



Order F24-21

THE RESORT MUNICIPALITY OF WHISTLER

Rene Kimmett
Adjudicator

March 21, 2024

CanLII Cite: 2024 BCIPC 27
Quicklaw Cite: [2024] B.C.I.P.C.D. No. 27

Summary: Under the *Freedom of Information and Protection of Privacy Act* (FIPPA) an applicant asked the Resort Municipality of Whistler (Municipality) for access to certain information about a rezoning assessment related to a specific piece of land. The Municipality provided the applicant with responsive records but withheld some information under ss. 14 (solicitor-client privilege), 21(1) (harm to third-party business interests), and 22(1) (harm to third-party personal privacy) of FIPPA. During the inquiry, the parties resolved their dispute about the information withheld under ss. 21(1) and 22(1) and the only issue left was whether the Municipality was authorized to withhold the information in dispute under s. 14. The adjudicator determined the Municipality 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), a registered strata corporation (applicant) asked the Resort Municipality of Whistler (Municipality) for access to information about a rezoning assessment for a specific piece of land (Property).

[2] The Municipality provided responsive records to the applicant in two separate packages but withheld some information from those records under ss. 14 (solicitor-client privilege), 21(1) (harm to third-party business interests), and 22(1) (harm to third-party personal privacy) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Municipality's decision to withhold information. Mediation by the OIPC did not resolve the matter and it proceeded to inquiry.

[4] During the submissions phase of this inquiry, the third party whose information the Municipality had withheld under s. 21(1), informed the Municipality that it no longer objected to the Municipality disclosing this information to the applicant.¹ The applicant has received all of the information previously withheld under s. 21(1)² and, therefore, I find that s. 21(1) is no longer in dispute in this inquiry.

[5] Further, around the same time, the Municipality reconsidered its decision to withhold certain information under s. 22(1) and provided that information to the applicant.³ The applicant submits that it is not seeking access to the remaining information the Municipality has withheld under s. 22(1)⁴ and, therefore, I also find that s. 22(1) is no longer at issue in this inquiry.

ISSUE AND BURDEN OF PROOF

[6] At this inquiry, I must decide whether the Municipality is authorized to refuse to disclose the information in dispute under s. 14 of FIPPA.

[7] Under s. 57(1) of FIPPA, the Municipality has the burden of proving that the applicant has no right of access to the information it has withheld under s. 14.

DISCUSSION

Background

[8] Several years ago, the Municipality received a rezoning application from a third party (Developer) that was seeking to develop the Property. The Municipality conducted a public hearing on this rezoning application and subsequently approved the Developer's application and amended the relevant bylaw.⁵

[9] The applicant submits it made its access request in order to gather information related to the rezoning application, specifically, the Developer's proposed rate of return on investment.⁶

Records at issue

[10] The two packages of responsive records total 374 pages. The Municipality has entirely withheld certain emails and email attachments totalling 11 pages under s. 14. As noted above, the remaining information in the records packages

¹ Manager's affidavit #1 at para 5.

² Applicant's submission at para 5 and Manager's affidavit #2 at para 2.

³ Manager's affidavit #1 at para 4.

⁴ Applicant's submission at para 4.

⁵ Applicant's submission at para 13.

⁶ Applicant's submission at para. 11.

has either already been disclosed to the applicant or is otherwise no longer in dispute. The Municipality provided me with an unredacted copy of the records to review in the context of this inquiry.

Solicitor-client privilege – s. 14

[11] Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege.

[12] The test for solicitor-client privilege has been expressed in various ways.⁷ For the purpose of this decision, I adopt the test as expressed by the Supreme Court of Canada in *Pritchard v Ontario (Human Rights Commission)*,⁸ which states that for solicitor-client privilege to apply there must be:

1. a communication between a solicitor and a client;
2. that entails the seeking or giving of legal advice; and
3. which is intended to be confidential by the parties.⁹

[13] Not every communication between a solicitor and their client is privileged, however, if the conditions above are satisfied, then solicitor-client privilege applies.¹⁰

[14] The communication does not need to specifically seek or give legal advice, as long as it can be placed in the continuum of communications in which the solicitor tenders advice.¹¹ The “continuum of communications” involves the necessary exchange of information between a lawyer and their client for the purpose of obtaining and providing legal advice, including history and background information provided by a client or communications to clarify or refine the issues or facts.¹²

[15] An attachment to an email may be privileged on its own, independent of being attached to another privileged record. Additionally, an attachment may be privileged if it is an integral part of the communication to which it is attached and its disclosure would reveal the communications protected by legal advice privilege, either directly or by inference.¹³

⁷ For example, *R. v B.*, 1995 CanLII 2007 (BCSC) sets out a four-part test for legal advice privilege.

⁸ *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31.

⁹ *Ibid* at para 15, citing *Solosky v The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 [*Solosky*] at 837.

¹⁰ *Solosky*, *supra* note 9 at 837.

¹¹ *Samson Indian Band v Canada*, 1995 CanLII 3602 (FCA), [1995] 2 FC 762 at para 8.

¹² *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para 40.

¹³ Order F18-19, 2018 BCIPC 22 at paras 36-40 and the authorities cited therein.

Parties' submissions

[16] The Municipality relies on the records themselves and affidavits from its Manager of Legislative Services/Corporate Officer (Manager), who is a practicing lawyer,¹⁴ as evidence that the information in dispute meets the test for solicitor-client privilege. The Manager says the information in dispute is comprised of written communications between the Municipality and its legal advisors that are directly related to the seeking, formulating or giving of legal advice.¹⁵

[17] The Manager does not state that the communications were confidential, but the Municipality submits that they were.¹⁶

[18] The applicant submits that the Municipality has not provided the adjudicator with redacted or unredacted copies of the information withheld under s. 14 and has not provided sufficient evidence that the information in the records meets all elements of the test for solicitor-client privilege.¹⁷

Analysis

[19] For the reasons that follow, I find the Municipality has established that all the information it withheld under s. 14 is subject to solicitor-client privilege.

[20] As noted above, the Municipality provided all of the information in dispute to the OIPC for the purposes of this inquiry. From my review, I can see that the information in dispute is contained in five emails¹⁸ and two email attachments¹⁹ sent between two Municipality employees and a person identified in the records as a lawyer.

[21] The emails are written communications, and I am satisfied that they were intended to be confidential between the parties, as no other individual is copied on these emails. Based on the information in the bodies of these emails, I am also satisfied that there was a solicitor-client relationship between the Municipality and the lawyer in question when the emails were sent and received. Further, I find, on the same grounds, that the emails entail the seeking, formulating and giving of legal advice. Therefore, I find that the information in the emails is subject to solicitor-client privilege.

[22] Turning to the email attachments at issue, I can see, from the information in the body of the emails, that the Municipality attached these documents to the

¹⁴ Manager's affidavit #2 at para 3.

¹⁵ Manager's affidavit #1 at para 7 and Manager's affidavit #2 at para 4.

¹⁶ Municipality's initial submission at para 13.

¹⁷ Applicant's submission at paras 23-26.

¹⁸ Records at PDF pages 121-122 and 173-174.

¹⁹ Records at PDF pages 175 and 176-182.

email in order to seek legal advice on the documents themselves or the circumstances surrounding the documents. As a result, I am satisfied that the attachments are integral to the emails that they are attached to and, given I found these emails are subject to solicitor-client privilege, that disclosing the attachments would reveal the contents of privileged communications.

Exercise of discretion

[23] The word “may” in s. 14 gives the head of the public body the option to disclose information even if that information is subject to solicitor-client privilege. If the head of a public body has failed to exercise its discretion under s. 14, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where the decision was made in bad faith or for an improper purpose, the decision took into account irrelevant considerations, or the decision failed to take into account relevant considerations.²⁰

[24] The Municipality’s initial evidence on the subject of discretion is that “the [Municipality] has considered the exercise of its discretion under section 14 and decided in good faith not to waive the protection of that exception.”²¹

[25] The applicant submits the Municipality did not address what, if any, factors were considered in exercising its discretion to withhold the s. 14 information.²²

[26] Based on the applicant’s concerns, I gave the Municipality the opportunity to provide more information on the factors it considered in declining to disclose additional information to the applicant.²³

[27] In response, the Municipality provided a further affidavit in which the Manager sets out the following factors that the Municipality considered in exercising its discretion under s. 14:

- (a) the purposes of the access provisions of FIPPA and section 14;
- (b) previous decisions of the courts and the OIPC interpreting section 14 of FIPPA;
- (c) the fundamental importance of solicitor-client privilege to the Canadian legal system;

²⁰ Order F23-51, 2023 BCIPC 59 at para 142, citing *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para 52 and Order 02-38, 2002 CanLII 42472 (BC IPC) at para 147.

²¹ Manager’s affidavit #1 at para 8.

²² Applicant’s submission at para 34.

²³ I gave the applicant the opportunity to reply, but it chose not to.

- (d) the sensitivity of the issues in the records;
- (e) the Applicant's interest in the records;
- (f) the Municipality's past practice in asserting privilege over solicitor-client communications;
- (g) the fact that the Municipality has no intention to waive the privilege; and
- (h) whether there was a compelling public interest in disclosure.²⁴

[28] It would have been helpful for the Municipality to provide more information about how it weighed the above considerations in the context of the information in dispute. However, based on the context provided by the records themselves and the Municipality's additional submission, I am satisfied that the Municipality has not exercised its discretion in bad faith, for an improper purpose, or based on irrelevant or incomplete considerations. Therefore, I decline to order the Municipality to reconsider its discretion in this case.

CONCLUSION

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

1. I confirm the Municipality's decision to refuse to disclose all the information in dispute under s. 14.

March 21, 2024

ORIGINAL SIGNED BY

Rene Kimmett, Adjudicator

OIPC File Nos.: F21-87570 & F22-88514

²⁴ Manager's affidavit #3 at para 2.