



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

Decision F08-04

CAPITAL REGIONAL DISTRICT

Michael McEvoy, Adjudicator

March 12, 2008

Quicklaw Cite: [2008] B.C.I.P.C.D. No. 11

Document URL: <http://www.oipc.bc.ca/orders/section56/DecisionF08-04.pdf>

Summary: The Capital Regional District's application that an inquiry under Part 5 not be held is granted. It is plain and obvious that the record in dispute is subject to solicitor-client privilege under s. 14 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14 and 56; *Local Government Act*, s. 174.

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F07-05, [2007] B.C.I.P.C.D. No. 7; Decision F07-04, [2007] B.C.I.P.C.D. No. 20.

1.0 INTRODUCTION

[1] The Capital Regional District ("CRD") requests under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), that an inquiry under Part 5 of FIPPA not be held with respect to an access to information request the respondent applicant made for access to records.

[2] I have considered the submissions of the parties and, for the reasons that follow, I have exercised my discretion to grant the CRD's request that this matter not proceed to inquiry.

2.0 DISCUSSION

The access request

[3] The respondent is the president of a nature society who made a presentation to the CRD expressing a concern about dogs in parks. The respondent believes that the CRD inaccurately recorded this presentation in its minutes and expressed this concern to the Chair of the CRD (“Chair”). The Chair responded by informing the respondent that he was referring the matter to the CRD’s lawyer for advice. Once received, the Chair conveyed the gist of the legal advice to the respondent. He stated that the CRD was of the view that, while the minutes could have been made clearer, they did refer to the specific issue the respondent raised, as well as reflecting the general intent of his comments. As such, the Chair stated the minutes could not be said to be inaccurate or so inaccurate as to offend the *Local Government Act*. The Chair also denied the respondent’s request that he be provided with a copy of the legal opinion, stating that the advice was for the benefit of the CRD. The respondent applied to this Office for a review of that decision.

Parties’ arguments

[4] The CRD says it is plain and obvious that the record in dispute is subject to the solicitor client exception under s. 14 of FIPPA. It notes that s. 14 of FIPPA incorporates both branches of common law solicitor-client privilege, *i.e.*, legal professional privilege and litigation privilege.

[5] The CRD submits that in this case the first branch of the privilege applies because the record clearly constitutes a communication between solicitor and client, it was provided in confidence and was for the purpose of providing legal advice.

[6] The respondent asks this Office whether it is appropriate for the CRD to invoke solicitor-client privilege in the circumstances of this case where no financial or personnel matters are involved. He suggests that the privilege is being used to “deny the public information regarding the proper functioning of its elected representatives, thus weakening democracy”. He asserts that the position of the Chair concerning the minutes amounts to an admission that the minutes were not accurate but that “close is good enough”. The respondent argues that in this context the CRD’s legal opinion “seems to provide counsel to evade a legal duty to follow regulatory Provincial law to the letter”.¹ Finally, the respondent contends that he and the organization he represents deserve to see the information requested, since, as members of the public and taxpayers, they “benefit from it”.²

¹ Respondent’s initial submission, p. 2.

² Respondent’s initial submission, p. 2.

[7] The CRD replies that solicitor-client privilege attaches to any communication between lawyer and client for the purpose of obtaining legal advice, not only with respect to financial and personnel matters. The CRD also submits that the fact it is a publicly funded body does not affect its right to claim solicitor-client privilege.

Analysis

[8] Section 56(1) of FIPPA reads as follows:

Inquiry by Commissioner

56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[9] Many previous decisions have enumerated the reasons why this discretion might be exercised in favour of not holding an inquiry. These include where it is plain and obvious that the record in dispute is subject to an exception to disclosure. In each circumstance it must be clear that there is no issue which merits adjudication in an inquiry.³

[10] Section 14 of FIPPA reads as follows:

Legal advice

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

[11] It is well established that s. 14 of FIPPA incorporates both branches of common law solicitor-client privilege, *i.e.*, legal professional privilege and litigation privilege.⁴

[12] The CRD argues that the first branch of the privilege applies here. In an application of this kind under s. 56, it is the CRD who bears the burden of demonstrating why that request should be granted.

[13] In my view, the materials provided clearly establish that the record in dispute comes within well-established case law on solicitor-client privilege in that it is a communication between solicitor and client, provided in confidence for the purpose of providing legal advice.

³ See for example Decision F07-04, [2007] B.C.I.P.C.D. No. 20.

⁴ See for example Order 01-53, [2001] B.C.I.P.C.D. No. 56.

[14] As was noted in Decision F07-04:⁵

In cases where it appears obvious from previous Orders and Decisions of this Office that the outcome of an inquiry will be to confirm that the public body has properly applied the provisions of FIPPA, the respondent must provide some cogent basis for arguing the contrary.

[15] The respondent has not done so here. There is no cogent or legal basis for the respondent's claims that the solicitor-client privilege as applied by the CRD in this case should not apply.

[16] The fact that the record may not concern itself with a financial or personnel issue is not germane, because the law of solicitor-client privilege is not restricted to matters of finance and personnel issues.

[17] The respondent's assertion that the disputed legal opinion⁶ seems to provide counsel to the CRD to evade its legal responsibility is not an issue which merits adjudication at an inquiry. I do not take the respondent to be saying that counsel for the CRD is advising the CRD to deliberately ignore its duties under the *Local Government Act*, a serious charge for which there is no evidence. Rather I take the respondent to be saying that the effect of the legal opinion is to allow the CRD to avoid its legal responsibilities. At the heart of this argument is the respondent's strongly-held opinion that the CRD minutes in question fail to comply with the *Local Government Act*. The fact the respondent's view of the law and that of the CRD do not coincide is not a basis for interfering with solicitor-client privilege.

[18] Finally the respondent also suggests that as a taxpayer within the CRD he is in effect the client to whom the advice was given and therefore should be given access to it. This would not be an arguable issue at an inquiry because the respondent, at law, is not the client. The fact that the respondent is a taxpayer within the CRD gives him no authority to direct or act on behalf of the CRD. Under the *Local Government Act*, the CRD is a corporation which is governed by a board of directors.⁷ Only the CRD can assert or waive the legal privilege at issue here.

[19] The root of the respondent's frustration is his belief that the CRD minutes are inaccurate and the CRD has failed to properly remedy this. That is not a matter over which I have any authority.

⁵ [2007] B.C.I.P.C.D. No. 20, para 18.

⁶ As noted above, the CRD shared the gist of the legal opinion with the respondent. The CRD is entitled to exercise its discretion in this regard without waiving privilege over the entire document (see for example Order F07-05, [2007] B.C.I.P.C.D. No. 7) and the respondent does not argue that it has. In this respect the CRD has added an element of transparency to its communication with the respondent.

⁷ *Local Government Act*, s. 174.

3.0 CONCLUSION

[20] I have concluded that it is plain and obvious that the requested information is protected by the solicitor-client privilege under s. 14 of FIPPA. This matter will not proceed to an inquiry under Part 5 of FIPPA.

March 12, 2008

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC File No: F07-32196