



OFFICE OF THE
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Order F11-33

CITY OF PRINCE RUPERT

Michael McEvoy
A/Senior Adjudicator

December 7, 2011

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Summary: The applicant requested a copy of a severance agreement between the City and its former Corporate Administrator. The City provided the total severance figure but declined to provide the severance agreement itself, on the basis that the records were subject to solicitor-client privilege and that their disclosure would unreasonably invade the former Corporate Administrator's privacy. The A/Senior Adjudicator found that because the communication at issue was between the City's lawyer and a third party, it was not subject to solicitor-client privilege. Further, the information in the record constituted remuneration under s. 22(4)(e) and, therefore, its disclosure would not be an unreasonable invasion of third party privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14 and 22(4)(e).

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F09-15, [2009] B.C.I.P.C.D. No. 12; Order No. 173-1997, [1997] B.C.I.P.C.D. No. 34; Order No. 46-1995, [1995] B.C.I.P.C.D. No. 19; Order No. 24-1994, [1994] B.C.I.P.C.D. No. 27; Order 04-20, [2004] B.C.I.P.C.D. No. 20.

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

INTRODUCTION

[1] The applicant requests that the City of Prince Rupert ("City") provide him with a copy of a severance agreement ("agreement") between the City and its former Corporate Administrator. The City refused, telling the applicant that disclosure of the agreement would be an unreasonable invasion of third party

privacy under s. 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). In particular, the City said the information related to employment history and personal recommendations, consequently disclosure would be a presumed unreasonable invasion of third party privacy under ss. 22(3)(d) and (g) respectively. The applicant asked the Office of the Information and Privacy Commissioner (“OIPC”) to review this decision. In the course of doing so, the applicant stated that the City had released the name of the third party and the total amount of severance paid, but no other details of the agreement. In the course of mediation, the City acknowledged the existence of additional records that formed part of the severance agreement, but said it was withholding those because they were subject to solicitor-client privilege under s. 14 of FIPPA. When mediation did not resolve the applicant’s request, the matter went to inquiry, which closed on October 21, 2011.

ISSUES

[2] The issues I must decide are:

1. Whether the City is authorized by s. 14 of FIPPA to refuse to disclose certain records because doing so would breach solicitor-client privilege and;
2. Whether disclosure of other records would be an unreasonable invasion of the former senior employee’s personal privacy under s. 22 of FIPPA.

DISCUSSION

[3] **The Records**—The records consist of a cover letter from the former Corporate Administrator’s lawyer to the lawyer for the City, outlining the terms of the severance agreement. The City withholds this cover letter because it says it is subject to solicitor-client privilege. There are two enclosures to this letter. The first is a one-page document detailing the calculation of the severance amount. The City also withholds this record because they say it is subject to solicitor-client privilege. The second enclosure is a five-page severance agreement executed by the City and the former Corporate Administrator. The City withholds it in its entirety, because it says disclosure would be an unreasonable invasion of the former Corporate Administrator’s personal privacy.

[4] **Solicitor-Client Privilege**—I will first deal with the City’s claim of solicitor-client privilege. 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.

[5] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal advice privilege and litigation privilege. The City argues that legal advice privilege applies here. It says that the cover letter and calculation of the severance amount “is communication between Legal Counsel for the Third Party and the City’s Legal Counsel that was provided to the City as advice and also communication between the City’s Legal Counsel and the City...”.

[6] Legal privilege protects a confidential communication between a lawyer and a client that is related to the giving or receiving of legal advice, unless the client waives that privilege, either expressly or impliedly. As stated in *B. v. Canada*:¹

As noted above, the 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
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.

[7] The communication at issue here is in writing but does not otherwise meet this test, in particular part three. The communications are, as the City itself notes, a letter from its counsel to a third party’s counsel. Communications between a lawyer and third party may be protected where the third party is performing a function on the client’s behalf. This is obviously not the case here, because the third party is a lawyer representing the former Corporate Administrator who is adverse in interest to the City. In short, the covering letter and attached severance calculation is a third party communication not subject to legal advice privilege.

¹ [1995] 5 W.W.R. 374 (B.C.S.C.).

[8] **Would Disclosure of Severance Agreement be an Unreasonable Invasion of Privacy?**—FIPPA requires public bodies to withhold personal information where its disclosure would be an unreasonable invasion of a third party's personal privacy. The test for determining whether disclosure would be an unreasonable invasion of privacy is contained in s. 22 of FIPPA.

[9] Many orders have considered the application of s. 22 including Order 01-53.² First, the public body must determine if the information in dispute is personal information. Then, it must consider whether disclosure of any of the information is not an unreasonable invasion of third party privacy under s. 22(4). If s. 22(4) does not apply, then the public body must determine whether disclosure of the information is presumed to be an unreasonable invasion of third party privacy under s. 22(3). Finally, it must consider all relevant circumstances, including those listed in s. 22(2), in deciding whether disclosure of the information in dispute would be an unreasonable invasion of third party privacy. I take this same approach here.

Is it personal information?

[10] The first step in applying s. 22 is to determine whether the requested information is personal information. The information here is about the City's former Corporate Administrator in the sense that it details the terms of his severance arrangement with the City. It is therefore information about an identifiable individual and, as such, constitutes personal information, as that term is defined under FIPPA.

Not an unreasonable invasion of privacy

[11] The second step in applying s. 22 is to determine whether any of the provisions of s. 22(4) apply. The applicant argues that s. 22(4)(e) applies here because the severance agreement falls under information about the remuneration of the now former Corporate Administrator. The City says s. 22(4)(e) does not apply but does not elaborate. Section 22(4)(e) reads as follows:

- (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
 - ...
 - (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

² [2001] B.C.I.P.C.D. No. 56.

[12] Several previous orders have found that severance and related agreements concerning public body employees constitute “remuneration” under s. 22(4)(e).³ The information at issue here is the calculated amount of severance along with the terms under which that severance payment was made. The records therefore constitute “remuneration” under s. 22(4)(e). This means that disclosure of the requested information is deemed by law not to be an unreasonable invasion of the personal privacy of the third party, and the City must not withhold the information under s. 22. Previous orders have established that, when s. 22(4) applies, there is no need to consider whether any of the provisions of ss. 22(3) or 22(2) apply, as the application of s. 22(4) trumps those provisions.⁴ Therefore, it is unnecessary for me to examine the City's argument concerning the applicability of s. 22(3).

CONCLUSION

[13] For the reasons given above, under s. 58 of FIPPA, I require that the City give the applicant access to information he has requested.

[14] I further require the City 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 January 19, 2012 and, concurrently, to copy me on its cover letter to the applicant.

December 7, 2011

ORIGINAL SIGNED BY

Michael McEvoy
A/Senior Adjudicator

OIPC File No.: F10-43594

³ See Order F09-15, [2009] B.C.I.P.C.D. No. 12, Order No. 173-1997, [1997] B.C.I.P.C.D. No. 34; Order No. 46-1995, [1995] B.C.I.P.C.D. No. 19 and Order No. 24-1994, [1994] B.C.I.P.C.D. No. 27.

⁴ See, for example, Order 04-20, [2004] B.C.I.P.C.D. No. 20, para. 18.