Office of the Information & Privacy Commissioner for British Columbia

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Order F19-07

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Laylí Antinuk
Adjudicator

February 15, 2019

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Summary: An applicant requested Ministry meeting minutes relating to damage to his property. The Ministry refused to disclose any information in the responsive records, claiming solicitor client privilege protects it all. The adjudicator determined that s. 14 of FIPPA authorizes the Ministry to refuse to disclose some of the withheld information but not all of it.

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

INTRODUCTION

[1] The applicant requested that the Ministry of Transportation and Infrastructure (Ministry) provide meeting minutes related to property damage the applicant alleged the Ministry caused. The Ministry refused to disclose any information in the responsive records under s. 14 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) on the grounds that it is subject to solicitor client privilege.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation did not resolve the matter and it proceeded to inquiry.

ISSUE

[3] The issue I must decide in this inquiry is whether s. 14 of FIPPA authorizes the Ministry to refuse access to the information in dispute. The Ministry bears the burden of proving that the applicant has no right to access the information.[1]

DISCUSSION

Background

[4] In 2012, the applicant alleged that water running off a road owned by the Ministry damaged his property.[2] The Ministry retained an independent third party geotechnical engineering firm to provide a report identifying the cause of the alleged damage to the applicant's property.[3]

[5] In July of 2018, the applicant filed a Notice of Civil Claim respecting the alleged property damage naming the Province as defendant.[4]

Records in dispute

[6] The records in dispute consist of two pages of handwritten notes (notes) authored by a Ministry employee (the author). The Ministry did not provide a copy of the notes for my consideration. Instead, it supplied two affidavits[5] and a table of records that describes the notes as handwritten notes dated April 6, 2017 and March 13, 2017.

[7] The Ministry withheld the notes in their entirety under s. 14.

[8] After carefully reviewing the evidence before me, I have decided that I have sufficient evidence to make my findings respecting the Ministry's claims. I do not find it necessary to review the notes.

Solicitor client privilege – section 14

[9] Section 14 states:

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[1] Section 57(1) of FIPPA. Whenever I refer to section numbers throughout the remainder of this order, I refer to sections of FIPPA.
[2] Ministry's submission at para. 9.
[3] *Ibid*.
[4] Lawyer's affidavit at para. 8.
[5] The Ministry provides affidavits sworn or affirmed by: *(a)* the lawyer who provided advice to the Ministry respecting its dispute with the applicant (I call this the "lawyer's affidavit"); and *(b)* the manager of Geohazards and Slope Stability at the Ministry who wrote the notes (I call this the "author's affidavit").

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

[10] Section 14 encompasses two kinds of privilege recognized at common law: legal advice privilege and litigation privilege.[6] Legal advice privilege protects communications between a solicitor and client made for the purpose of obtaining and giving legal advice; litigation privilege applies to materials gathered or prepared for the dominant purpose of litigation.[7]

[11] For the reasons that follow, I find that the Ministry has not established that litigation privilege applies to the notes. However, the Ministry has established that legal advice privilege applies to a portion of the notes.

Parties' Positions

[12] The Ministry submits that both legal advice and litigation privilege apply to the notes. The Ministry asserts that litigation "was clearly contemplated at the time the Records were created" and that the Ministry created the notes "to prepare for litigation."[8] Therefore, the Ministry claims litigation privilege applies.

[13] In addition, the Ministry says that the notes "relate to the formulating of a plan to seek legal advice or the discussion of legal advice the Ministry had already sought and received."[9] According to the Ministry, this means that legal advice privilege applies.

[14] The applicant does not make submissions that relate directly to the Ministry's assertions of solicitor client privilege. Instead, the applicant expresses his disappointment with the Ministry's approach to responding to the property damage, stating that the Ministry does not care about the situation. The applicant says that the Ministry gets to "defend themselves with public funds when they should have fixed the issue in the beginning so we wouldn't be wasting every ones [*sic*] time."[10]

Legal advice privilege

[15] Legal advice privilege does not protect every communication between solicitor and client. Rather, in order for this form of privilege to shield a

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[6] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* (*College of Physicians*), 2002 BCCA 665 at para. 26.
[7] *Ibid*.
[8] Ministry's submissions at paras. 23-24.
[9] Ministry's submissions at para. 31.
[10] Applicant's October 17, 2018 email sent at 5:09 PM to the OIPC registrar of inquiries.

communication and records related to it, the communication must satisfy the following four conditions.[11]

1) There must be an oral or written communication.
2) The communication must be confidential in character.
3) The communication must be between a client (or agent) and a legal advisor.
4) The communication must be directly related to the seeking, formulating, or giving of legal advice.

Previous OIPC orders[12] have applied this four-part test in the context of s. 14 and claims of legal advice privilege. I will do the same.

[16] As described above, the notes consist of two pages of handwritten notes from meetings that occurred approximately one month apart. I consider each page a distinct record and will make findings in relation to each one.

[17] The author of the notes works as a manager of Geohazards and Slope Stability with the Ministry.[13] He says he wrote the notes during meetings and that the notes relate to the matters the applicant seeks information about.[14] He states that he wrote about his intention to seek legal advice on page one of the notes.[15] He goes on to confirm that he then received legal advice from a lawyer (lawyer) with the Ministry of Attorney General's Legal Services Branch regarding the matters described on page one.[16] He says that he believes that disclosing page one of the notes would allow an individual to draw accurate inferences as to the legal advice he received.[17]

[18] The Ministry provides an affidavit from the lawyer. The lawyer says that she has reviewed the notes and confirms that they include a reference to the intent to seek legal advice. She also confirms that she provided legal advice to the Ministry on those matters.[18] Given this, I find that page one of the notes contains a reference to the intent to seek legal advice. I also find that the Ministry did seek and receive the legal advice referred to on page one.

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[11] *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22; *Solosky v. The Queen,* 1979 CanLII 9 (SCC) at p. 837.
[12] For a few examples, see Order F18-33, 2018 BCIPC 36 at para. 15-16; Order F17-43, 2017 BCIPC 47 at para. 38; Order F15-52, 2015 BCIPC 55 at para. 10; and Order F15-15, 2015 BCIPC 16 at para. 15.
[13] Author's affidavit at para. 2.
[14] Author's affidavit at para. 5.
[15] *Ibid*.
[16] *Ibid*.
[17] Author's affidavit at para. 6.
[18] Lawyer's affidavit at para. 6.

[19] In considering the four-part test for legal advice privilege, I observe that the notes are not a communication between a solicitor and client respecting legal advice. The Ministry admits this, stating that the records do not involve direct communication with a lawyer.[19] However, the Ministry submits that the notes relate to the formulation of a plan to seek legal advice.

[20] Previous orders have held that a statement in a record about the intent or need to seek legal advice at some point in the future does not, on its own, suffice to establish that a confidential communication between a client and solicitor actually occurred. In order to establish that legal advice privilege applies, there must be evidence that disclosure of the statement would reveal actual confidential communication between solicitor and client.[20]

[21] In this case, the evidence satisfies me that the author acted on his intention to seek legal advice as described on page one and the Ministry's lawyer provided legal advice regarding the matters described on page one. Thus, I find that disclosing page one of the notes would reveal a communication between the Ministry and its lawyer that directly relates to seeking and receiving legal advice.

[22] The final part of the test requires that the communication occurred in confidence. The author states that his notes have remained confidential[21] and I find it reasonable that a person would expect his or her personal, handwritten notes of what took place at a meeting to remain confidential. Nothing in the evidence suggests that he was taking formal meeting minutes to share with others, for instance, or that the information about seeking legal advice was discussed with anyone other than Ministry staff and the lawyer. With all this in mind, I find that legal advice privilege protects page one of the notes.

[23] However, the Ministry has not established that page two of the notes would reveal a confidential communication directly related to the seeking, formulating or giving of legal advice. The Ministry provides no evidence that describes anything specific about page two. For example, the author states that he believes that the disclosure of page one of the records would allow an individual to draw accurate inferences as to the legal advice he received. He makes no such claim in relation to page two. Additionally, the author confirms that he did receive legal advice "regarding the matters described on page one."[22] Again, he makes no such statement in relation to page two.

[24] As stated, the Ministry provides no evidence that specifically relates to page two. That said, the Ministry makes the generalized claim that the notes relate to "the discussion of legal advice the Ministry had already sought and

[19] Ministry's submissions at para. 31.
[20] Order F17-23, 2017 BCIPC 24 at paras. 46-50; Order F16-26, 2016 BCIPC 28 at para. 32.
[21] Author's affidavit at para. 10.
[22] *Ibid* at para. 5.

received."[23] However, nothing in either affidavit indicates that the notes chronicle a "discussion of legal advice the Ministry had already sought and received" nor does the evidence indicate that a discussion of previously procured legal advice occurred at either meeting. As such, I reject the claim that either page of the notes relates to the discussion of legal advice the Ministry had sought and received previously.

[25] Taking all this into account, I find that legal advice privilege does not apply to page two of the notes but it does apply to page one.[24]

[26] I will now turn to the Ministry's litigation privilege claim.

Litigation privilege

[27] Litigation privilege protects materials created or collected as part of the process of preparing for and engaging in litigation.[25] Litigation privilege creates a "zone of privacy" in relation to pending or apprehended litigation to allow litigants to prepare for trial.[26] Once the litigation ends, the privilege ceases to exist.[27]

[28] In order for litigation privilege to protect a document, the party asserting privilege – in this case the Ministry – must establish two facts:[28]

1) litigation was ongoing or reasonably contemplated at the time the document was created; and
2) the dominant purpose of creating the document was to prepare for that litigation.

[29] The evidence indicates that relevant events unfolded as follows.

- In 2012, the applicant alleged that water running off a Ministry road damaged his property.
- On March 13, 2017, a meeting about the applicant's claims occurred. At this meeting, the author took handwritten notes.
- On April 6, 2017, another meeting about the applicant's claims occurred. The author also took handwritten notes at this meeting.

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[23] Ministry's submissions at para. 31.
[24] For an example of an order in which the adjudicator found part of a record protected by legal advice privilege, but not other parts, see Order F13-29, 2013 BCIPC No. 38 at paras. 18-19.
[25] *College of Physicians*, *supra* note 6 at para. 28.
[26] *Ibid* at para. 30.
[27] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 34.
[28] *Gichuru v. British Columbia (Information and Privacy Commissioner)*, (*Gichuru*), 2014 BCCA 259 at para. 32 quoting with approval from *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at para. 96.

- In July of 2018, the applicant filed a lawsuit against the Ministry related to the alleged property damage.

[30] The author penned the notes in the late winter and early spring of 2017. The applicant filed a lawsuit a full 15 months later. This means that litigation had not yet begun at the time the author wrote the notes. Therefore, the first question I must answer is whether litigation was in reasonable prospect in the late winter/early spring of 2017.

Reasonable prospect

[31] The courts have clarified that litigation is in reasonable prospect if:

> … a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it.[29]

[32] The test for whether litigation was in reasonable prospect involves an objective assessment based on reasonableness. It does not require certainty but it is "not enough that litigation was simply considered a possibility."[30] Additionally, the Ministry must provide evidence that goes beyond mere speculation. A bare assertion that litigation is in reasonable prospect will not suffice.[31] As stated in *Brown v. Wilkinson*:

> It is not enough for one of the parties to the communication or creation of the document to say "I anticipated litigation" or "I thought that litigation was inevitable"; there must be objective indicia to confirm or negate that subjective view.[32]

[33] To support its claim that litigation was in reasonable prospect, the Ministry points to the author's statement that when he wrote the notes he "was aware that the dispute between the Applicant and the Ministry could result in litigation."[33] The evidence establishes that the applicant alleged the property damage occurred in 2012 and five years later, when the meetings took place, the applicant's concerns remained unresolved. With this in mind, I agree that when the author wrote the notes in 2017, it was possible that the applicant's allegation *could* result in litigation. However, the possibility of litigation exists in every claim

[29] *College of Physicians*, *supra* note 6 at para. 83 quoting with approval from *Hamalainen v. Sippola*, 1991 CanLII 440 (BC CA), at para. 20.
[30] *Fitzpatrick v. Wang et al.*, 2014 ONSC 4251 at para. 68.
[31] *Raj v. Khosravi,* 2015 BCCA 49 at para. 10.
[32] *Brown v. Wilkinson*, 2012 BCSC 398 at para. 28.
[33] Author's affidavit at para. 7.

for loss or damage[34] and so I do not find the author's subjective view that litigation "could" occur determinative.

[34] Turning to the objective indicia in the evidence before me, I note that by the time the applicant filed his lawsuit, five years had passed since he had first informed the Ministry about the damage. His submissions suggest that he had made this claim multiple times and the Ministry responded by repeatedly denying it.[35] The applicant appeared determined about getting a more favourable response from the Ministry; his evidence indicates that he did not give up despite repeated rejections by the Ministry over the years. I also note that the Ministry's lawyer began providing legal advice to the Ministry respecting its dispute with the applicant as early as 2015.[36] Additionally, the applicant did ultimately commence litigation.

[35] The courts have clarified that the test for whether or not litigation was in reasonable prospect "is not one that will be particularly difficult to meet."[37] With this in mind and considering the totality of the evidence before me, I find that litigation was in reasonable prospect at the time the author wrote the notes.

Dominant purpose

[36] To establish that the notes pass the dominant purpose part of the test, the Ministry must prove that the author wrote them for the dominant purpose of aiding in the conduct of litigation.[38]

[37] As noted above, the Ministry describes the notes as relating to the retention of the independent engineer. Beyond this, the Ministry does not state what the meetings or notes were about. Given that the notes are handwritten, I find it reasonable to conclude that they were notes to self that would serve the author as reminders about what happened at the meetings. Again, nothing in the evidence indicates that the author took these notes as formal meeting minutes in order to share them with others.

[38] The author says that he created the records "for the dominant purpose of helping the Ministry prepare for possible litigation" with the applicant.[39] The Ministry offers no other persuasive evidence to confirm the author's assertion. The courts have made it clear that simply stating that a document was created

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[34] *Hamalainen, supra* note 29 at para. 20. Quoted with approval by the BC Court of Appeal in *Raj v. Khosravi*, *supra* note 31 at para. 10. For similar reasoning in the context of motor vehicle accidents, see *Fitzpatrick v. Wang et al.*, *supra* note 30 at para. 99.
[35] In the applicant's email to the OIPC registrar of inquiries (sent October 17, 2018 at 5:09 PM), he states, "this actual claim was denied multiple times."
[36] Lawyer's affidavit at para. 7.
[37] *Supra* note 29.
[38] *Raj v. Khosravi, supra* note 31 at para. 12.
[39] Author's affidavit at para. 8.

for the dominant purpose of litigation will not suffice. Other evidence must confirm this purpose.[40] Nothing in the Ministry's evidence confirms the author's assertions. In my view, the nature of the notes – handwritten, personal records of what occurred at meetings written by a Ministry employee (not its lawyer) – weighs against the author's assertions. So too does the fact that nothing in the evidence indicates that the author shared these notes with the Ministry's lawyer prior to the inquiry. In other words, it does not appear that the author took the notes in order to relay all of what happened at the meetings to the Ministry's lawyer to help her prepare for possible litigation.

[39] With all this in mind, I am not satisfied that the author took the notes for the dominant purpose of litigation.

[40] To summarize, the Ministry has not adduced evidence that persuades me that litigation privilege applies to the records. While litigation was in reasonable prospect at the time the author wrote the notes, I am not satisfied that the author wrote them for the dominant purpose of litigation.

Duty to sever – section 4(2)

[41] Section 4(2) imposes a duty on a public body to sever records. It states:

> The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part [which includes s. 14], but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[42] In situations where privileged information contained in one part of a record is clearly separate from non-privileged information contained in a separate part of the record, the severance provision in s. 4(2) applies.[41]

[43] The evidence satisfies me that legal advice privilege protects page one of the notes but not page two. Page one can be severed from page two of the notes – as described above, the author took the notes at two different meetings approximately one month apart. Therefore, the two pages are distinct, separate records. Consequently, I find that while the applicant has no right to access page one, he does have the right to access all the information on page two.

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[40] *Mazerolle v. Bright* (1999), 219 N.B.R. (2d) 25; [1999] N.B.J. No. 468 (C.A.) at para. 8 quoted with approval in *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835 at para. 56, appeal to the BC Court of Appeal allowed in part but not in respect of this issue.

[41] *College of Physicians*, *supra* note 6 at paras. 63-68.

CONCLUSION

[44] For the reasons above, I make the following order under s. 58 of FIPPA:

1. I confirm, in part, the Ministry's decision that it is authorized to refuse to disclose information under s. 14. The Ministry is authorized to refuse to disclose page one of the records.

2. I require the Ministry to give the applicant access to the remainder of the information in the records by April 1, 2019. The Ministry must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

February 15, 2019

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

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