it withheld under s. 14.

[12] The Ministry provided initial submissions in support of its s. 14 claim, and also provided affidavit evidence and a table of records in support of its position. The affidavit was sworn by Lawyer A, a lawyer with the Legal Services Branch (LSB) of the Ministry. In the affidavit, Lawyer A deposes that she is legal counsel with the Office of the Assistant Deputy Attorney General (ADAG); that she reviewed the records at issue; and that, based on her review of the records and knowledge of LSB operations, she believes the records fit within the requirements to establish the solicitor-client claim.[14] She also deposes that she

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[8] *Gardner v Viridis Energy Inc*, 2013 BCSC 580 (in Chambers) at para. 36. See Rule 7-1(7) of the Supreme Court Civil Rules.
[9] *Anderson Creek Site Developing Limited v Brovender*, 2011 BCSC 474 (*Anderson Creek*) at para. 114.
[10] *Ibid* at para. 113.
[11] *Nelson and District Credit Union v Fiserv Solutions of Canada Inc*, 2017 BCSC 1139 (Master) [*Nelson*] at para. 52; *Nanaimo Shipyard Ltd v Keith et al*, 2007 BCSC 9 (Master) at para. 29.
[12] *Intact Insurance Company v 1367229 Ontario Inc*, 2012 ONSC 5256 at para. 22 (stating that a party was required at a minimum to provide a sworn affidavit or viva voce evidence setting out the basis of the claim to privilege). See also Dodek, Adam M., Solicitor-Client Privilege (Toronto: LexisNexis, 2014) at §9.19.
[13] *Nelson*, *supra* note 11 at para. 54 wherein Master Harper noted counsel's professional duty to properly claim privilege.
[14] Lawyer A's first affidavit, paras. 1, 8 and 9.

believes that the attachments to the communications were attached for the purpose of informing legal counsel, so that legal advice could be sought and given.[15] The Table of Records prepared by the Ministry and attached to its initial submissions provided a brief description of the seven records at issue including the date, sender and recipient of the last email in each string, and the number of pages of attachments to each email string.

[13] In its response submissions, the applicant argued that the Ministry's evidence was not sufficient for the Commissioner to make a decision regarding the application of s. 14 of FIPPA and that the Ministry had not met its burden of proof. The applicant asked that this office either order disclosure of the records, order that the records be produced to the Commissioner, or require the Ministry to provide additional evidence.

[14] The Ministry provided reply submissions, re-affirming its position that s. 14 applied, and stating that this office had been provided with sufficient evidence to support the s. 14 claim. The Ministry also provided an affidavit sworn by the paralegal who had prepared the Table of Records, confirming the accuracy of the description of records.

[15] After reviewing the representations of the parties, I sent the Ministry a letter[16] advising that the evidence was not sufficient to decide whether privilege applied. I identified the following questions and concerns with the nature of the evidence provided:

- concerns about the broad and generic description of the records in the Table of Records, including concerns about the generic description of the attachments;
- concerns that the connection between Lawyer A's affidavit and the description of the records in the Table of Records was unclear (Lawyer A's affidavit did not refer directly to the description in the Table of Records nor did she indicate that she had reviewed it);
- questions about why Lawyer A, who was not personally involved in the matter to which the records relate, swore the affidavit; and
- concerns about the basis upon which Lawyer A was making her assertions about the records.

[16] In response, the Ministry provided additional submissions and evidence. In its additional submissions, the Ministry states that the records at issue are communications with the Deputy Attorney General (DAG) that were "clearly communicated to him in the discharge of the role of the Attorney General as chief legal advisor of ministries of government."[17] The Ministry also provided a second

[15] Lawyer A's first affidavit, para. 10.
[16] Adjudicator's letter dated October 18, 2019.
[17] The Ministry refers to section 2 of the *Attorney General Act*, RSBC 1996, c. 22.

affidavit sworn by Lawyer A, with an attached revised Table of Records (Table of Records #2) providing a more detailed description of the records at issue. The Ministry's additional submissions and affidavit evidence were shared with the applicant, who also provided submissions and affidavit evidence in support of its position that the evidence continued to be insufficient for me to make a finding on the application of s. 14. The applicant asked that I either order disclosure of the records, or order the Ministry to produce the records to me.

[17] Based on my review of the additional evidence provided by the Ministry in this inquiry, including, in particular, the detailed description of the records that the Ministry has now provided, I conclude it is unnecessary to order production of the records. Specifically, I note that in her second affidavit, Lawyer A deposes:

- that she is Senior Legal Counsel with the Office of the ADAG, LSB, Ministry of Attorney General and that, in this role, she has "personal knowledge of the day-to-day operations of the Office of the ADAG and the Office of the DAG;"
- that one of the lawyers involved in this file is no longer with the BC Government;
- that she has reviewed the records at issue in this inquiry and the Table of Records #2 attached to her affidavit as Exhibit B;
- that the attached Table of Records #2 provides an accurate description of the records; and
- that based on her review of the records and knowledge of LSB operations, she believes that the records consist of email communications and relate directly to the seeking, formulating and giving of legal advice by legal counsel at LSB to their clients.

[18] The Table of Records #2 lists the dates and senders of all of the emails in all of the emails and email chains. The descriptions also identify the purpose for which the emails were sent, the general nature of these emails, and the purposes of the attachments (including a more detailed description of the nature of many of these attachments).

[19] Based on the additional information provided by the Ministry, I am satisfied that the evidence provided by the Ministry is sufficient to allow me to determine whether s. 14 of FIPPA applies to the records.

[20] Before proceeding, I will address one of the specific concerns the applicant has raised about the sufficiency of the evidence provided by the Ministry.[18] The applicant notes that the Ministry's additional affidavit is again sworn by Lawyer A, who was not directly involved in the email communications. The applicant correctly points out that this was one of the concerns I had

[18] Some of the other concerns raised by the applicant about the sufficiency of the evidence provided by the Ministry are addressed in my review of the application of the s. 14 claim, below.

identified in my letter to the Ministry, in which I stated: "The fact that an affidavit is sworn by a lawyer not personally involved with a file directly affects the weight to be given to the evidence."

[21] In her Affidavit #2, Lawyer A states that one of the LSB lawyers directly involved in the communications is no longer with the BC government. The applicant states that although one of the lawyers with the LSB may no longer be employed, a number of other individuals directly involved in the emails (either as lawyers or clients) appear to still be employed by the various ministries.[19] The applicant asks that, in these circumstances, an adverse inference should be drawn that these individuals would give evidence that is unfavorable to the Ministry's position.[20]

[22] I have considered the applicant's concerns regarding the fact that the affidavit evidence provided by the Ministry was provided by Lawyer A, and not by individuals directly involved in the communications. However, I am satisfied that the evidence now provided by the Ministry, particularly through Lawyer A's second affidavit, is sufficient to allow me to determine whether s. 14 applies to the records. Lawyer A, who is senior legal counsel with LSB with personal knowledge of the day-to-day operations of the Offices of the ADAG and the DAG, deposes that she reviewed the records at issue, and that Table of Records #2 accurately describes the records. Further, Table of Records #2 provides a clear description of each email in each chain, and a clear identification of the purpose for which each email was sent. In the circumstances and after reviewing the totality of the evidence, I am satisfied that the evidence provided by the Ministry is sufficient. Furthermore, in the circumstances and given the nature of the records as described in Table of Records #2, I decline to draw an adverse inference from the fact that the affidavit evidence was provided by Lawyer A, and not those directly involved in the communications at issue.

The Records

[23] The records in dispute are seven emails or email strings, six of which include attachments. All seven of the emails or email strings end with an email to one or more of either the DAG, the ADAG, or two named legal counsel at the LSB of the Ministry (Lawyers Y and Z). The description of the records set out

[19]The applicant provides affidavit evidence in support of its position that some of these individuals appear to continue to be so employed.

[20] The applicant refers to circumstances where an adverse interest may be drawn where, in the absence of an explanation, a party fails to call a material witness who would have knowledge of the facts, and refers to *Insurance Corporation of British Columbia v Mehat*, 2018 BCCA 242, at paras. 85-90. The applicant confirms that the drawing of an adverse inference is discretionary and posits that these circumstances warrant the exercise of that discretion.

below is taken from Table of Records #2 attached to Lawyer A's second affidavit.[21]

Records 1 and 2 - email string ending with an email to the DAG[22]

[24] Record 1 is a three-page record, consisting of an email string of two emails (both dated March 14, 2017), and a two-page attachment.

[25] The first email in the string is from a representative of Government Communications and Public Engagement (GCPE) to three representatives of the Ministry of Natural Gas Development and Minister Responsible for Housing (NGDH) and/or the Office of Housing and Construction Standards (OHCS). That email includes a two-page attachment. This email with the attachment is then forwarded by the NGDH representative to the DAG. This email was also copied to the two other representatives of the NGDH and/or the OHCS. This second email is described as sent to the DAG "for the purpose of informing his legal advice and forming part of the continuum of communications, enabling him to provide ongoing legal advice about the matter described in attachment."

[26] Record 2 is described in the same way as Record 1, with the same parties identified as the senders and recipients of the emails, the same number of pages, and the same dates as Record 1.

Record 3 - email string between the DAG and ministry representatives[23]

[27] Record 3 is an email string of four emails, as well as 46 pages of attachments.

[28] The first (earliest) email in the string is dated March 14, 2017 and is sent from the DAG to the NGDH representative who sent him Records 1 and 2.[24] This email is described as sent from the DAG "requesting material from [the NGDH representative] relating to matter discussed in email for the purpose of informing his legal advice."

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[21] The Ministry did not provide me with the records at issue, but provided a detailed description of the records as set out in Table of Records #2. That Table describes the general nature of the records at issue, but also identifies the purposes for which the records were created/sent. Because of this, the description of the records in Table 2 also forms part of the evidence provided by the Ministry in support of its position that s. 14 applies to the records. For clarity and to avoid repetition, I have included some of those stated purposes in the description of the records set out here. I make my findings on whether I accept the affidavit evidence and the accuracy of these descriptions in my analysis of s. 14 later in this order.

[22] Pages 1-3 and 4-6.

[23] Pages 7-57.

[24] This email was also sent to Lawyer Y.

[29] The second email in this string is sent from the NGDH representative and the third email is sent from an OHCS/NGDH representative. Both of these are described as "forwarding [earlier] email" and requesting material "to be compiled and provided to [the DAG] at the request of legal counsel for the purposes of informing his legal advice." The description of these emails also states: "We understand from the body of the email, and the preceding and subsequent emails in the string that the email was sent to Ministry employees for the purpose of compiling and providing material to [the DAG] at his request."

[30] The fourth and last email, dated March 15, 2017, is sent from a representative of the NGDH to the DAG and Lawyer Y. It is described as "forwarding below email and attaching 46 pages of materials compiled and provided by Ministry employees, sent to [the DAG] at his request, for the purpose of informing his legal advice and forming part of the continuum of communications, enabling him to provide ongoing legal advice about matter described in attachments."

Records 4 and 5 - emails sent to the DAG with attachments[25]

[31] Record 4 is an email dated March 15, 2017 sent from a representative of the NGDH and the OHCS to the DAG. This email is described as "attaching four pages sent to [the DAG] for the purpose of informing his legal advice and forming part of the continuum of communications, enabling him to provide ongoing legal advice about matter described in attachments."[26]

[32] Record 5 is an email dated April 6, 2017 from a representative of the NGDH to the DAG, the ADAG and Lawyer Z, with a 65-page attachment of material. This material is described as "compiled and provided by Ministry employees at the request of legal counsel, for the purposes of informing their legal advice and forming part of the continuum of communications, enabling them to provide ongoing legal advice about matter described in attachment."

Records 6 and 7 - emails or email strings between the DAG, the ADAG and Lawyer Z, some with attachments[27]

[33] Record 6 is a three-page email sent from the DAG to the ADAG and Lawyer Z. This email is described as "providing information for the purpose of informing their legal advice."

[34] Record 7 is an email from the ADAG to Lawyer Z, forwarding the email identified as Record 5 (with attachments) as well as forwarding eight additional

[25] Pages 58-62 and 63-128.
[26] This email was also copied to two NGDH representatives who were involved in some of the earlier emails (Record 3 emails 1 and 4).
[27] Pages 129-131 and 132-205.

pages identified as "correspondence relating to matter discussed in the email." The description identifies Record 7 as an email "discussing attachments for the purpose of providing legal advice."

Solicitor client privilege

[35] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. Section 14 includes legal advice privilege and litigation privilege.[28] The Ministry is claiming legal advice privilege over all of the withheld records, including the attachments.

[36] Solicitor client privilege is a foundational legal principle. As Justice Côté for the majority in *University of Calgary* stated, "[t]he importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole."[29] The protection it affords ensures that clients can speak fully and frankly with their lawyers and receive appropriate legal advice. Solicitor client privilege must be jealously guarded and infringed upon only in unusual circumstances.[30] Once privilege has been established, it applies "to all communications made within the framework of the solicitor-client relationship…."[31]

[37] In the context of FIPPA, the purpose of s. 14 is "to ensure that what would at common law be the subject of solicitor-client privilege remains protected."[32] As explained in *Legal Services Society v BC (Information and Privacy Commissioner)*:

> Certainly the purpose of the Act as a whole is to afford greater public access to information and the Commissioner is required to interpret the provisions of the statute in a manner that is consistent with its objectives. However, the question of whether information is the subject of solicitor-client privilege, and whether access to a record in the hands of a government agency will serve to disclose it, requires the same answer now as it did before the legislation was enacted. The objective of s. 14 is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly.[33]

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[28] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.
[29] *University of Calgary*, *supra* note 6 at para. 26.
[30] *University of Calgary*, *supra* note 6 at paras. 34–35.
[31] *Descôteaux et al v Mierzwinski*, [1982] 1 SCR 860, 1982 CanLII 22 (SCC) (*Descoteaux*) at p. 893.
[32] *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 (leave to appeal denied) (*Lee*) at para. 31 relying on *Legal Services Society v British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 (*Legal Services*) at para. 35.
[33] *Legal Services, ibid* at para. 35, referencing *Legal Services Society v The Information and Privacy Commissioner of the Province of B.C.*,1996 Can LII 1780 (BC SC) at para. 26.

[38] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking, formulating and giving legal advice. In order for legal advice privilege to apply to a communication (and records related to it), the communication must:

1. be between a solicitor and client;
2. entail the seeking or giving of legal advice; and
3. the parties must have intended it to be confidential.[34]

[39] Courts have also found that solicitor client privilege extends to communications that are "part of the continuum of information exchanged" between the client and the lawyer in order to obtain or provide the legal advice.[35] Legal advice privilege also extends to internal client communications that discuss legal advice and its implications,[36] as well as communications involving a lawyer's support staff, and communications dealing with administrative matters if the communications were made with a view to obtaining legal advice.[37] As stated by the Supreme Court of Canada:

> … a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality.[38]

Parties' positions

[40] The Ministry takes the position that the records in this inquiry disclose email communications between legal counsel and their clients, that these records relate directly to the seeking, formulating and giving of legal advice by legal counsel to their clients, and that the records are confidential in nature.[39] The Ministry states that the records are therefore subject to solicitor-client privilege and that, from the moment the solicitor-client relationship arises, all

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[34] *Solosky v The Queen*, 1979 CanLII 9 (SCC) at p. 837 [*Solosky*].
[35] *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83; *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (*Camp*) at paras. 40-46.
[36] *Bank of Montreal v Tortora*, 2010 BCSC 1430 at para. 12; *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.
[37] *Descôteaux*, *supra* note 31 at p. 892-893; *Oleynik v Canada (Privacy Commissioner)*, 2016 FC 1167 at para. 60 [*Oleynik*].
[38] *Descôteaux*, *ibid*.
[39] Ministry's initial submissions paras. 25-29.

communications between a solicitor and client which are directly related to the seeking, formulating, or giving of legal advice are privileged.[40]

[41] The Ministry submits that Lawyer A's affidavits "clearly establish that the records at issue consist of communications made within the framework of the solicitor client relationship." The Ministry says these records "form part of the continuum of communications in which legal counsel (the DAG) provides advice."[41]

[42] In her second affidavit, Lawyer A deposes that she has reviewed the records at issue in this inquiry and the "Table of Records #2" relating to the records attached to that affidavit. She also deposes that the attached Table of Records #2 provides an accurate description of the records and states that, based on her review of the records and knowledge of LSB operations, she believes that:

> A) the records consist of email communications between legal counsel at the Ministry of Attorney General and their client representatives;
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> B) the records relate directly to the seeking, formulating and giving of legal advice by legal counsel at LSB to their clients; and
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> C) the records are privileged and confidential in nature.

[43] As noted above, the Table of Records #2 attached to Lawyer A's second affidavit provides a detailed description of the records.

[44] The Ministry also states that solicitor-client privilege also attaches to a "continuum of communications" between a lawyer and client where one individual, or their agent, passes information to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required.[42] The Ministry submits that it is widely accepted that privilege attaches broadly to the "continuum of communications and meetings" that underlie legal advice.[43] In support, the Ministry refers to the following from the *Camp* decision:[44]

> … [solicitor client] privilege extends to more than the individual document that actually communicates or proffers legal advice. The reality is that in order for a lawyer to provide advice, he or she will often require history and background from a client. … He or she may repeatedly contact the client asking for clarification of some issue that is salient to the retainer and to the advice being sought. The first expression of an opinion prepared,

[40] Ministry initial submissions paras. 25, 26 and 27.
[41] Ministry's additional submissions dated November 8, 2019
[42] Ministry initial submissions at para. 22. The Ministry also refers to *British Columbia Teacher's Federation v British Columbia*, 2010 BCSC 961 at para. 29.
[43] *Camp*, *supra* note 35.
[44] *Camp*, *supra* note 35 at paras. 40 and 46. The Ministry notes that this aspect of *Camp* was discussed extensively in Order F18-26, 2018 BCIPC 29.

> whether in a letter or in a commercial document, may elicit further comment from the client and require revision. It is this chain of exchanges or communications and not just the culmination of the lawyer's product or opinion that is privileged. …
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> A further consideration, which is practical in nature, is relevant. Disclosing one part of a string of communications gives rise to the real risk that privilege might be eroded by enabling the applicant for the communication to infer the contents of legal advice. …[45]

[45] The applicant takes the position that the Ministry has not provided sufficient evidence to establish that solicitor-client privilege applies to the records.[46] The applicant also argues that:

- a communication is not automatically privileged simply because a lawyer is involved, and notes that the courts have "frequently emphasized that business or financial advice, for instance, does not attract solicitor-client privilege."[47]
- not everything done by a government lawyer attracts solicitor-client privilege; that government lawyers may be called upon to offer policy advice that has nothing to do with their legal training or expertise, and that advice given by lawyers on matters outside the solicitor-client relationship is not protected.[48]
- each situation involving government lawyers must be assessed on a case-by-case basis to determine if conditions for legal advice privilege have been met, and that a party "cannot simply cloak notes, documents or communications with privilege merely because a lawyer was involved or handled the documents."[49]
- the concept of the "continuum of communications" is not unlimited, and that the BC Court of Appeal has noted that, even within the framework of a solicitor client relationship, some communications can be severed if they relate to other matters, such as policy advice, or are third party

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[45] The excerpt from *Camp* referenced by the Ministry also references *No. 1 Collision Repair and Painting (1982) Ltd. v Insurance Corporation of British Columbia* (1996), 1996 CanLII 2311 (BC SC), 18 B.C.L.R. (3d) 150, where the court, at para. 5, stated: "Moreover, I am satisfied that a communication which does not make specific reference to legal advice is nevertheless privileged if it falls within the continuum of communication within which the legal advice is sought or offered: see Manes and Silver, supra, p. 26. If the rule were otherwise, the disclosure of such documents would tend in many cases to permit the opposing side to infer the nature and extent of the legal advice from the tenor of the documents falling within this continuum. Thus the intent of the rule would be frustrated."

[46] The applicant makes this argument in both its initial submissions dated March 27, 2019 and its additional submissions dated November 28, 2019.

[47] Applicant initial submissions at para. 15.

[48] The applicant references *R v Campbell*, [1999] 1 SCR 565, at para. 50.

[49] Applicant submissions at para. 17, and reference to *Intact Insurance Company v 1367229 Ontario Inc.*, 2012 ONSC 5256. at para. 21.

> documents.[50] Simply because a communication passes between a client and a lawyer does not necessarily mean it is privileged.[51]

[46] In its later submissions, the applicant takes the position that the Ministry has not provided sufficient evidence about the context or circumstances of the records. It raises a number of concerns about the evidence including: that the statements in Table of Records #2 about the purposes for which certain information was provided to counsel appear to be "unattributed hearsay or double hearsay" and that the Table does not indicate the basis upon which the statements are made; that Lawyer A does not indicate if she consulted with anyone personally involved in the creation of the records; and that Table of Records #2 does not identify which, if any, of the attachments contain legal content, and which attachments may be strictly factual in nature.

[47] The applicant also posits that the Ministry's approach to applying solicitor-client privilege to the records is overbroad. It refers to cases that it argues support the position that documents that form part of a "continuum of communications" may be disclosed if they do not reveal or allow a reader to infer privileged legal advice.[52] The applicant also states that since Lawyer A's opinion about whether the records are privileged appears to be based on the Ministry's overbroad statement of the law, it should be given little weight.

Analysis and Findings

[48] Based on the evidence provided by the Ministry and on the description of the records as set out in Table of Records #2, I am satisfied that legal advice privilege applies to the records at issue.

[49] To begin, I accept the sworn testimony of Lawyer A regarding the nature of the documents and the descriptions of the records. Lawyer A is senior legal counsel with the Office of the ADAG, and I accept her sworn evidence that she has reviewed the records at issue and that Table of Records #2 "provides an accurate description of the Records." Moreover, based on her affidavit, I am satisfied that Lawyer A has a proper understanding of how legal advice privilege applies to communications."[53] Although Lawyer A was not directly involved in the records at issue, based on her experience and sworn affidavit evidence, I accept her evidence on the nature of the documents and the descriptions of the records.

[50] In addition, based on the evidence provided by the Ministry, I am satisfied that the four lawyers involved in these communications (the DAG, the ADAG and

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[50] Applicant submissions at para 18. and reference to *Lee*, *supra* note 32.
[51] Applicant submissions at para. 19.
[52] Applicant additional submissions at para. 16 and references to *Lee*, *supra* note 32 and *College*, *supra*, note 28.
[53] In para. 9 of Lawyer A's second affidavit she identifies that the records fit within the requirements for legal advice privilege to apply to communications.

Lawyers Y and Z) were involved in their role as legal counsel, and that the email communications relate directly to the seeking, formulating and giving of legal advice by legal counsel to their clients.

[51] The Ministry has provided evidence in support of its position that the records at issue consist of communications made within the framework of the solicitor client relationship. The Ministry references section 2 of the *Attorney General Act*[54] which establishes the powers and duties of the Attorney General. The Ministry states that "[Lawyer A's] affidavits demonstrate that the records at issue involve communications with the DAG that were clearly communicated to him in the discharge of the role of the Attorney General as chief legal advisor of ministries of government."[55] The Ministry also submits that Lawyer A's affidavits "clearly establish that the records at issue consist of communications made within the framework of the solicitor client relationship. These records form part of the continuum of communications in which legal counsel (the DAG) provides advice."[56] In addition, the Ministry states that the communications "were not exchanged for any other purpose whether that be for the purpose of giving or receiving policy advice or any other purpose."[57]

[52] Lawyer A deposes that, based on her review of the records and knowledge of LSB operations, she believes that the records consist of email communications between legal counsel at the Ministry of Attorney General and their client representatives; that the records relate directly to the seeking, formulating and giving of legal advice by legal counsel at LSB to their clients; and that the records are privileged and confidential in nature.

[53] I have considered the applicant's concerns that a communication is not automatically privileged simply because a lawyer is involved, and that if a lawyer provides business or financial advice, for instance, this does not attract solicitor-client privilege. However, based on the evidence provided by the Ministry and the nature of the records, I am satisfied that the emails at issue relate directly to the seeking, formulating and giving of legal advice by legal counsel to their clients. In the circumstances, I am satisfied that the communications between the representatives of the NGDH and/or the OHCS and the identified legal counsel (the DAG, the ADAG and Lawyers Y and Z) were not for purposes other then seeking, formulating and giving legal advice.

[54] With reference to the above, I make the following findings regarding the specific records at issue.

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[54] RSBC 1996, c. 22.
[55] Ministry's additional submissions at para. 5.
[56] Ministry's additional submissions at para. 4.
[57] Ministry additional submissions at para. 4.

Email communications

Records 1 and 2

[55] Record 1 is a chain of two emails. Based on the description of this email chain and my findings above, I am satisfied that the final (second) email in Record 1 was sent by the NGDH representative to the DAG for the purpose of informing his legal advice.

[56] With respect to the first email in this string, I have considered the specific representations of the parties regarding this first email, which was sent from a GCPE representative to the three representatives of the NGDH and/or the OHCS. In her second affidavit, Lawyer A refers to the role of the office of the GCPE. She deposes that, in her experience, GCPE sometimes communicates directly with the DAG in circumstances where it wishes to seek legal advice on a particular matter, and also communicates directly with the ADAG and legal counsel with carriage of a particular matter when it wishes to seek legal advice in this context.

[57] In its subsequent submissions the applicant points out that this first email in the chain was not sent by or to a lawyer, rather it was sent from a GCPE representative to the three identified government representatives. The applicant also identifies that, notwithstanding Lawyer A's evidence that the GCPE sometimes communicates directly with the DAG concerning legal advice, this does not appear to have occurred here. The applicant states that the GCPE representative "first sent the emails to other officials in other Ministries, which were then forwarded to lawyers."

[58] I accept that the first email in this string was not sent directly from the GCPE representative to legal counsel. However, as noted, Table of Records #2 identifies that the second email forwarded the first email to the DAG for the purpose of informing his legal advice and forming part of the continuum of communications, "enabling him to provide ongoing legal advice about the matter described in the attachment." In these circumstances, I accept that the first email is directly related to the legal advice that the government representative sought from the DAG by way of the second email.

[59] Accordingly, for the reasons set out above, I am satisfied that legal advice privilege applies to the entire email string in Record 1. I make the same finding about Record 2 as it is described in the same way as Record 1.

Record 3

[60] Record 3 is an email string of four emails, as well as 46 pages of attachments.

[61] As noted above, the first (earliest) email in the string is sent from the DAG to the NGDH representative who sent him Records 1 and 2,[58] and is described as sent from legal counsel "requesting material from [the representative] relating to matter discussed in email for the purpose of informing his legal advice." The second and third emails in this string are sent from the NGDH and/or the OHCS representatives to ministry employees "forwarding [earlier] email" and requesting material "to be compiled and provided to [legal counsel] at the request of legal counsel for the purposes of informing his legal advice." The fourth and last email is sent from an NGDH representative to the DAG and Lawyer Y, and is identified as "forwarding below email and attaching 46 pages of materials compiled and provided by Ministry employees, sent to [named legal counsel] at his request, for the purpose of informing his legal advice …."

[62] For the reasons set out above and based on the descriptions of the records, I am satisfied that the legal advice privilege applies to this email string. I find that these communications relate directly to the seeking, formulating and giving of legal advice by legal counsel to their clients. In the circumstances, I am satisfied that these emails represent a true "back and forth" between counsel and clients for the purpose of seeking, formulating and giving legal advice.

Records 4 and 5

[63] For the same reasons as those referred to above, I find that legal advice privilege applies to the emails in Records 4 and 5. Based on the description of the emails, I am satisfied that these communications relate directly to the seeking, formulating and giving of legal advice by legal counsel to their clients. With respect to Record 4, I find that it was sent to legal counsel for the purpose of informing his legal advice and "enabling him to provide ongoing legal advice about matter described in attachments."[59] Regarding Record 5, I am satisfied that it was sent to the identified legal counsel for the purpose of informing their legal advice and "enabling them to provide ongoing legal advice about matter described in attachments."

Records 6 and 7

[64] Records 6 and 7 consist of communications between the various legal counsel involved in providing the legal advice. These communications were not

[58] This email was also copied to Lawyer Y.

[59] I note that this email was sent from one of the named government representatives who was involved in forwarding legal counsel's request for material (the third email in Record 3).

directly between legal counsel and their clients, although a number of the pages of attachments were documents sent from clients to legal counsel. In my view, legal advice privilege protects all these emails sent between legal counsel.

[65] Courts have long recognized that lawyers, their staff and other firm members working together on a file may share privileged information amongst themselves without vitiating confidentiality.[60] Previous orders have also determined that 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.[61] Applying these principles, and based on the evidence provided by the Ministry and the description of the records set out in Table of Records #2, I am satisfied that Records 6 and 7 consist of confidential email communications between legal counsel involved in formulating and providing legal advice, and that these emails fall under the protection of legal advice privilege.

Attachments

[66] The Ministry also takes the position that the attachments to the emails are privileged, as they are attached to the communications between legal counsel and their clients for the purpose of informing legal counsel so that legal advice could be sought and given.[62] It submits that allowing disclosure of the attachments would, at a minimum, allow accurate inferences to be made regarding the legal advice due to the fact that the attachments "are an integral part of the communication."[63] The Ministry submits that each of the attachments are privileged in their context as attachments to privileged communications, and that they form part of the continuum of communications between solicitor and client and provide counsel with the necessary context to provide legal advice.[64] The Ministry also states that this approach is consistent with the approach taken by the BC Court of Appeal in *Lee*. The Ministry refers to the court's statement that "once privilege has been established, it applies 'to all communications made within the framework of the solicitor-client relationship.'"[65]

[67] The Ministry also states that severing any of the information is not possible. It argues that the court in *Lee* may have left a narrow margin for severing in certain circumstances, but only where there is no risk that privileged legal advice would be revealed or capable of ascertainment.[66] It refers to Lawyer A's first affidavit as affirming that the records at issue in this appeal were

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[60] See *Shuttleworth v Eberts et. al.*, 2011 ONSC 6106 at paras. 67 and 70-71; *Weary v Ramos*, 2005 ABQB 750 at para. 9.
[61] See Orders F15-41, 2015 BCIPC 44 and F20-01, 2020 BCIPC 01.
[62] Ministry submissions para. 42 and Lawyer A's 1st affidavit para. 10.
[63] The Ministry references Order F16-09, 2016 BCIPC 11.
[64] Ministry submissions para. 43.
[65] *Lee*, *supra* note 32 at para. 35.
[66] *Lee*, *supra* note 32 at para. 40.

"provided in a formal solicitor-client relationship and were confidential."[67] Furthermore, it states that disclosure of the attachments would allow an individual to draw accurate inferences as to what legal advice was sought or given.

[68] The applicant takes the position that the attachments to the emails are not necessarily privileged. It notes that the Ministry relies on the assertion of privilege over the emails to establish privilege over the attachments. It distinguishes the decisions referenced by the Ministry which relate to attachments to legal opinions, as it notes that there is no evidence that the attachments in this inquiry were attached to legal opinions. The applicant takes the position that, based on previous decisions of the courts and this office, where a party seeks to withhold attachments to privileged communications, that party must establish either that those attachments are themselves privileged, or that the attachments cannot be severed without revealing the contents of privileged communications.[68]

[69] The applicant refers to court decisions and orders of this office which found that, in certain circumstances, attachments to privileged communications could be severed and disclosed.[69] It states that the Ministry's description of the records and the evidence provided is insufficient to prove that all of the records are independently privileged, and, "in particular, has not proven that the attachments cannot be severed from privileged communications about their contents."[70]

[70] In the circumstances, I am satisfied that the attachments to the email communications all clearly form part of the privileged communications. The attachments to Records 1, 2 and 4 were sent to legal counsel to enable counsel "to provide ongoing legal advice about the matter described in the attachments." The attachments to the emails in Records 3 and 5 are identified as having been provided to legal counsel at their request "for the purpose of informing [their] legal advice and forming part of the continuum of communications, enabling [them] to provide ongoing legal advice about matter described in attachments." The evidence about the email between legal counsel in Record 7 is that this email "[discusses] the attachments for the purpose of providing legal advice."

[71] As a result, I am satisfied that the attachments to the emails all clearly form part of the privileged communications, and that legal advice privilege applies to them. I find that these attachments are directly related to the legal advice sought from the legal counsel or fall under the "continuum of

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[67] Ministry reply submissions at para. 57.
[68] Applicant submissions at para. 35 and references to *College*, *supra* at note 28 and Order F18-18, 2018 BCIPC 21.
[69] The applicant refers to *College*, *supra* at note 28, *Murchison v Export Development Canada*, 2009 FC 77, and Orders F18-18, 2018 BCIPC 21 and F18-26, 2018 BCIPC 29. The applicant also refers to the severance provision in section 4(2) of FIPPA.
[70] Applicant's additional submissions at para. 18.

communications" between a lawyer and a client. As noted above, a "continuum of communications" involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as "history and background from a client" or communications to clarify or refine the issues or facts.[71]

[72] My findings are supported by the factual description of the emails between legal counsel and the representatives of the NGDH and/or the OHCS. The first email (with attachment) was sent to the DAG on March 14, 2017 (Records 1 and 2). On that same day, the DAG requested material from the NGDH representative to inform his legal advice (first email in Record 3). That request is then forwarded to other NGDH and/or OHCS employees, asking that the requested information be compiled (emails 2 and 3 of Record 3), resulting in the representatives providing the DAG with the attached materials. In addition, the attachments in Record 5 are shared between counsel on the same day they are received (Record 7). In these circumstances, I am satisfied that the attachments encompass "all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose"[72] and that the attachments are privileged.

[73] I have considered the applicant's argument that the Ministry has failed to identify which, if any, of the attachments contain legal content, and which attachments may be strictly factual in nature. However, given the nature of the email communications and their attachments and the context in which they were sent, it is not necessary to review every attachment to determine whether or not it actually contains legal advice. As the BC Court of Appeal observed in *Lee*, the critical question is whether the communications occurred in the context of a solicitor-client relationship. The court observed that, "Once privilege has been established, it applies to all communications made within the framework of the solicitor-client relationship."[73]

[74] I am satisfied that the communications at issue were all made within that solicitor-client relationship. I also note that this approach was applied by Commissioner McEvoy, when he was an adjudicator and had to consider whether privilege applied to attachments to emails.[74] In Order F10-20, Commissioner McEvoy acknowledged that not all communications between a lawyer and client are privileged, and that simply because a client conveys a record to a lawyer does not make that record privileged. However, he found that the withheld attachments before him in that inquiry formed part of the

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[71] *Camp*, *supra* note 35 at para. 40.
[72] See *Descôteaux*, *supra*, note 31 at p. 893.
[73] *Lee*, *supra*, note 32 at para. 51. Both parties provided lengthy submissions on the application of the legal advice privilege to attachments to emails, and the impact of the decisions in *Lee* and *College*, *supra* notes 32 and 28.
[74] Order F10-20, 2010 BCIPC 31.

communications between lawyer and client and "clearly relate to the seeking of legal advice in a manner contemplated by the solicitor-client privilege test" and that the exemption applied to the attachments.[75]

[75] I acknowledge that the Commissioner in F10-20 had the benefit of reviewing the actual attachments at issue before him. In this inquiry, I must rely on affidavit evidence and the descriptions of the records provided by the Ministry. However, based on that material, I am satisfied that legal advice privilege applies to all of the attachments to the emails.

[76] In addition, based on the descriptions of the records and reasons why the attachments were attached to the email communications, I also conclude that the attachments cannot be severed, as the disclosure of the attachments would reveal privileged communications or allow accurate inferences to be made regarding the legal advice.

CONCLUSION

[77] For the reasons given above, under s. 58 of FIPPA, I make the following order:

1. The Ministry is authorized under s. 14 to refuse to disclose the records at issue.

April 23, 2020

ORIGINAL SIGNED BY

Frank DeVries, Adjudicator

OIPC File No.: F18-73702

[75] Order F10-20, *ibid*, at para. 15.