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Order F15-09

CAPITAL REGIONAL DISTRICT

Elizabeth Barker
Senior Adjudicator

February 26, 2015

CanLII Cite: 2015 BCIPC 9
Quicklaw Cite: [2015] B.C.I.P.C.D. No. 9

Summary: The applicant requested access to legal advice received by the Capital Regional District (“CRD”) regarding a new zoning bylaw proposed by the Township of Esquimalt. The adjudicator found that the CRD was authorized to refuse to disclose the legal advice under s. 14 of FIPPA because it is subject to solicitor client privilege and the privilege had not been waived.

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

Authorities Considered: B.C.: Order 00-07, 2000 CanLII 7711 (BC IPC); Order F07-05, 2007 CanLII 9596 (BC IPC); Order F13-10, 2013 BCIPC 11 (CanLII); Order F13-15, 2013 BCIPC 18 (CanLII).

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *R. v. B.*, 1995 Can LII 2007 (BCSC); *Canada v. Solosky*, [1980], 1 S.C.R. 82; *Descôteaux v. Mierzwinski* [1982] 1 S.C.R. 860; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209; *Gill v. Canada (Attorney General)*, 2012 BCSC 1807 (CanLII); *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC); *Guelph (City) v. Super Blue Box Recycling Corp.*, 2005 CanLII 34954 (ON SC); *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, 1988 CanLII 3214 (BC CA); *Lowry v. Canadian Mountain Holidays Ltd.*, 1984 CanLII 378 (BC SC).

Authors cited: Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, (1993, Toronto: Butterworths).

INTRODUCTION

[1] The applicant requested access to “all legal advice referenced in a July 8 letter” sent by the City of Victoria’s Corporate Officer to the Township of Esquimalt (“Esquimalt”) regarding matters related to the proposed location of a wastewater treatment plant within the Capital Regional District (“CRD”).

[2] The CRD identified a letter from its lawyer as the responsive record (“Record”). The CRD refused to disclose the Record under s. 14 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) because it asserted the Record was protected by solicitor-client privilege. The applicant disagreed with the CRD’s decision and requested a review of that decision by the Office of the Information and Privacy Commissioner (“OIPC”). Mediation did not resolve the dispute and the applicant requested that it proceed to written inquiry. The applicant made an initial submission and the CRD made initial and reply submissions.

ISSUE

[3] The issue to be decided in this inquiry is whether the CRD is authorized to refuse access to the Record under s. 14 of FIPPA. Under s. 57(1) of FIPPA, the burden of proof rests with the CRD.

DISCUSSION

[4] **Background** – In 2012, the CRD and the provincial and federal governments announced funding for the construction of a new wastewater treatment system for the CRD. The new system is known as the Core Area Wastewater Treatment Program (“CAWTP”). The capital costs of CAWTP are to be shared by the three levels of government.

[5] The CAWTP consists of three components: upgrades to the existing conveyance system, construction of a biosolids energy center and the construction of a wastewater treatment plant and marine outfall. The CAWTP identified McLoughlin Point in Esquimalt as the location for the wastewater treatment plant and marine outfall location.

[6] The CRD obtained legal title to McLoughlin Point and applied to Esquimalt for rezoning to permit the property to be used for the wastewater treatment plant and marine outfall. Esquimalt scheduled a public hearing to address three proposed Esquimalt bylaws regarding the zoning and use of McLoughlin Point.

[7] The CRD obtained legal advice regarding the impact of one of the proposed zoning bylaws (Bylaw 2806) on the CRD’s plans for the McLoughlin Point site.

[8] The CRD wrote a letter (“CRD Letter”) conveying their concerns regarding Bylaw 2806. The CRD Letter, dated July 8, 2013, was addressed to the Esquimalt Mayor and Council and was signed by the CRD’s Corporate Officer. At the public hearing on July 8, 2013, the Chair of the CRD presented the CRD letter to the Esquimalt Mayor and Council.

[9] **Record in Dispute** - The record in dispute is a six page letter (“Record”) from a lawyer to the CRD. The CRD has refused to disclose any part of the letter to the applicant.

[10] **Solicitor Client Privilege** - The CRD is withholding the Record under s. 14 of FIPPA, which says that a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. This provision encompasses both legal advice privilege and litigation privilege.¹ The CRD says that legal advice privilege applies to the Record. The applicant does not dispute that the Record is subject to solicitor client privilege. The issue the applicant raises is whether the CRD waived privilege over the Record.

[11] For legal advice privilege to apply the following conditions must be satisfied:

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.

[12] Not every communication between client and solicitor is protected by solicitor client privilege, but if the four conditions above are satisfied, then privilege applies to the communications and the records relating to it.²

[13] I have reviewed the Record and find that it is a written communication between the CRD, as client, and its lawyer containing legal advice, which is marked “privileged and confidential”. Therefore, I find that the Record meets all of the conditions required for solicitor client privilege to apply.

¹ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 26.

² For a statement of these principles see also *R. v. B.*, 1995 Can LII 2007 (BCSC), para. 22 and *Canada v. Solosky*, [1980], 1 S.C.R. 82, p. 13.

Waiver of privilege

[14] Solicitor-client privilege belongs to the client and persists unless it is waived by the client. The following passage from *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd.* is a helpful starting point in any analysis of waiver:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication.³

[15] Therefore, while privilege may be expressly waived, a waiver can also be implied where an objective consideration of the client's conduct demonstrates an intention to waive privilege and fairness so requires.⁴

[16] Regarding situations where only part of a privileged communication has been disclosed, the courts in BC have held that rather than finding that disclosure of part necessitates disclosure of the whole, it is preferable to look at all the circumstances of the case and ask whether the conduct in disclosing part of a communication is likely to mislead the other party or the court, such that privilege should be found to have been waived over the whole of the communication.⁵ As stated in *Gill v. Canada (Attorney General)*, "The cases dealing with whether waiver of privilege over part of a communication will be deemed to be waiver over the entire communication are based on unfairness to the other party. They prevent a party engaging in selective and self-serving disclosure..."⁶ This approach to partial disclosure is consistent with the principle that solicitor client privilege must be as close to absolute as possible and disclosure of information which is properly subject to solicitor client privilege is only ordered when it is absolutely necessary to achieve the ends of justice.⁷

[17] The applicant submits that the CRD waived privilege over the legal advice in the Record when the Chair of the CRD board announced at the public meeting that the CRD had obtained legal advice regarding Bylaw 2806 and

³ 1983 CanLII 407 (BC SC), para. 6.

⁴ See also: Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, (1993, Toronto: Butterworths), p. 191; Order 00-07 2000 CanLII 7711 (BC IPC); Order F07-05, 2007 CanLII 9596 (BC IPC).

⁵ *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, 1988 CanLII 3214 (BCCA), para. 10, adopting *Lowry v. Canadian Mountain Holidays Ltd.* 1984 CanLII 378 (BC SC), para. 18.

⁶ *Gill v. Canada (Attorney General)*, 2012 BCSC 1807 (CanLII), para. 32.

⁷ *Descôteaux v. Mierzwinski* [1982] 1 S.C.R. 860, p. 13; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, para. 36.

submitted the CRD Letter to Esquimalt outlining the CRD's specific legal concerns.⁸

[18] The CRD denies that the CRD waived privilege over the legal advice contained in the Record. The CRD explains that it never intended to waive privilege when its Chair disclosed the existence of legal advice regarding proposed Bylaw 2806. Rather, the CRD intended to publicly affirm that it had sought professional advice in order to come to an informed position regarding the legality of the proposed bylaw, and that it had communicated its concerns regarding the same to Esquimalt. The CRD submits that at the meeting and in the CRD Letter it merely revealed the existence of the legal advice, but that the contents of that legal advice were never disclosed. Although the CRD Letter states that the CRD has received legal advice that Bylaw 2806 “contains legal flaws” and then goes on to list and discuss four flaws, the CRD submits that the CRD Letter does not indicate to what extent it is in fact a summary of all or any portion of the legal advice.⁹

[19] In this case, I find that what took place was a partial waiver of privilege and the evidence satisfies me that there was an intention to waive privilege at least to a limited extent. The CRD chose to reveal at the public meeting, and in more detail in its CRD Letter, that it had obtained legal advice that the proposed bylaw contained certain legal flaws.

[20] However, given the circumstances, this is not a case where waiver of part of a privileged communication should be held to be waiver as to the entire communication. There was nothing to indicate that when the CRD disclosed what it did about the privileged communications with its solicitor that it intended to mislead or cause unfairness, nor is there any indication that it did in fact have that effect. In my view, merely disclosing the existence and gist of the legal advice in order to explain that the advice had informed the CRD's actions should not amount to an implied waiver over all of the privileged communications contained in the Record. This finding is consistent with court decisions and other BC Orders, which have held that disclosing that legal advice was received and relied on, or revealing the mere gist, summary or conclusion of that advice is not sufficient to imply a waiver over the whole of the privileged communications absent any unfairness.¹⁰ Further, this approach reflects the fundamental purposes of freedom of information legislation because it recognizes the need for accountability on the part of public bodies without impinging on their right to maintain confidentiality over privileged communications.

⁸ Applicant's request for review by the OIPC.

⁹ CRD's initial submissions, para. 35.

¹⁰ Order 00-07, 2000 CanLII 7711 (BC IPC); Order 07-05, 2007 CanLII 9596 (BC IPC); Order F13-10, 2013 BCIPC 11 (CanLII); F13-15, 2013 BCIPC 18 (CanLII). *Guelph (City) v. Super Blue Box Recycling Corp.*, 2005 CanLII 34954 (ON SC).

[21] The CRD submits that it must not be penalized for acknowledging that it received legal advice in an effort to maintain transparency and advise Esquimalt of the CRD's concerns and opposition to Bylaw 2806. I agree and can find nothing to suggest that the CRD revealed the information it did for reasons other than to inform the public and Esquimalt of its objections to the proposed bylaw. I find that the following statement from Order F07-05 applies equally to this case:

If a public body makes partial disclosure of privileged material in an effort to follow a "policy of transparency", this should not be weighed against it in terms of assessing the public body's conduct for the purpose of determining an intention to waive privilege. In this sense, the underlying motivation of the public body for partially disclosing privileged legal advice, as opposed to its motivation for seeking it in the first place, is relevant to an assessment of whether waiver of privilege has occurred. To hold otherwise would prejudice the public body for taking action which is in fact consistent with the express purpose of FIPPA, which is "to make public bodies more accountable to the public."¹¹

[22] In conclusion, this is not a case where fairness and consistency require disclosure of the whole of the privileged communication contained in the Record.

CONCLUSION

[23] I find that the Record is protected by solicitor client privilege and the privilege has not been waived. Therefore, the CRD may refuse to disclose the Record under s. 14 of FIPPA.

February 26, 2015

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F13-55684

¹¹ Order F07-05, 2007 CanLII 9596 (BC IPC), para. 26.