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Order F14-29

RESORT MUNICIPALITY OF WHISTLER

Caitlin Lemiski
Adjudicator

July 31, 2014

Quicklaw Cite: [2014] B.C.I.P.C.D. No. 32
CanLII Cite: 2014 BCIPC No. 32

Summary: The Resort Municipality of Whistler retained a lawyer to investigate the applicant's workplace harassment complaint. The applicant requested a copy of the report the lawyer produced and Whistler withheld it under s. 14 of FIPPA. The adjudicator determined that the report is privileged and authorized Whistler to withhold it under s. 14.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 14.

Authorities Considered: B.C.: Order F05-35, 2005 CanLII 48297 (BC IPC); Order F10-18, 2010 BCIPC 29 (CanLII); Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order 02-20, 2002 CanLII 42445 (BC IPC); Order 03-02, [2003] CanLII 49166 (BC IPC); Order 00-07, 2000 CanLII 7711 (BC IPC); Order F07-05, 2007 CanLII 9596 (BC IPC); Order F13-10, 2013 BCIPC 11 (CanLII).

Cases Considered: *Slansky v. Canada (Attorney General)* [2013] F.C.J. No. 996; *Gower v. Tolko Manitoba Inc*., 2001 MBCA 11, 196 D.L.R. (4th) 716; *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665.

INTRODUCTION

[1] This inquiry concerns a request for a report ("Investigation Report") prepared by a lawyer ("Investigating Lawyer") retained by the Resort Municipality of Whistler ("Whistler") to investigate the applicant's workplace harassment complaint. Whistler is withholding the entire report under section 14

(solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). It is also applying s. 22(1) (unreasonable invasion of third party privacy) of FIPPA to some portions of the report. The applicant requested a review of Whistler's decision to withhold the report. Mediation did not resolve the matter, and an inquiry was held under Part 5 of FIPPA. Both Whistler and the applicant made initial and reply submissions.

[2] An unsevered copy of the Investigation Report is included in the materials before me. It is the only record at issue in this inquiry.

ISSUES

[3] This issues before me are as follows:

1. Is Whistler authorized by s. 14 of FIPPA to refuse access to the Investigation Report?

2. Is Whistler required by s. 22(1) of FIPPA to refuse access to the Investigation Report?

[4] Under s. 57(1) of FIPPA, Whistler has the burden of proof to establish that s. 14 authorizes it to withhold the requested information. However, s. 57(2) of FIPPA places the burden on the applicant to establish that disclosure of personal information would not be an unreasonable invasion of third-party personal privacy under s. 22 of FIPPA.

DISCUSSION

[5] **Background**—The applicant complained to his employer, Whistler, that the human resources director ("Director") and another Whistler employee harassed him. The applicant later dropped his complaint against the Director. Normally the Director investigates any complaints of workplace harassment made by Whistler employees. However, because the Director was originally one of the subjects in this case, Whistler hired a lawyer to investigate the applicant's complaint.

[6] The lawyer investigated the complaint and wrote the Investigation Report. She gave it to the Director. The Director told the applicant that the outcome of the investigation was that his complaint was made in good faith but was unsubstantiated. The Director did not give him a copy of the Investigation Report. The applicant requested a copy under FIPPA, and Whistler denied access to it in its entirety under section 14. It also withheld portions of the Investigation Report under s. 22(1) of FIPPA as well.

[7] **Records at Issue**—The Investigation Report is 249 pages long, including a number of appendices. It contains the terms of reference under which the Director retained the Investigating Lawyer. It also contains notes of the Investigating Lawyer's interviews with the complainant and several witnesses, findings of fact, as well as legal advice as to how Whistler should deal with the complaint.

[8] **Preliminary Issues**—The applicant has raised two preliminary issues that I will address before considering whether ss. 14 and 22 of FIPPA apply.

[9] The first preliminary issue is that the applicant alleges that the Investigating Lawyer Whistler hired is biased. He alleges this because the Investigating Lawyer and the law firm for which she works have a history of acting for employers, including Whistler. I understand from his submissions that the applicant believes that disclosure of the Investigation Report is necessary to ensure that the Investigating Lawyer conducted her investigation fairly.

[10] It is well-established by courts that speculating that there is actual bias or reasonable apprehension of bias is insufficient; such allegations must be supported by evidence.[1] In this case, the applicant has not provided me with evidence that there is a reasonable basis on which to conclude the Investigating Lawyer is biased. I am also not persuaded that the question of whether the Investigating Lawyer is biased has any bearing in this case on whether s. 14 and s. 22(1) apply.

[11] The second preliminary issue is that the applicant has asked me to refuse to accept Whistler's reply submission to this inquiry because it sent the applicant a paper copy that arrived three days after the submission deadline. However, the applicant received Whistler's reply submission by email on the submission deadline and there is no evidence of prejudice to the applicant, so I will consider Whistler's reply submission.

[12] I will now turn to the question of whether s. 14 of FIPPA applies to the Investigation Report.

Section 14 – Is the Investigation Report subject to solicitor-client privilege?

[13] Section 14 of FIPPA is a discretionary exception to the general rule of access in FIPPA. Section 14 provides that a public body may refuse to disclose access to part or all of a record if the record is subject to solicitor-client privilege.

[1] Order 02-20, 2002 CanLII 42445 (BC IPC), at para. 13.

[14] The law recognizes two kinds of privilege, litigation privilege and legal advice privilege.[2] Whistler is claiming legal advice privilege over the Investigation Report. The test for whether legal advice privilege applies is well-established by the courts. It is as follows:

1) there must be a communication, whether oral or written;

2) the communication must be confidential;

3) the communication must be between a client (or agent) and a legal advisor; and

4) the communication must be directly related to the seeking, formulating, or giving of legal advice.[3]

[15] The applicant submits that the test to determine whether legal advice privilege applies is a "guideline" and that "common sense should be allowed to prevail"[4] in determining that the report is not privileged. While Whistler has discretion to decide whether to exercise legal privilege over a record, once that privilege has been claimed, as it has here, the courts have recognized that this test is the appropriate method to evaluate claims of legal advice privilege. I am therefore proceeding with an analysis of Whistler's claim using the four-part test.

Parties' submissions

[16] Whistler submits that the entire Investigation Report is subject to legal advice privilege. It relies on evidence that it asked the Investigating Lawyer to investigate the applicant's harassment allegation and provide it with confidential legal advice.[5] It submits that the script the Investigating Lawyer followed when she interviewed the applicant makes it clear that she was acting as legal counsel for Whistler and that her report would be privileged and confidential. Whistler also submits that the applicant knew Whistler did not intend to disclose a copy of the report to him.

[17] The applicant acknowledges that the Director told him that the Investigation Report would be confidential and that she would not share a copy with him, but he says he never agreed that he would not receive a copy. He submits that Whistler gave him information the last time he made a harassment complaint; therefore Whistler has set a precedent of disclosure. The applicant submits that he is only seeking enough access to the report to gain

[2] Order 03-02, 2003 CanLII 49166 (BC IPC), at para. 121.
[3] Order 03-02, at para. 123.
[4] Applicant's reply submission, at para. 2.
[5] Public body's initial submission, at para.10.

assurance that the investigation process was fair and transparent. He submits that Whistler never identified the Investigating Lawyer as a lawyer. He says the Director only told him Whistler had hired an independent, third-party investigator.

Communication between client and lawyer

[18] Whistler submits that the Investigating Lawyer prepared the Investigation Report and submitted it to the Director. The applicant does not dispute this. Based on my review of the contents of the Investigation Report, and in particular, the terms of reference, I find that there is a written communication between a client and a legal advisor. This satisfies the first and third parts of the four-part test.

Confidential communication

[19] Evidence Whistler submitted *in camera* shows that Whistler intended to keep the Investigation Report confidential and that once it was written, it was treated confidentially. In addition, the pages of the Investigation Report are marked confidential. The Director deposed that she told the applicant Whistler intended to keep the Investigation Report privileged and confidential.[6]

Lack of agreement by the applicant

[20] The applicant submits that he never agreed that the Investigating Lawyer's report would be privileged and confidential; Whistler does not dispute this. However, because Whistler is the client, the fact that the applicant did not consent does not change whether the report is subject to solicitor-client privilege. Although the applicant is an employee of the client, he did not have the authority to retain the Investigating Lawyer on behalf of Whistler and he did not retain her. Whether the applicant consented or not would not change whether the Investigation Report is privileged. Similarly, the applicant's argument that Whistler disclosed more information to him following a previous harassment complaint does not compel Whistler to do the same regarding this complaint.

Absence of outside communications

[21] The Investigating Lawyer only communicated with Whistler when she prepared her report. This is in contrast to *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*.[7] In *College of Physicians*, the BC Court of Appeal held that parts of a report prepared by a lawyer for the College were not privileged because the report included opinions of outside experts the lawyer obtained. The experts were

[6] Affidavit of Denise Wood, Director of Human Resources at para. 8, p. 3.
[7] *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665.

retained by the lawyer and acted on the lawyer's instructions.[8] In the present case before me, the Investigating Lawyer only interviewed Whistler employees.

[22] I find that the Investigation Report is confidential and the second part of the four-part test is met.

Communication related to seeking or providing legal advice

[23] In regards to the fourth part of the four-part test, I have decided that the entire contents of the Investigation Report are related to the seeking, formulating, or giving of legal advice and are therefore subject to s. 14 of FIPPA. In reaching this conclusion, I am guided by previous decisions of analogous cases.

A clear mandate to provide legal advice

[24] Courts have established that the terms under which a client retains a lawyer, while not conclusive, will have a bearing on whether the information the lawyer produces is subject to solicitor-client privilege.[9] In Order F05-35, former Commissioner Loukidelis determined that the entire report prepared by a lawyer retained by the City of Richmond to investigate an employee's allegation of wrongdoing was subject to solicitor-client privilege. In that case, it was central to the Commissioner's finding that the terms of reference between the City and the lawyer it retained stipulated that the report was to include legal advice and was to be confidential between the lawyer and the City.[10] In that case, as here, the lawyer gathered and assessed factual information in order to write the report and to render legal advice as set out in the terms of reference. This is in contrast to Order F10-18, where former Acting Commissioner Fraser determined that there was no evidence that the public body intended to establish a solicitor-client relationship.[11] It is also in contrast to *Slansky v. Canada (Attorney General),*[12] where the terms of reference between the Canadian Judicial Council and the lawyer it retained did not include an express provision to provide the Council with legal advice.

[25] In the present case, based on the *in camera* materials, I am satisfied that Whistler retained the Investigating Lawyer to provide a privileged and confidential report that included legal advice.[13] Although Whistler may not have told the complainant that the investigator it hired was a lawyer, it is not necessary to the existence of the solicitor-client relationship between the Investigating Lawyer and Whistler that she disclosed this to the applicant. In any event, it is clear from the

[8] 2002 BCCA 665, at para. 51.
[9] *Slansky v. Canada (Attorney General)*, [2013] F.C.J. No. 996, at para. 94, citing with approval *Gower v. Tolko Manitoba Inc*., 2001 MBCA 11, 196 D.L.R. (4th) 716, at para. 40.
[10] 2005 II 48297 (BC IPC), at paras. 13-15.
[11] 2010 BCIPC 29 (CanLII), at para. 40.
[12] [2013] F.C.J. No. 996, at para. 89.
[13] Public body's initial submission, at para. 6.

parties' submissions that the applicant knew the investigator was a lawyer at the time she interviewed him.[14]

Dual role of Investigating Lawyer

[26] Previous decisions have determined that if a client hires a lawyer to do the work of an investigator only, then records produced in those circumstances are not privileged.[15] However, when a client hires a lawyer to investigate and provide legal advice, the records are privileged so long as they meet the other parts of the test for either legal advice privilege or litigation privilege. This includes the legal advice a lawyer provides as well as the information the lawyer uses to prepare the advice. In *College of Physicians*, the Court held that "[l]awyers must often undertake investigative work in order to give accurate legal advice. In this respect, investigation is integral to the lawyer's function".[16] Once Whistler made the decision that the applicant's complaint should be investigated, it had several choices about how to proceed. It did not have to hire a lawyer. What the evidence clearly shows is that Whistler decided to hire a lawyer to investigate and provide legal advice. My review of the Investigation Report confirms that this is exactly what the Investigating Lawyer did. These facts lead me to conclude that the entire Investigation Report is privileged.

Waiver of privilege

[27] Neither party raised the issue of waiver but I will address it briefly here. After the investigation was completed, the Director told the applicant that the outcome of the investigation was that his complaint was made in good faith but was unsubstantiated. I find that the Director's actions do not mean that there was an express or implied waiver of privilege by Whistler of the Investigation Report. My conclusion that privilege was not waived is consistent with several previous orders that have determined that disclosing part of a privileged communication does not result in waiving privilege over all of it.[17] For example, recently Adjudicator Alexander considered this issue in the context of disclosure of part of a privileged email. In concluding that the public body did not waive disclosure over the entire email, he determined that "[t]he fact that the Agency exercised its discretion to increase transparency by disclosing privileged information to the applicant should not be weighed against it in assessing its conduct for the purpose of determining an intention to waive privilege."[18] I agree. In the present case, Whistler's willingness to share the Investigating Lawyer's

[14] Applicant's initial submission at p. 3, as well as Exhibit B of the affidavit of the Investigating Lawyer.
[15] See for example, Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44 at para.80; Order F10-18, 2010 BCIPC 29 (CanLII).
[16] College of Physicians at para. 39.
[17] See Order 00-07, 2000 CanLII 7711 (BC IPC) at para. 42; Order F07-05, 2007 CanLII 9596 at para. 22; Order F13-10, 2013 BCIPC 11 (CanLII) at para. 49.
[18] Order F14-16, 2014 CanLII 39875 (BC IPC).

overall conclusions with the applicant should not prevent it from claiming privilege over it.

CONCLUSION

[28] As I have determined that the Investigation Report is privileged, I find that Whistler is authorized to withhold it under s. 14 of FIPPA. In light of my finding, it is not necessary for me to consider whether s. 22(1) of FIPPA applies.

[29] For the reasons given above, I order pursuant to s. 58 of FIPPA that Whistler is authorized under s. 14 of FIPPA to refuse access to all of the information in dispute.

July 31, 2014

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

OIPC File No.: F14-51467