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Order F15-67

THE BOARD OF EDUCATION OF SCHOOL DISTRICT 71 (COMOX VALLEY)

Elizabeth Barker
Senior Adjudicator

December 3, 2015

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Summary: The former chair of the Board of Education for School District No. 71 (Comox Valley) requested records related to an operational review of the school district. The Board refused to disclose some information under s. 13 (policy advice and recommendations) and s. 14 (solicitor client privilege) of FIPPA. The adjudicator determined that all of the information withheld under s. 14 was protected by solicitor client privilege and that the privilege had not been waived.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 13, 14.

Authorities Considered: B.C.: Order 00-07, 2000 CanLII 7711 (BCIPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order F12-05, 2012 BCIPC 6 (CanLII); Order F13-05, 2013 BCIPC 5 (CanLII); F13-15, 2013 BCIPC 18 (CanLII); Order F14-29, 2014 BCIPC 32 (CanLII).

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *R. v. B.*, 1995 Can LII 2007 (BCSC); *Canada v. Solosky*, 1979 CanLII 9 (SCC); *S&K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC); *Power Consol.(China) Pulp Inc. v. B.C. Resources Invt. Corp.*, 1988 CanLII 3214 (BCCA); *Lowry v. Canadian Mountain Holidays Ltd.* 1984 CanLII 378 (BC SC); *Gill v. Canada (Attorney General)*, 2012 BCSC 1807 (CanLII); *R. v. Basi*, 2009 BCSC 777 (CanLII); *Chapelstone Developments Inc. v. Canada*, 2004 NBCA 96 (CanLII); *Descôteaux et al. v. Mierzwinski*, 1982 CanLII 22 (SCC); *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 (CanLII).

INTRODUCTION

[1] This case involves a request by a former chair of the Board of Education for School District No. 71 (Comox Valley) (“Board”) for records related to an operational review of the school district. The Board disclosed some records but withheld other records and parts of records under s. 13 (policy advice and recommendations), s. 14 (solicitor client privilege), s. 17 (harm to financial and economic interests of public body) and s. 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). It also withheld parts of some records because it believed those parts were not responsive to the request.

[2] The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the Board’s decision. During the review, the Board located and disclosed additional records. It also added s. 21 as a basis for withholding some information. Mediation settled the issues related to ss. 17, 21, 22 and the “not responsive” information. However, the issues related to ss. 13 and 14 were not resolved, and the applicant requested that they proceed to written inquiry. Both parties provided written inquiry submissions. The Board requested and received approval to provide some of its submissions *in camera*.

ISSUES

[3] The issues to be decided in this inquiry are whether the Board is authorized under ss. 13 and/or 14 of FIPPA to refuse to disclose the information requested by the applicant. Section 57(1) of FIPPA places the onus on the public body to prove that the applicant has no right of access to the information being withheld under ss. 13 and 14.

DISCUSSION

[4] **Background** - The applicant is a former member and chair of the Board. Her request is for records related to an operational review of School District 71 for all dates up to and including June 21, 2010, a time frame during which she was the chair of the Board.

[5] In 2009, the Board decided to retain a consultant to conduct an operational review. The report with the review’s findings was publicly issued in May 2010. Subsequently, concerns were expressed by the public, Board members and staff regarding the operational review, and there were calls for the applicant and another Board member to resign.¹ As a result, the Board commissioned an independent review “to examine the conduct of SD 71 School Trustees in the development and carrying out of the SD 71 Operational Review

¹ Applicant’s submissions, para. 35-36.

process.”² A redacted version of the independent reviewer’s report (“Staples Report”) was publicly issued on November 26, 2013.

[6] **Information in Dispute** - The records before me in this inquiry consist of 18 pages of emails. In each email, the applicant (in her former role as Board chair) is either a recipient or the author of the email. Small portions of the emails have been withheld under s. 14. Section 13 has applied to only one excerpt, which is also withheld under s. 14.

[7] **Request that inquiry be dismissed** - In its reply submission, the Board submits that I should dismiss this inquiry “as an abuse of process which undermines and is contrary to the purposes of FIPPA.”³ It says that the applicant admits that she already has a copy of one of the records in dispute (*i.e.*, an email between herself as Board chair and the Board’s lawyer at exhibit 6 of her submissions), and that “it is clear that the Applicant has insisted on proceeding to inquiry to obtain access to records she already has, in an attempt to legitimize her unauthorized possession of privileged Board documents. This is wholly improper, and is an abuse of process.”⁴ The Board also submits that it is not the purpose of FIPPA to legitimize an applicant’s unauthorized possession of a public body’s records.

[8] The purposes of FIPPA, as listed in s. 2, are to make public bodies more accountable to the public and to protect personal privacy by, among other things, giving the public a right of access to records, specifying limited exceptions to the rights of access and providing for an independent review of decisions made under FIPPA. A person who makes a request for records under FIPPA has a right of access to any record in the custody or under the control of the public body, subject only to records that are outside the scope of FIPPA and to information excepted from disclosure under Division 2, Part 2 of FIPPA. Further, s. 52(1) provides that a person who makes a request to the head of a public body for access to a record may ask the commissioner to review any decision, act or failure to act of the head that relates to that request.

[9] In my view, it is not an abuse of FIPPA processes for the applicant to request access to a record she has already obtained by other means. It may be that she recognizes that her ability to use the record is restricted because of the manner in which it was obtained, so she seeks to obtain it under the auspices of FIPPA. Further, FIPPA applies to records in the custody or under the control of a “public body” and applicants are not public bodies under FIPPA. Therefore, it is not within the purposes or provisions of FIPPA, or my delegated authority, to

² Applicant’s submissions, para. 36 and exhibit 13.

³ Board’s reply, para. 28. Given my finding regarding this abuse of process issue, it was not necessary to seek the applicant’s submissions on this issue.

⁴ Board’s reply, para. 24.

judge why an applicant already has a copy of a record in dispute and whether the possession of that record is “unauthorized”, as is alleged in this case.

[10] In conclusion, I have considered the Boards’ submissions, the circumstances of the access request, and the fact that the Board’s allegation of abuse relates to only the one record although there are several records in dispute, and I find that the applicant’s request for an inquiry is not an abuse of FIPPA processes. Therefore, the Board’s request that the inquiry be dismissed as an abuse of process is denied.

Solicitor client privilege (s. 14)

[11] The Board has withheld some information under s. 14 of FIPPA, which says that the head of a public body may refuse to disclose information that is subject to solicitor client privilege.

[12] The law is well established that s.14 of FIPPA encompasses both types of solicitor client privilege found at common law: legal advice privilege and litigation privilege.⁵ In this case, the Board submits that the information in dispute is protected by legal advice privilege. 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.⁶

[13] 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 papers relating to it).⁷ The above criteria have consistently been applied in BC Orders, and I will take the same approach here.

[14] The Board submits that the redacted portions of the records are protected by legal advice privilege. The Board explains that the communications relate to the seeking, formulating or giving of legal advice and were either between the

⁵ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 26.

⁶ See *R. v. B.*, 1995 Can LII 2007 (BCSC), para. 22 and *Canada v. Solosky*, 1979 CanLII 9 (SCC). For examples of BC Orders see: Order F13-05, 2013 BCIPC 5 (CanLII), Order F12-05, 2012 BCIPC 6 (CanLII), Order01-53, 2001 CanLII 21607 (BC IPC).

⁷ See *R. v. B.*, 1995 Can LII 2007 (BCSC), para. 22.

Board and its legal advisor or between Board members and staff. The Board's submissions and evidence are that the communications remained confidential between the Board and its legal counsel.⁸

[15] The applicant agrees that the information at issue under s. 14 contains legal advice, and she expresses the belief that it relates to more than one legal matter. She explains that she is only interested in the legal advice related to the operational review. She says that she already has a copy of that legal advice, and she provides a copy as exhibit 6 to her inquiry submissions. Exhibit 6 is an email between herself as Board chair and the Board's lawyer. She agrees that legal advice privilege applies to exhibit 6. However, as will be discussed below, she submits that the Board waived privilege over that legal advice.

[16] For clarity, I will refer to the legal advice in exhibit 6 as the "Clark advice" as this is the term used by the parties. Only a portion of the information in dispute in the 18 pages of emails is the Clark advice and subsequent communications about the Clark advice.

[17] I have reviewed all of the information withheld from the responsive records under s. 14. It comprises written communications among Board members and the Board's legal advisors. The communications are clearly and directly related to the seeking, formulating and giving of legal advice. The evidence provided by the Board also satisfies me that the communications were confidential communications between Board members and the Board's lawyers. I find that all of the withheld information (including the Clark advice and subsequent communications about it) meets the criteria for legal advice privilege.

Was there a waiver of privilege?

[18] While the applicant agrees that solicitor client privilege applies to the Clark advice, she submits that the Board waived its claim of privilege over that information and the subsequent privileged communications about it. The Board denies that it waived privilege over the information in dispute.⁹

[19] A waiver of solicitor client privilege is ordinarily established where it is shown that the possessor of the privilege knows of the existence of the privilege and voluntarily demonstrates an intention to waive that privilege. However, waiver may also occur in the absence of an express intention to waive where fairness and consistency so require.¹⁰ Thus, in some circumstances, a waiver of privilege respecting part of a communication may be held in the interests of fairness to require waiver in respect of the whole communication. In a case

⁸ Board's initial submissions, para. 23, and former secretary treasurer's affidavit, paras. 14-17.

⁹ Board's reply submission, para. 13.

¹⁰ *S&K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC), para. 6 and 10.

involving a partial waiver, the preferred approach is to look at all the circumstances of the case and ask whether the conduct in disclosing part of a privileged communication is likely to mislead the other party or the court.¹¹ This approach to partial disclosure is consistent with the principles that solicitor client privilege must be as close to absolute as possible and that 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.¹²

[20] In this case, the applicant does not expressly say how she believes the Board waived privilege over the legal advice contained in Clark advice. However, as I understand her submissions, she is implying that a waiver took place in two ways. The first was when the Board decided to commission the independent review and the applicant personally gave a copy of the email containing the Clark advice to the independent reviewer. The second was when a truncated version of the Clark advice was included in the published version of the independent reviewer's report (i.e., in the Staples Report).

Giving the Clark advice to the independent reviewer

[21] The applicant suggests that waiver occurred when the independent review was commissioned and/or the applicant gave a copy of the Clark advice to the independent reviewer. She says:

To believe that the intention of the Board was to not allow the reviewer access to the legal opinion is to assert that the Board which passed the motion, or the Board which served during the 2011 to 2014 term, intended to obfuscate the facts by hiding the legal opinion from the reviewer. This was not the intention of the Board I served on.¹³

[22] The applicant says she gave the reviewer the Clark advice on or about December 4, 2011 when she was being interviewed about what took place during the operational review. Although she says that her term on the Board ended in 2011, she provides no information about whether she was still a member of the Board when she gave the Clark advice to the independent reviewer.

[23] The Board submits that if the applicant did give the Clark advice to the independent reviewer, it was not a waiver by the Board because the applicant was no longer a member of the Board when she did this. The Board also says:

¹¹ *Power Consol.(China) Pulp Inc. v. B.C. Resources Invt. Corp.*, 1988 CanLII 3214 (BCCA), para. 10, adopting *Lowry v. Canadian Mountain Holidays Ltd.* 1984 CanLII 378 (BC SC), para. 18. See also: *Gill v. Canada (Attorney General)*, 2012 BCSC 1807 (CanLII), para. 32; *R. v. Basi*, 2009 BCSC 777 (CanLII), para. 22; *Chapelstone Developments Inc. v. Canada*, 2004 NBCA 96 (CanLII), para. 58.

¹² *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.

¹³ Applicant's submissions, para. 47.

“Additionally, the idea that she alone could waive privilege on behalf of the Board by making self-serving reference to the Clark Advice as part of review of her conduct as a Trustee is preposterous.”¹⁴ The Board provides affidavit evidence from its Superintendent of Schools who says that the applicant’s term on the Board ended November 30, 2011. Further, the Board says that the action of commissioning the independent review cannot be said to amount to an intention to waive privilege.

[24] The law is well established that solicitor client privilege belongs to, and may only be waived by, the client. The Clark advice was advice to the Board, and the Board was the client. Based on the superintendent’s affidavit evidence, which does not conflict with what the applicant says about her term on the Board, I find that the applicant was no longer on the Board when she gave the Clark advice to the independent reviewer. Furthermore, the applicant provided no submissions or evidence to establish that, even if she were still Board chair, she had the authority to waive the Board’s claim of privilege over the Clark advice by giving it to the independent reviewer. Therefore, I find that there was no waiver of privilege over the Clark advice when the applicant gave a copy of it to the independent reviewer.

Including the Clark advice in the Staples Report

[25] The second means by which the applicant suggests the Board waived privilege over the Clark advice occurred when a reference to that advice appeared in the Staples Report. As part of her submissions, the applicant provided a copy of the Staples Report, which she says was publicly released in November 2013. The Board does not dispute this occurred. The part of the publicly issued Staples Report which is relevant to this analysis says:

The Chair sought a legal opinion on whether the Board should disqualify the supplier who met earlier with five Board members and who provided advice about the RFP. The Chair received legal advice recommending against disqualifying the supplier as it might create another set of legal problems.¹⁵

[26] The applicant explains that the Board agreed to add the above excerpt into the Staples Report in order to resolve her third party request for review that she initiated under FIPPA.¹⁶

[27] The Board submits that the Staples Report only contains a “general reference” to the Clark advice, and that this does not amount to waiver of privilege over that advice.¹⁷ The Board says:

¹⁴ Board’s reply submission, para. 12.

¹⁵ Page 6 of the Staples Report, Applicant’ submissions at exhibit 13.

¹⁶ The applicant objected to the proposed disclosure of her personal information in the Staples Report because she felt it would be an unreasonable invasion of her personal privacy under s. 22 of FIPPA.

While it is unclear from her Submission, it appears the Applicant may be suggesting that the general reference to the Clark Advice in the published version of the Staples Report constitutes waiver of privilege over the Clark Advice. This is not the case. To begin from a practical perspective, this position is difficult to accept as the Applicant concedes that a general reference to the Clark Advice was added at her behest. Indeed, the Applicant admits that the reference to the Clark Advice was only added to the published version of the Staples Report after an extensive mediation by the OIPC and after her counsel raised the absence of a reference to the Clark Advice while advocating on her behalf....¹⁸

[28] The Board submits that disclosure of part of a privileged communication does not automatically result in waiver of the whole, and they reference several OIPC orders that held that to be the case.¹⁹ The Board submits that fairness does not weigh in favour of a waiver in the present circumstances when the general reference to the privileged information was made in the interests of greater transparency. It submits, “Accordingly, punishing the Board for including a reference to the Clark Advice where that increased the transparency of the Staples Report would be inconsistent with the purpose of FIPPA.”²⁰

[29] In my view, the excerpt from the Clark advice contained in the Staples Report is more than a “general reference” to the Clark advice. It reveals some of the content of that legal advice. There is nothing that indicates that the inclusion of the information in the Staples Report was involuntary or done in ignorance of the fact that the information was legal advice protected by privilege. The Board does not suggest that it was unaware of the existence of the privilege in the Clark advice, and there is correspondence that the Board had legal representation when it agreed to the excerpt being included in the Staples Report.²¹ Therefore, I find that the Board voluntarily and knowingly waived privilege over that part of the Clark advice disclosed in the Staples Report.

[30] However, the question remains whether fairness dictates that this partial waiver should result in a waiver of the full content of the Clark advice and subsequent privileged communications about it.

What does fairness require in these circumstances?

[31] The parties agree that the excerpt that references the Clark advice was included in the Staples Report at the applicant’s request in order to resolve her third party request for review to the OIPC regarding her personal information contained in the report.

¹⁷ Board’s reply, para. 15 - 17.

¹⁸ Board’s reply, para. 15.

¹⁹ Order F14-29, 2014 BCIPC 32; F13-15, 2013 BCIPC 18.

²⁰ Board’s reply, para. 19.

²¹ Applicant’s submissions, exhibit 12.

[32] The applicant already knows the full content of the Clark advice and she retained a copy of it after her tenure on the Board ended (as evidenced by the fact that she provided a copy along with her submissions). She does not directly explain what she intends to do with the Clark advice and the related communications, if she receives them by way of this inquiry under FIPPA. However, based on her submissions, I infer that she would like the information so that she can refer to it publicly. The applicant submits that the Board is “engaging in selective and self-serving disclosure and that has the effect of misleading the public” and that “much of the content of the Staples Report was not accurate or fair.”²² She believes that the information that the Board claims is protected by solicitor client privilege would refute portions of the Staples Report.²³

[33] The Staples Report is critical of the actions and decisions of the applicant and the other Board trustees and staff, and the applicant is concerned that it does not include “an accounting of the actions that were taken in order to follow the [Clark] advice”.²⁴ My understanding of the applicant’s submissions is that she wants to be able to publicly fill in the gaps she believes were missed in the Staples Report and point out that, although the author of the Staples Report disagreed with the Board’s actions during the operational review, the Board followed the legal advice they received.²⁵

[34] I note that there is no information to suggest that there is any litigation or other legal proceedings that might be impacted by the partial waiver or the information in dispute in this case. The applicant does not explain in what way partial disclosure unfairly advances the Board’s (or anyone else’s) position in any forum or gives it an unfair advantage. Further, there is nothing in the circumstances of this case, and how the Clark advice came to be included in the Staples Report, that supports the applicant’s allegation that the partial waiver misleads the public.

[35] In my view, the partial waiver effectively increased public transparency regarding the Board’s actions during the operational review. Further, the applicant’s assertion about how the reference to the Clark advice in the Staples Report is misleading to the public is not supported by the evidence or the content of the Clark advice. Although the partial waiver only provides a summary of the legal advice, in my view, it is an accurate statement of the legal advice and it is not misleading just because it omits further specifics.

[36] Solicitor client privilege is integral to the legal system and it is not to be interfered with lightly. Case law establishes that a waiver over part of a privileged

²² Applicant’s submissions, para. 74.

²³ Applicant’s submissions, paras. 74 and 60.

²⁴ Applicant’s submissions, para. 77-78.

²⁵ Applicant’s submissions, paras. 74-82 and exhibits 12 and 15

communication may be held to be a waiver over the whole communication only if required to ensure fairness and consistency in court or other legal adversarial proceedings.²⁶ After considering the circumstances in this inquiry and the parties' submissions and evidence, I find that this is not one of those cases. While I acknowledge the applicant's strongly held belief that the Staples Report is inaccurate and unfairly portrays the actions of the Board and herself, this is not, in my view, a situation where fairness dictates that privilege be overridden. Therefore, I am not satisfied that fairness necessitates finding that there must be a waiver of all of the Clark advice and the subsequent privileged communications about it.

[37] In conclusion, I find that all of the information the Board withheld under s. 14 is protected by solicitor client privilege and that the privilege was not waived.

Policy Advice or Recommendations - s. 13

[38] Section 13(1) states that the head of a public body may refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. The Board applied s. 13 to only one small excerpt, which was also withheld under s. 14. In light of my finding that s. 14 applies to all the information in dispute, there is no need to also consider the application of s. 13.

CONCLUSION

[39] For the reasons above, pursuant to s. 58 of FIPPA, I order that the Board is authorized under s. 14 of FIPPA to refuse to disclose the information in dispute.

December 3, 2015

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

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²⁶ See footnotes 9 and 10.