



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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Order F13-05

CITY OF ROSSLAND

Ross Alexander, Adjudicator

February 5, 2013

Quicklaw Cite: [2013] B.C.I.P.C.D. No. 5

CanLII Cite: 2013 BCIPC No. 5

Summary: The applicant requested records relating to all letters, opinions, and reviews from the City's lawyer referred to in a memo from the City's Chief Administrative Officer to the Mayor and City Council. The City refused to disclose the records on the basis that solicitor-client privilege applied. The Adjudicator found that solicitor-client privilege applies to the records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* ss. 4(2) and 14.

Authorities Considered: B.C.: Order F12-05, [2012] B.C.I.P.C.D. No. 6; Order F11-33, [2011] B.C.I.P.C.D. No. 41; Order F10-02, [2010] B.C.I.P.C.D. No. 2.

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

INTRODUCTION

[1] This inquiry concerns a request by an applicant to the City of Rossland ("City") for certain letters, opinions, and reviews from the City's lawyer.

[2] The City refused the applicant's request under s. 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), asserting that the records were subject to solicitor-client privilege. The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review the City's decision.

[3] Mediation did not resolve this matter, and it proceeded to inquiry under Part 5 of FIPPA.

ISSUE

[4] The issue in this inquiry is whether the City is authorized to refuse access to the disputed records because they are protected by solicitor-client privilege under s. 14 of FIPPA.

DISCUSSION

[5] **Background**—The applicant is a former City Councillor and former member of the City’s Parcel Tax Roll Review Panel (“Panel”). The applicant says that during the time he was a City Councillor, the City’s Chief Administrative Officer (“CAO”) provided a memo to the Mayor and City Council entitled “Appointment of Parcel Tax Review Panel and Parcel Tax Roll 2011”. The applicant says the memo refers to letters, opinions, and reviews written by the City’s lawyer, and it is that information he seeks.

[6] **Records at Issue**—The disputed records consist of two letters from the City’s lawyer to the CAO.

[7] **Solicitor-Client Privilege**—Section 14 of FIPPA states:

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

[8] 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 to the records.

[9] Previous OIPC orders have consistently applied the following test for legal advice privilege:

[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

4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

If these four conditions are satisfied then the communications (and papers relating to it) are privileged.¹

[10] The burden of proof is on the City, under s. 57(1) of FIPPA, to show why the applicant has no right of access to the withheld information in the records under s. 14 of FIPPA.²

[11] Having reviewed the records, I am satisfied they are written communications of a confidential character. They are, in fact, marked “Privileged and Confidential”. Branches 1 and 2 of the test for legal advice privilege have been met.

[12] With respect to branch 3 of the test, the applicant submits that the communications are from the City’s lawyer, but he denies that they were communicated to the City or its agent. The applicant argues that the opinions in question were sought out by the CAO for his personal use or purpose, not for the City or Panel. The applicant submits that the CAO was attempting to challenge the Panel’s authority, and attack those members of City Council who were Panel members. He further submits that the lawyer’s communications were to the CAO as a “third party”, not in his capacity as a City employee, so the City is not in the position of “a client” for claiming privilege over the records.

[13] I cannot accept the applicant’s submission. The evidence is clear that the CAO had the authority to obtain legal advice on behalf of the City. City *Bylaw No. 2472* (“Bylaw”) states that the powers, duties, and functions of the CAO include “obtain[ing] legal advice”. The Bylaw does not limit the circumstances when the CAO can obtain legal advice for the City, or qualify the permitted subject matter of the legal advice. Further, the communications at issue relate to City matters, the records were addressed to the CAO referencing his “Chief Administrative Officer” job title³, and the memo referring to this legal advice is addressed from the CAO as a City employee. The evidence does not in any way support the applicant’s contention that the CAO acted in bad faith, or outside of his authority. I find that the CAO was authorized to, and did, obtain the legal opinions for the City.

¹ *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC). See Order F12-05, [2012] B.C.I.P.C.D. No. 6 or Order F11-33, [2011] B.C.I.P.C.D. No. 41 for examples of orders.

² Order F12-05.

³ Initial submission of the City.

[14] The applicant refers to Order F11-33⁴ and Order F10-02⁵ in support of his position. The disputed communications in each of these orders are between a public body's lawyer and a third party's lawyer. These are examples where solicitor-client privilege did not apply because the communications at issue were between a public body's lawyer and a third party. These cases have no application here because of my finding that the CAO was acting for the City. The CAO cannot be characterized as a third party as described in the above two orders.

[15] For the reasons above, I conclude the records are communications between the City (through its employee the CAO) and its lawyer. Therefore, branch 3 of the test for legal advice is satisfied.

[16] The applicant further submits that branch 4 of the test for legal advice privilege is not satisfied because the records are not directly related to the seeking, formulating, or giving of legal advice. He speculates about the content of the records, and supports his submissions with documents properly submitted *in camera*.

[17] My review of the withheld records satisfies me that the records are directly related to the giving of legal advice. The records are legal opinions. Consequently, I find that branch 4 of the test has been satisfied.

[18] In summary, based on the reasons set out above, I am satisfied that the City has properly claimed solicitor-client privilege with respect to the records at issue.

[19] I parenthetically note that the applicant's submissions raise issues regarding some of the content in the memo, alleged obligations of the CAO, and the legislative authority, procedures and appeal processes relating to the Panel under the *Community Charter and Assessment Act*. These are not matters within my authority to decide under FIPPA, and I expressly decline to do so.

Severing

[20] The applicant submits that if the records are not released in their entirety, the information in the records not containing legal advice—particularly the applicant's personal information—ought to be released. The City submits that the records are privileged in their entirety, and there is no personal information about the applicant in the records.

⁴ [2011] B.C.I.P.C.D. No. 41.

⁵ [2010] B.C.I.P.C.D. No. 2.

[21] I agree with the City that the records consist entirely of legal opinions, so no information can reasonably be severed from them under s. 4(2) of FIPPA.

CONCLUSION

For the reasons set out above, under s. 58 of FIPPA, I confirm that the City is authorized to refuse access to the withheld information under s. 14 of FIPPA.

February 5, 2013

ORIGINAL SIGNED BY

Ross Alexander
Adjudicator

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