



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-58

CITY OF BURNABY

D. Hans Hwang
Adjudicator

July 4, 2024

CanLII Cite: 2024 BCIPC 68
Quicklaw Cite: [2024] B.C.I.P.C.D. No. 68

Summary: An applicant requested the City of Burnaby (City) provide records respecting certain communications between the City and its lawyer. The City refused to disclose the responsive records on the basis that disclosure would reveal information that is subject to solicitor-client privilege under s. 14 of the *Freedom of Information and Protection of Privacy Act*. The adjudicator determined that the City was authorized to withhold all the information in dispute under s. 14.

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

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an individual (applicant) requested the City of Burnaby (City) provide records about the City's communications with its lawyer regarding the applicant.

[2] The City withheld the responsive records under s. 14 (solicitor-client privilege) of FIPPA.¹

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the City's decision. The OIPC's mediation process did not resolve the matter and it proceeded to inquiry.

¹ From this point forward, whenever I refer to section numbers, I am referring to sections of FIPPA unless otherwise specified.

Preliminary Issues

Issue estoppel

[4] The City submits that I should not decide whether solicitor-client privilege under s. 14 applies to the information in dispute because of issue estoppel. The legal doctrine of issue estoppel means that an issue should not be heard again because it has already been decided in a previous proceeding.²

[5] The City says that the applicant is attempting to re-litigate matters that were decided in Order F23-36.³

[6] For issue estoppel to apply, the following three requirements must be satisfied:

1. The issue in the current proceeding must be the same as the one decided in the prior decision;
2. The prior judicial decision must have been final; and
3. The parties to both proceedings, or their privies, must be the same.⁴

[7] In Order F23-36, I determined that s. 14 applied to some of the information in dispute in that inquiry because the information was protected by legal advice privilege.⁵ However, the information at issue in the present inquiry is not the same as in Order F23-36.⁶ Whether s. 14 applies to the information in dispute in this inquiry is not the same issue I decided in Order F23-36. As a result, I find issue estoppel does not apply to this inquiry.

Privacy breach complaint

[8] In his submission, the applicant raises an issue that was not set out in the OIPC investigator's fact report or the notice of inquiry. He alleges that his privacy was breached when the City obtained his confidential and private information from the Royal Canadian Mounted Police (RCMP) and the Canada Border Services Agency (CBSA) without proper authorization.⁷

² *Schweneke v. Ontario*, 2000 CanLII 5655 (ONCA) at para 25.

³ City's initial submission at paras 29-38.

⁴ *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63 (CanLII) at para 23.

⁵ Order F23-36, 2023 BCIPC 43 (CanLII) at paras 28-29.

⁶ In Order F23-36, a record withheld under s. 14 was a two-page email from LC to BS, copying TR, PT and DE referencing legal memorandum dated September 4, 2020. In this inquiry, records at issue consist of 35 emails from June 11, 2019 to February 22, 2021 which contain an email from BS to LC copying TR, PT and DE dated September 4, 2020.

⁷ Applicant's response submission. In response to the applicant's assertion, the Ministry says the applicant's assertions are beyond the scope of this inquiry.

[9] Past OIPC orders have consistently said that parties may only introduce new issues at the inquiry stage if they request and receive permission from the OIPC to do so.⁸ The notice of inquiry, which was provided to both parties at the start of this inquiry, also states that parties may not add new issues into the inquiry without the OIPC's prior consent. In this case, the applicant did not request prior permission from the OIPC to add this issue or explain what circumstances would justify adding it at this late stage. Accordingly, I will not consider, or make any decision about, the applicant's allegation that his privacy was breached.

ISSUE

[10] The issue I must decide in this inquiry is whether the City is authorized to refuse to disclose the information at issue under s. 14.

DISCUSSION

Background⁹

[11] The applicant is a former employee of the City. The applicant's request for records relates to the termination of his employment.

Records at issue

[12] In response to the applicant's request, the City identified 305 pages of responsive records which it says consists of approximately 35 emails. The City has withheld these records in full.

Solicitor-client privilege, s. 14

[13] The City applied s. 14 to withhold the records at issue.

[14] Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. This section encompasses both legal advice privilege and litigation privilege.¹⁰ The City is relying on legal advice privilege to withhold the emails.¹¹

⁸ For example, Order F16-34, 2016 BCIPC 38 at para 9.

⁹ The information in this background section is based on information in the City's initial submission at paras 4, 9, 10 and 15, which is not in dispute.

¹⁰ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para 26.

¹¹ City's initial submission at paras 16, 20 and 28.

[15] Legal advice privilege serves to promote full and frank communications between solicitor and client, thereby facilitating effective legal advice, personal autonomy, access to justice and the efficacy of the adversarial process.¹²

[16] Not all communications between a client and their lawyer are protected by legal advice privilege, but the privilege will apply to communications that:

1. are between a solicitor and client;¹³
2. entail the seeking or giving of legal advice; and
3. are intended by the solicitor and client to be confidential.¹⁴

[17] I will address each category below, and I am satisfied that legal advice privilege applies to the information at issue for the reasons that follow.

Evidentiary basis for solicitor-client privilege

[18] The City did not provide me with a copy of records it withheld under s. 14. To support its claim of legal advice privilege, the City provided affidavit evidence from a lawyer.

[19] Section 44(1)(b) gives me, as the Commissioner's delegate, the power to order production of records to review them during the inquiry. However, given the importance of solicitor-client privilege, and in order to minimally infringe on that privilege, I would only order production of records being withheld under s. 14 where absolutely necessary to decide the issues in dispute. This approach is warranted due to the importance of solicitor-client privilege to the proper functioning of the legal system.¹⁵

[20] After a preliminary review of the City's submissions and the lawyer's affidavit, I determined that the City had not provided a sufficient evidentiary basis for me to make a decision about the claim of solicitor-client privilege respecting the records in dispute. Therefore, I provided the City an opportunity to submit additional evidence in support of its privilege claim over the records at issue.¹⁶ The City provided further submissions and an affidavit from its director of labour relations (Director).¹⁷

¹² *College*, supra note #10 at para 30.

¹³ *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 at para 83.

¹⁴ *Solosky v The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 [*Solosky*] at p. 837.

¹⁵ Order F19-14, 2019 BCIPC 16 (CanLII) at para 10; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 17; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 68.

¹⁶ OIPC letter dated May 21, 2024.

¹⁷ City's additional submissions dated June 6, 2024; Affidavit #1 of Director of Labour Relations at the City (Director).

[21] As an administrative tribunal, OIPC is not bound by strict rules of evidence and it is open to me to accept sworn evidence and belief as opposed to first-hand knowledge in some cases.¹⁸ While the Director was not included in all of the communications from which the Ministry withheld information under s. 14, I accept that the Director was included in some of these communications¹⁹ and she has reviewed the records at issue and has personal knowledge of these records. After reviewing the submissions and the affidavit, I find I now have sufficient evidence to decide whether s. 14 applies.²⁰

Parties' submissions, s. 14

[22] The City says that disclosure of the records would reveal privileged information between the City and a law firm retained by the City (Law firm) about the City's legal strategy in handling the applicant's labour relations matter.²¹ The City further says that the withheld records are confidential communications between City employees and the Law firm for the purpose of the seeking or giving of legal advice.²² The City asserts it is plain and obvious that if City employees reach out to the Law firm (whether they send emails and/or documents or otherwise), they do so for the purpose of obtaining privileged and confidential legal advice.²³

[23] The applicant did not directly address the City's application of s. 14 to the disputed information.²⁴

Analysis and findings

[24] From my review of the Ministry's submissions and evidence,²⁵ I find the Ministry is refusing to disclose the following records:

¹⁸ Order F21-15, 2021 BCIPC 19 at para 65, citing Order F20-16, 2020 BCIPC 18 at para 10; Order P07-01, 2007 CanLII 44884 (BC IPC) at para 59 citing *Cambie Hotel (Nanaimo) Ltd. (c.o.b. Cambie Hotel) v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 119.

¹⁹ Communications dated June 30, 2020; July 20, 2020; September 4, 2020; and October 19, 2020.

²⁰ See for similar reasoning *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para 78; Order F22-23, 2022 BCIPC 25 (CanLII) at paras 17-19.

²¹ City's initial submission at para 23.

²² City's initial submission at para 28.

²³ City's additional submission dated June 4, 2024.

²⁴ As explained above, the applicant says that the information disclosed to him as a result of an access request he previously made is different than information at issue in this inquiry.

²⁵ Exhibit A (Records table) to Affidavit #1 of Director.

1. Emails that City employees sent to lawyers and/or legal assistants of the Law firm, copying other City employees (City emails to the Law firm);²⁶ and
2. Emails that the Law firm sent to City employees, copying other lawyers and/or legal assistants of the Law firm (Law firm emails to the City).²⁷

Solicitor and client

[25] The first step of the legal advice privilege test looks at whether the communications are between a solicitor and client. For the reasons that follow, I find this first step is met.

[26] The City provided two affidavits in support of its position that the records at issue are privileged. These affidavits are sworn by a lawyer and the Director. As explained above, the Director held her position with the City's labour relation department at the time the records were created and she was responsible for labour management, including decisions about terminations.²⁸ The Director says she worked closely with the human resources department of the City (HR Department) regarding the applicant's workplace conduct.²⁹ The Director further says she and the HR Department were involved together in seeking and receiving legal advice from the Law firm about this issue.³⁰

[27] Based on the City's evidence, which I accept, I find that the City and City employees were in a solicitor-client relationship with the Law firm at all relevant times.

Seeking or giving of legal advice

[28] I will now consider whether the email communications entail the seeking or giving of legal advice.

[29] The Director says that she reviewed the records at issue.³¹ She says that each record is communications between the City and the Law firm for the purpose of seeking and giving legal advice. The Director does not specifically address each email in her affidavits, but I am satisfied her evidence establishes that all of the City's email communications with the Law firm and attachments are

²⁶ Emails located at pages 1-7, 12-16, 20-26, 30-87, 88-91, 92-93, 94-95, 96-97, 98-99, 100-102, 116-117, 118-177, 182-185, 186-192, 193-199, 224-242, 243-259, 266-270, 271-289, 290-295, 299-305 of the records at issue.

²⁷ Emails located at pages 8-9, 10-11, 17-19, 27-29, 103-105, 106-108, 109-111, 112-115, 178-181, 200-204, 205-206, 207-223, 260-265, 296-298 of the records at issue.

²⁸ Affidavit #1 of Director at paras 2-3.

²⁹ Affidavit #1 of Director at paras 3-4.

³⁰ Affidavit #1 of Director at para 4.

³¹ Affidavit #1 of Director at para 1.

concerned with the applicant's workplace conduct.³² Considering these circumstances, I find that these communications were made for the purpose of seeking or giving legal advice and, therefore, the second step of the test is met.

Intended to be confidential

[30] I accept that the withheld information was intended to be confidential, on the basis of the affidavit evidence before me.

[31] The Director says that all communications and attachments between the City and the Law firm were intended to be confidential.³³ Turning to the involvement of several City employees, I find the City's affidavit evidence establishes that the Director and several City employees (whose names and positions are identified) worked together to address the City's concerns about the applicant's workplace conduct. I am satisfied that they shared the Law firm's legal advice on the understanding that this advice would be held in confidence.³⁴

[32] As a result, I conclude that the parties to the solicitor-client relationship intended for the communications to be confidential and the communications were treated in that manner.

Conclusion, s. 14

[33] To summarize, I find that disclosing the information in dispute would reveal confidential solicitor-client communications that entail the seeking and providing of legal advice. I conclude that the City is authorized to withhold the disputed information under s. 14.

CONCLUSION

[34] For the reasons given above, under s. 58 of FIPPA, I confirm the City's decision to refuse to disclose information under s. 14 of FIPPA.

July 4, 2024

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File No.: F21-86297

³² Affidavit #1 of Director at para 5.

³³ Affidavit #1 of Director at para 6.

³⁴ Affidavit #1 of Director at para 4.