OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F10-20

MINISTRY OF ENVIRONMENT

Michael McEvoy, Adjudicator

June 10, 2010

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Summary: The applicant requested all records related to the permit application of Clayoquot Wilderness Resorts to develop horseriding trails and campsites in Strathcona Park. The Ministry was authorized to withhold all records for which it claimed solicitor-client privilege and most of the records that it withheld under s. 13(1) of FIPPA. The Ministry was required to disclose information from one record because it was a management directive and not a recommendation or advice under s. 13(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1) and 14.

Authorities Considered: B.C.: Order 00-06, [2000] B.C.I.P.C.D. No. 6; Order P10-02, [2010] B.C.I.P.C.D. No. 10; Order 02-38, [2002] B.C.I.P.C.D. No.38.

Cases Considered: *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

1.0 INTRODUCTION

[1] The Friends of Strathcona Park ("applicant") requested the Ministry of Environment ("Ministry") provide it with "all records from January, 2002 related to the permit application of Clayoquot Wilderness Resorts to develop horseriding trails and campsites in Strathcona Park."

[2] The Ministry responded by releasing some information while withholding other information under ss. 13(1), 14, 21(1) and 22(1) of the *Freedom of Information and Protection of Privacy Act (*"FIPPA").

[3] The applicants wrote to the Office of the Information and Privacy Commissioner ("OIPC") requesting the OIPC review the Ministry's decision to withhold information pursuant to ss. 13(1) and 14 of FIPPA.

[4] When mediation did not resolve these issues, an inquiry was held under Part 5 of FIPPA.

2.0 ISSUE

[5] The issues in this case are whether the Ministry was authorized by s. 13(1) and s. 14 to withhold information. Section 57(1) of FIPPA provides that it is up to the Ministry to prove that the applicant has no right of access.

3.0 DISCUSSION

[6] **3.1 Solicitor-Client Privilege—**The majority of the records in dispute are subject to the Ministry's claim of solicitor-client privilege and for this reason I will deal with that issue first. These records consist for the most part of emails, sometimes with attachments, between Ministry employees and their legal counsel. Section 14 of FIPPA reads as follows:

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

[7] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal professional privilege (sometimes referred to as legal advice privilege) and litigation privilege. The Ministry identifies and acknowledges these two types of privilege but does not explicitly say which it considers applies here. However, I infer from the Ministry's submissions that in using the term "solicitor-client privilege" throughout its argument, it means to say that legal advice privilege is the type of privilege at issue here.

[8] Decisions of this office have consistently applied the test for legal advice privilege at common law. Thackray J. (as he then was) put the test this way:[1]

> [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

[1] *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.
>
> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

[9] The Ministry submits that it has properly severed the information in the records under s. 14 of FIPPA on the basis that:[2]

- The information consists of communications (including attachments to those communications) that were exchanged between a lawyer and her client, in confidence, for the purpose of seeking and giving legal advice (see pages 52(a), 52(g), 52(m), 62, 63, 64, 65, 67 to 138, 146 to 148, 150 to 192, 194, 197 to 208, 210 to 255, 260 to 294, 296 to 299, 301, 303, 306 to 329, 335 to 336, 342, 348 and 354); or
- The information, if released, would reveal communications that were exchanged between a lawyer and her client, in confidence, for the purpose of seeking and giving legal advice (see pages 4, 9, 14, 19, 21, 24, 26, 31, 33, 35, 38, 40, 256, 381 and 385).[3] The information that has been severed under s. 13 from the requested information and briefing notes falls into this category.

[10] The Ministry adds that some of the severed information was copied to legal counsel for the Ministry, as opposed to being sent by or directly to legal counsel. The Ministry submits that the information in these emails is subject to s. 14 because:[4]

- They are attached to a confidential email that was exchanged between a lawyer and her client and was directly related to the seeking, formulating, or giving of legal advice. In this regard the Ministry contends these emails are like any other attachment to a privileged communication in that they are privileged by virtue of being confidentially shared with legal counsel for the purpose of obtaining legal advice; and
- The emails in question were copied to legal counsel (Lisa McBain) for the purpose of updating her on events relating to the permit application.

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[2] Ministry's initial submission, para. 4.33. In this Order, I will use the Ministry's list of numbered records when referring to the information in dispute. This list includes cross-references the Ministry's page numbers with the corresponding pages on the applicant's list. Although, as the applicant notes, a few of the applicant's corresponding page numbers were not cross-referenced, I am satisfied the parties' submissions have fully canvassed all of the records in dispute.

[3] The Ministry notes that the references to the "Attorney General" in those pages are a reference to advice received from a lawyer at the Legal Services Branch, Ministry of Attorney General.

[4] Ministry's initial submission, para. 4.34.

The Ministry says this enabled legal counsel to be in a position to provide the Ministry with ongoing legal advice in relation to the permit application nor to advise her of the fact her advice had been passed along to other Ministry staff.

[11] The applicant notes it is at a considerable disadvantage in not being able to see the records or view a summary of the records. It contends that:

- The "sheer volume of the records excluded under s. 14 argues against the likelihood that all exclusions meet the narrow test of communications between Public Body and its solicitor for the purpose of seeking legal advice."[5]
- It is significant that certain severed information appears to relate to a legal opinion provided by the applicant. It says that the record would "certainly" not be severable and, while the applicant does not want the record back, it says this severance demonstrates a failure on the part of the Ministry to apply the solicitor-client privilege test correctly.[6]
- The "very small deletions" in records 381 and 385, for example, are not severable under s. 14 because the matter they relate to is an important public issue.[7]
- If the copied emails are found to be privileged that this would allow a public body to hide much of its internal correspondence by simply copying it to its counsel.[8]
- If some of the excluded records are found to meet the solicitor-client privilege test then such communications lose their confidential character, and thus their privileged status, by being edited, or otherwise changed and forwarded, electronically or otherwise within the public body.[9]
- If the records of the public body are sent to a lawyer, they are not privileged as they are not being sent for the purpose of seeking legal advice.[10]

Findings

[12] I have considered the parties' submissions and the affidavit evidence, including that of Ministry solicitor Lisa McBain, and have carefully reviewed the disputed records. I have no difficulty in concluding that all of the records for which the Ministry claims solicitor-client privilege meet the requisite test under s. 14 of FIPPA.

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[5] Applicant's initial submission, para. 9.
[6] Applicant's initial submission, para. 11.
[7] Applicant's reply submission, para. 6.
[8] Applicant's reply submission, para. 7.
[9] Applicant's initial submission. para. 13.
[10] Applicant's initial submission, para. 14.

[13] The communications in question are in writing. Most are explicitly noted in writing as confidential, while I conclude that the others, based on their context, were implicitly undertaken in confidence. Most communications are directly between the Ministry and its solicitor Lisa McBain for the purpose of seeking, formulating or giving legal advice. These are privileged.

[14] In some instances, Lisa McBain is copied on emails between her clients. I am cognizant of Commissioner Loukidelis's caution in Order 00-06[11] that such a communication – even a confidential one – addressed by a client to someone and that is copied to the client's lawyer does not, without more, mean the client's copy of the communication is privileged. In this case, however, the nature of the records satisfies me that the severed information at issue was clearly part of an ongoing communication between lawyer and client where the lawyer was copied so that she was in a position to formulate and give legal advice. I would add that disclosure of these copied emails, in this case, would also reveal legal advice. For these reasons, these communications are privileged.

[15] The Ministry also asserted privilege over all or part of attachments to certain emails between the Ministry and Lisa McBain. Without disclosing their contents, I can say that these attachments form part of legal advice sought or given. Again, I am cognizant of the comments in *B. v. Canada* above that not all communications between a lawyer and client are privileged. Simply because a client conveys a record to a lawyer does not make that record privileged.[12] Legal advice privilege only applies to that record if it meets all conditions of the test set out in *B. v. Canada*. Here, the withheld attachments formed part of the communications between lawyer and client and, as noted, clearly relate to the seeking of legal advice in a manner contemplated by the solicitor-client privilege test enunciated above.

[16] The applicant also argues that these privileged records lose their confidential character, and thus their privileged status, by being edited or otherwise changed and forwarded, electronically or otherwise within the public body. I do not agree. There are instances in this case where, for example, a Ministry employee summarizes Lisa McBain's opinion and shares that summary with others in the Ministry, including Lisa McBain herself. Ministry employees are clients of the lawyer and as such are entitled to share their solicitor's legal opinion without waiving privilege over it.

[17] As to the "small deletions" referred to by the applicant, I can only say, without revealing their contents that they directly relate to the seeking of legal advice.

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[11] [2000] B.C.I.P.C.D. 06. In that case, SFU employees wrote letters to other SFU employees and in some instances to third parties and copied these to SFU's lawyer.

[12] For a discussion of this issue, see Order P10-02 at para. 25.

[18] In summary, I conclude that solicitor-client privilege covers all information for which the Ministry applies s. 14 of FIPPA.

]19] **3.2 Advice or Recommendations**—Section 13(1) of FIPPA reads as follows:

> **Policy advice, recommendations or draft regulations**
>
> 13(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.

[20] This provision is intended to allow full and frank discussion of advice or recommendations within the public service, preventing the harm that would occur if the deliberative process of government decision and policy-making was subject to excessive scrutiny. Section 13(1) has been the subject of many orders and I take the same approach here.[13]

[21] The records are composed of email communications, some with attachments, between Ministry employees, draft decision notes and correspondence. In this case, the Ministry categorizes the information it severed from these records under s. 13 in the following manner:[14]

1. Advice developed for the Assistant Deputy Minister concerning the direction of a management plan (pages 4, 9 and 13);
2. Options put forward to the Assistant Deputy Minister with respect to a proposal to upgrade the Lower Bedwell Trail in Strathcona Park for the purposes of conducting guided horse and mountain bike activities, as well as the implications of each option (pages 17, 18, 24, 25, 31, 32, 38, 39, 45, 46, 143, 144, 379 and 380);
3. Advice concerning the drafting of a decision note (pages 42, 139 and 208); and
4. Advice concerning issues relating to the Permit Application, including what issues needed to be addressed (pages 48, 49, 191, 192, 194, 195, 256, 285, 298, 303, 335, 381 and 385).

[22] I will refer to these four numbered categories of severed records in my findings below.

[23] The Ministry argues that a necessary component of giving advice about a range of options is giving guidance as to the implications or consequences of such options. Some of the information severed under section 13, it says, consists of the implications or consequences of various options. The Ministry

[13] See for example, Order 02-38, [2002] B.C.I.P.C.D. No. 38, in particular, paras. 101-127..
[14] Ministry's initial submission, para. 4.13.

submits the Commissioner in Order No. 02-38[15] found that such information qualifies as advice under s. 13.

[24] The Ministry also submits that disclosure of the information severed from the records under s. 13 of FIPPA would reveal advice and recommendations developed by a public body or for a public body. As such, the Ministry contends that it is authorized to withhold the information under s. 13(1) of FIPPA.

[25] The Ministry argues that the none of the factors listed in s. 13(2) applies here to compel disclosure of the withheld information.

[26] Moreover, the Ministry says the requested records are not more than 10 years old and as such, the application of section 13(1) is not affected by section 13(3) of FIPPA. That section of FIPPA states that s. 13(1) does not apply to information that has been in existence for 10 or more years.

[27] The applicant submits only that I review the records excluded under Section 13 and other records listed by the Ministry as "non responsive" and order production of records not properly excepted.

Findings

[28] I need not deal with the information under category number 1 because my solicitor-client privilege ruling applies to it.

[29] In carefully reviewing the records under category number 2, I refer to the words of Commissioner Loukidelis in Order 02-38[16]:

> A record presenting a "range of policy options" to a decision-maker may be normative in that respect, but I consider that, even in the absence of explicit language of recommendation, the options presented are recommendations or advice as to courses of action that arise in the context of a deliberative process within the public body.

[30] It is clear to me that in reviewing the information in category 2 all of it fits squarely within the reasoning of Order 02-38 and for this reason I consider that the severed material is advice or recommendations pursuant to s.13(1) of FIPPA.

[31] As to the information under category number 3, pages 42 and 139 are duplicates. Those pages and page 208 contain direct advice or recommendations concerning a "decision note" given in one case by Brian Bawtinheimer and in the other by Ron Quilter, both Ministry of Environment employees.

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[15] [2002} B.C.I.P.C.D. No. 38.
[16] At para.127.

[32] With respect to the information in category number 4, my solicitor-client privilege ruling above applies to records 256 to 385 and it is therefore not necessary to consider them under s. 13. Records 48, 191, 192, 194 and 195 in my view are matters of advice and recommendations developed for a public body.

[33] However, the same is not true of the small amount of information severed in record 49. The Ministry correctly notes that s. 13 applies to advice and recommendations concerning potential or suggested courses of action. It properly adds that advice can apply to a communication by an individual whose advice is sought or to the recipient of the advice as to which courses of action are preferred or desirable. Part of the definition of advice the Ministry cites, and with which I agree, refers to "an opinion given or offered as to action; counsel."[17]

[34] However, it is evident on review that the severed passage in record 49 does not accord with the analysis cited in the above paragraph. The severed passage is not, on its face, or impliedly, an opinion, advice or recommendation as to action or counsel. Nor does it concern an opinion on matters of fact that a public body employee must deliberate on. Without disclosing the record's specific content, I can say that it conveys a direction given to Ministry employees by a superior. Advice or recommendation, as defined above implies that the receiver of the information has latitude to accept or reject it after giving it consideration. The direction contained in the severed passage does not fit within this framework.

[35] The onus of proof in this matter is with the Ministry. The only specific evidence before me concerning the passage in record 49 is the record itself and as stated, it reads as a management directive, not advice or a recommendation. For these reasons, I find that s. 13(1) does not apply to the severed passage of record 49.

[36] Finally, the applicant requests that I review the records labelled "out of scope" by the Ministry. The notice of inquiry and the Portfolio Officer's Fact Report do not list these records as being in dispute. However, I have reviewed them and find that them to be out of scope.

4.0 CONCLUSION

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

1. I confirm that the Ministry is authorized by s. 14 of FIPPA to withhold records 4, 9, 14, 19, 21, 24, 26, 31, 33, 35, 38, 40, 52(a), 52(g), 52(m), 62, 63, 64, 65, 67 to 138, 146 to 148, 150 to 192, 194, 197 to 208, 210 to 255,

[17] Ministry initial submission, para. 4.

256, 260 to 294, 296 to 299, 301, 303, 306 to 329, 335 to 336, 342, 348, 354, 381 and 385.

2. I confirm that the Ministry is authorized by s. 13(1) to withhold records 17, 18, 24, 25, 31, 32, 38, 39, 42, 45, 46, 48, 139, 143, 144, 191, 192, 194, 195, 208, 379 and 380.

3. I require the Ministry to give the applicant access to information it severed and withheld under s. 13(1) in record 49.

4. I require the Ministry to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before July 22, 2010 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the record.

June 10, 2010

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

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