Order F21-52

CITY OF NEW WESTMINSTER

Ian C. Davis
Adjudicator

October 29, 2021

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Summary: The New Westminster Firefighters' Union, IAFF Local 256, made a request to the City of New Westminster (City) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for access to the dates and amounts on legal bills that a law firm issued to the City during a three-year period for work advising and representing the City's Fire Department. The City refused access to the responsive records and information under s. 14 (solicitor-client privilege) of FIPPA. The adjudicator confirmed the City's decision that it is authorized under s. 14 to refuse access to the disputed records and information.

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

INTRODUCTION

[1] The New Westminster Firefighters' Union, IAFF Local 256 (Union), made an access request to the City of New Westminster (City) under the *Freedom of Information and Protection of Privacy Act* (FIPPA).[1] The Union requested a copy of the legal bills that a named law firm (Firm) issued to the City from January 1, 2016 to December 31, 2018 "for work advising and representing the Fire Department".[2] In its request, the Union wrote: "Feel free to redact all information on each bill other than the date and the total amount billed."[3]

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[1] Initially, this inquiry also concerned the City's responses to requests for a workplace investigation report (OIPC File Nos. F19-78159 and F19-78178). The Union withdrew those requests for review and the OIPC issued a notice cancelling the related inquiries. The parties agree that the present inquiry only concerns the City's response to the Union's request for the legal bills (OIPC File No. F19-78158): Union's submissions at para. 33; City's reply submissions at para. 3.
[2] Letter from the Union to the City dated January 16, 2019.
[3] *Ibid*.

[2] The City responded to the Union's request by refusing access to the responsive records in their entirety under ss. 14 (solicitor-client privilege), 17(1) (harm to financial or economic interests of a public body), 21(1) (harm to third-party business interests) and 22(1) (unreasonable invasion of a third party's personal privacy) of FIPPA.[4]

[3] The Union asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision. Mediation did not resolve the matter and it proceeded to inquiry. The City advised that it is no longer relying on ss. 17(1), 21(1) and 22(1), so the only section at issue is s. 14.[5]

ISSUE

[4] The issue I will decide in this inquiry is whether the City is authorized under s. 14 to refuse the applicant access to the responsive records on the basis of solicitor-client privilege. Section 57(1) of FIPPA places the burden on the City to prove that s. 14 applies.[6]

RECORDS AND INFORMATION IN DISPUTE

[5] The City did not provide the OIPC with the responsive records. However, the City provided sworn evidence, which I accept, that the responsive records consist of "various bills" the Firm issued to the City from January 1, 2016 to December 31, 2018 "for legal services rendered to the City's Fire Department" (Legal Bills).[7] The Legal Bills consist of 129 pages.[8]

[6] As noted above, the Union told the City in its access request to "redact all information on each bill other than the date and the total amount billed". Based on this, I find that the only information the Union is seeking and that is in dispute in this inquiry is the dates and total amounts billed (dates and amounts).

[7] Neither party argued that it is necessary for me to see the actual dates and amounts on the Legal Bills in order to decide whether solicitor-client privilege applies to them. The evidence makes clear that the general nature of the disputed information is dates and amounts. I am satisfied that this is sufficient for me to decide whether privilege applies in this case.

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[4] Letter from the City to the Union dated January 29, 2019.
[5] City's reply submissions at para. 3; email from the City to the Union and the OIPC dated June 15, 2021.
[6] However, as I set out below, the burden is on the Union to rebut the presumption that legal billing information is presumptively privileged.
[7] Affidavit #1 of the City's Manager of Legal Services at paras. 13-15.
[8] Investigator's Fact Report at para. 12; City's initial submissions at para. 2.

SOLICITOR-CLIENT PRIVILEGE

[8] Section 14 states that the head of a public body may refuse to disclose information to an applicant that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.[9] In this case, the City only claims legal advice privilege. When I refer to "solicitor-client privilege" or "privilege" below, I mean legal advice privilege only.

[9] Solicitor-client privilege applies to all confidential communications between solicitor and client that entail the seeking or giving of legal advice.[10] The privilege is so important to the legal system that it applies broadly and must be as close to absolute as possible.[11] The confidentiality ensured by solicitor-client privilege allows clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better assist their clients.[12]

[10] Legal billing information, including fees and disbursements, is presumptively privileged.[13] This is because legal billing information is based on the client's instructions, reflects work done by the lawyer for the client and is capable of revealing privileged information between the lawyer and the client.

[11] The presumption of privilege may be rebutted. The party seeking to do so must establish that there is "no reasonable possibility", from the perspective of an "assiduous inquirer", that disclosing the legal billing information would directly or indirectly reveal privileged communications.[14] The courts have described this standard as "appropriately high" and "very strict".[15]

Are the dates and amounts presumptively privileged?

[12] In my view, the presumption of privilege clearly applies to the dates and amounts. I accept the City's evidence that, at all relevant times during the three-year period, the Firm provided the City with labour and employment legal

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[9] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.
[10] *Solosky v. The Queen*, [1980] 1 S.C.R. 821, 1979 CanLII 9 (SCC) at p. 837.
[11] *R. v. McClure*, 2001 SCC 14 at para. 35; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 10 and 13.
[12] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34.
[13] *Maranda v. Richer*, 2003 SCC 67 at para. 32-33; *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 at paras. 60-61 [*CCF* BCCA]; *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 at para. 100.
[14] *CCF* BCCA, *ibid* at paras. 2, 61 and 83; *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at paras. 51 and 55 [*CCF* BCSC], affirmed in *CCF* BCCA, *ibid*.
[15] *CCF* BCCA, *ibid* at para. 83; *CCF* BCSC, *ibid* at para. 51.

advice.[16] I find this establishes a solicitor-client relationship between the Firm and the City in relation to the dates and amounts. I accept that the dates and amounts arise from the solicitor-client relationship, are based on the City's instructions and reflect legal work the Firm did for the City. As a result, the presumption of privilege applies.

Has the Union rebutted the presumption of privilege?

[13] The next question is whether the Union has rebutted the presumption of privilege. The parties focussed their submissions on this issue.

Union's submissions

[14] The Union submits that there is no reasonable possibility that disclosing the dates and amounts would allow an assiduous inquirer to deduce privileged information. Accordingly, the Union submits that the presumption of privilege has been rebutted, so s. 14 does not apply and the dates and amounts must be disclosed.[17]

[15] The Union argues that a key factor in this case is that the disputed information relates to an undetermined number of legal matters, rather than a single matter. The Union argues that this factor distinguishes this case from others where legal billing information relating to a single matter was found to be privileged. The Union provided evidence that there were 12 legal matters commenced or ongoing between it and the Fire Department during the relevant three-year period, which have all since been concluded or otherwise resolved.[18] The Union says the disputed information likely relates to many other matters that it has no knowledge of or involvement in.

[16] The Union acknowledges that it has more background knowledge than another applicant might, but argues that this is not enough for it to be able to make any accurate inferences about privileged information.

[17] In support of its position, the Union relies on Orders F17-55 and F15-64.[19] In both those cases, the adjudicator concluded that the presumption of privilege applied, but had been rebutted. The Union submits that Order F20-30 and *British Columbia (Attorney General) v. Canadian Constitution Foundation* [*CCF*] are distinguishable.[20] I discuss these cases in more detail below.

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[16] Affidavit #1 of the City's Manager of Legal Services at paras. 12-14.
[17] Union's submissions at paras. 1-29.
[18] Affidavit #1 of the Union's President at paras. 4-5.
[19] Order F17-55, 2017 BCIPC 60; Order F15-64, 2015 BCIPC 70; Union's submissions at paras. 9-17 and 22-27.
[20] Order F20-30, 2020 BCIPC 36; *CCF* BCCA, *supra* note 13; Union's submissions at paras. 2-8 and 18-21.

[18] Ultimately, the Union says it is seeking the dates and amounts "not with any intention or ability to make deductions about privileged communications, but to hold the public body to account with its constituents".[21] The Union says it is only asking for the information necessary to do that and is not seeking descriptive information.

City's submissions

[19] The City submits that the Union has failed to discharge its onus to establish that there is no reasonable possibility that disclosure of the dates and amounts would allow an assiduous inquirer to deduce privileged information.[22]

[20] The City submits that the Union is especially well-informed about the labour relations issues within the Fire Department, which is the specific focus of the Union's access request.[23] It says the Union's own evidence demonstrates that it knows there were 12 legal matters commenced or ongoing between it and the Fire Department during the relevant period. The City says it is reasonable to conclude the Union knows the timing of those matters.

[21] The City submits that the Union is incorrect in stating that the disputed information relates to an undetermined number of matters, some of which it has no knowledge of or involvement in.[24] The City emphasizes that the Union's access request is for information relating to work advising and representing the Fire Department, which the Union is associated with. The City says it only uses the Firm for labour and employment matters,[25] so the disputed information only relates to those kinds of matters, which the Union is involved in and knows about. The City says the disputed information relates to the 12 legal matters the Union mentioned.

[22] Overall, the City's central argument is that the Union has extensive pre-existing knowledge of the legal matters to which the disputed information relates and that it could use that pre-existing knowledge in combination with the dates and amounts to accurately infer privileged information, such as how much time the City instructed the Firm to put into each of the 12 legal matters.

[23] The City argues that *CCF* and Order F20-30 support its position.[26] In those cases, the Court and the adjudicator concluded that legal billing information was privileged in large part because the applicant had considerable background knowledge from which to draw accurate inferences about privileged information. The City submits that Orders F15-64 and F17-55 are distinguishable

[21] Union's submissions at para. 28.
[22] City's initial submissions at paras. 4-9; City's reply submissions at paras. 1-20.
[23] City's reply submissions at paras. 9-16.
[24] City's reply submissions at paras. 7 and 13-15.
[25] City's reply submissions at para. 13.
[26] City's reply submissions at paras. 6-7 and 14-17.

because the access applicants in those cases did not have the level of background knowledge that the Union has here.[27]

Analysis

[24] The parties devoted a significant portion of their submissions to *CCF* and Orders F15-64, F17-55 and F20-30. I will summarize those cases here and use them as guidance for my decision, recognizing that this case must ultimately be decided on its own facts.

[25] *CCF* concerned a petition for judicial review of an OIPC adjudicator's order requiring the Ministry of Attorney General to disclose the total amount of legal costs it had incurred, during a defined period, to defend ongoing and high-profile constitutional litigation. The chambers judge quashed the OIPC's order and the Court of Appeal upheld that decision. The courts concluded that the total legal costs were privileged.

[26] The Court of Appeal found that there was a reasonable possibility that disclosing the total legal costs would reveal privileged information, specifically privileged information relating to the government's litigation strategy and state of preparation. The Court found that several factors supported this conclusion, including that:

- disclosure would have occurred at an early stage of the litigation when aspects of strategy and preparation had not yet been revealed by overt steps taken in the litigation;
- the access applicant and the plaintiffs were particularly well-informed about the litigation and especially well-placed to draw accurate inferences about privileged information; and
- there was considerable public knowledge available about the case that made it more likely that accurate inferences about privileged information could be drawn.[28]

[27] In Order F15-64, the information in dispute was the aggregate amounts paid to government lawyers during an 11-month period for legal work relating to the investigation of a health data breach, including litigation involving the access applicant. The adjudicator found that there was no reasonable possibility that disclosing the aggregate amounts would allow an assiduous inquirer to deduce privileged information because the amounts related to multiple matters and the amounts were not tied to specific dates or lawyers.

[28] In Order F17-55, the applicant requested access to 10 invoices that two law firms issued to the public body during a 14-month period for legal services

[27] City's reply submissions at paras. 8-15 and 18.
[28] *CCF* BCCA, *supra* note 13 at paras. 71-84.

provided in relation to access to information requests. The public body disclosed the dates on the invoices, but withheld the total amounts of legal fees billed. The adjudicator found that there was no reasonable possibility that disclosing the amounts would allow an assiduous inquirer to deduce privileged information because the amounts related to a wide range of matters and the applicant would not have access to the descriptions of legal services, pricing breakdowns or the specific date ranges.

[29] In Order F20-30, the applicant requested access to three invoices a lawyer issued to the public body. The invoices related to the lawyer's work representing the public body in an OIPC inquiry involving the applicant. The adjudicator concluded that the invoices were privileged primarily on the basis that they related to one specific legal matter that the applicant was involved in and had extensive knowledge of.

[30] In my view, these authorities demonstrate that whether the presumption of privilege has been rebutted in any given case depends on the facts and, in particular, considerations such as:

- if the disputed billing information relates to litigation matters, the stage of the litigation;
- how detailed the disputed billing information is;
- how many legal matters the billing information relates to;
- the extent of the applicant's involvement in the legal matters;
- the extent of the applicant's pre-existing knowledge about the legal matters; and
- the publicly available knowledge that an assiduous inquirer could use to draw inferences about privileged information.[29]

[31] I agree with the Union that aspects of the Court's reasoning in *CCF* are of limited assistance here. The Court's reasoning drew heavily on considerations specific to the context of a lengthy court trial. I accept the City's evidence that the legal matters involved here relate to labour and employment matters. However, it is not clear to me from the evidence whether those matters involved dispute resolution procedures, such as arbitration or litigation before the courts or a tribunal. The City does not argue, for example, that disclosing the disputed information would reveal privileged information about trial strategy.

[32] Turning to the nature of the disputed information, I find the dates and amounts more detailed than the information at issue in *CCF*. In *CCF*, the access applicant requested a single figure representing the total legal costs incurred to litigate one specific legal matter over a defined period. Here, however, the Union did not request the single-figure aggregate amount of fees the Firm billed to the

[29] See also Order F19-47, 2019 BCIPC 53 at para. 18.

City over the three-year period. Rather, the Union requested the total amounts billed at points throughout the three-year period, tied to specific dates. In this respect, the access request is closer to the one at issue in Order F17-55.

[33] It is also clear in this case that the disputed information relates to multiple legal matters, unlike the one litigation matter at issue in *CCF*.

[34] However, the parties disagree about precisely how many legal matters the dates and amounts relate to. As noted, the Union says that, in addition to the 12 legal matters it says were commenced or ongoing during the relevant period, "there are likely many other matters for which the City sought legal advice from [the Firm] during that period of which the Union has no knowledge or involvement."[30] However, the City says it only sought legal advice from the Firm in relation to labour and employment matters involving the Fire Department, so the disputed information relates to the 12 legal matters the Union is aware of.[31]

[35] I accept the City's evidence that the disputed information only relates to the 12 legal matters the Union is aware of. The Union is speculating about other legal matters. However, the City has the records, knows the legal matters the disputed information relates to, and says that information only relates to the 12 legal matters.[32] In my view, the City's evidence and submissions are more persuasive and establish that the disputed information relates to the 12 matters the Union is aware of.

[36] I turn now to the amount of information publicly available about the 12 legal matters. I find this is not a significant factor here. Unlike in *CCF*, the evidence in this case does not establish that there is a significant amount of publicly available information about the legal matters. For example, neither party provided me with any publicly available documents such as court judgments or news articles discussing the details of the legal matters. In *CCF*, the Court found that publicly available information enhanced an assiduous inquirer's ability to draw accurate inferences about privileged information, but that is not the case here.

[37] That said, although public knowledge is not a key factor here, I must also consider the private knowledge of an assiduous inquirer. In *CCF*, the Court considered what a "fully informed assiduous observer", including the access applicant and the plaintiffs in that case, knew or were taken to have known.[33] Accordingly, here I must consider what the Union knows or must be taken to know in the circumstances.

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[30] Union's submissions at para. 16.
[31] City's reply submissions at paras. 13-14.
[32] City's reply submissions at paras. 13-18.
[33] *CCF* BCCA, *supra* note 13 at paras. 76-79.

[38] The Union's evidence demonstrates that it knows there were "12 legal matters commenced or ongoing between [it] and the Fire Department" during the relevant three-year period and that all of these matters have been "concluded or otherwise resolved."[34] The Union says that its president has "personal knowledge" of these matters and that it was "involved" in these matters.[35] The Union does not specify or elaborate on its knowledge of, or involvement in, the legal matters.

[39] I find it reasonable to conclude, based on the Union's own evidence about its knowledge of and involvement in the legal matters, that the Union knows or must be taken to know further details about the 12 legal matters.

[40] The Union provided sworn evidence that the legal matters have been "concluded or otherwise resolved." I do not see how the Union could know this without knowing the general nature of the matters and further details about how those matters were concluded or resolved. For example, the resolution or conclusion to a workplace complaint could be that the complainant withdrew the complaint or that the parties reached a settlement or something else entirely. In my view, if the Union knows the legal matters have been "concluded" or "resolved", it must also be taken to know some of the details.

[41] I also find that the Union, having been involved in the legal matters, must be taken to know specifics about the timing of those matters. I do not see how the Union could know that the 12 legal matters were "commenced or ongoing" during the three-year period without knowing details about when those matters were commenced and how they progressed over time individually and in relation to each other.

[42] Further, I find that the Union must be taken to know which lawyers represented the City in the 12 legal matters. The Union's access request explicitly names the Firm, so it clearly knows which firm provides the City legal advice regarding labour and employment matters involving the Fire Department. I also do not see how the Union could have been involved in the 12 legal matters without knowing which lawyers represented the City. The Union's evidence does not persuade me that its involvement in the legal matters was so limited that it would not know, or have access to, this kind of information.

[43] I accept that the fact that the disputed information relates to multiple matters makes it more difficult for the Union to deduce privileged information. It seems likely that the matters overlapped in time, so some or all of the amounts probably reflect legal work done on multiple legal matters. I accept that this makes it more difficult for the Union to determine how much of each total amount

[34] Affidavit #1 of the Union's President at paras. 4-5.
[35] Affidavit #1 of the Union's President at para. 1; Union's submissions at para. 16.

relates to a specific legal matter, and that this in turn makes it more difficult for the Union to make accurate inferences about privileged information.

[44] However, the Union was involved in all of the legal matters, not just one or some of them. I cannot ignore the Union's general role as representative for the Fire Department's firefighters. As a result of that role, the Union's knowledge spans across the legal matters. The Union is not like the access applicants in Orders F15-64 and F17-55, for example, who were only involved in, and had background knowledge of, one of many legal matters to which the disputed legal billing information related. Rather, I am satisfied that the Union must be taken to know the general nature of the legal matters, if not the specifics, the relative timing of those matters and the City lawyers involved.

[45] Armed with this information, and combined with knowledge of the dates and amounts, I am satisfied that there is a reasonable possibility that an assiduous inquirer such as the Union could make accurate inferences about matters protected by solicitor-client privilege. In my view, the Union could work out which legal matters each total amount relates to, roughly how much each City lawyer charges, and approximately how much the City spent on the legal matters during reasonably identifiable time periods. I accept that the Union may not know the City lawyers' exact billing rates, but I am satisfied it can make reasonably accurate estimates based on who the lawyers are.

[46] Piecing the information together, I consider it reasonably possible that the Union could begin to form accurate judgments about matters privileged as between the City and the Firm. For example, if the Union were to discover from the dates and amounts that the City spent considerably more or less than it would have expected on matters active during a certain time period, it could begin to form judgments about the City's legal strategy and state of preparation, including whether the City relied on consulting experts, all of which is based on the City's privileged instructions to the Firm.[36]

[47] In my view, the kind of inference just sketched is reasonable in the circumstances of this case and not "merely fanciful or entirely speculative."[37] *CCF* does not require the City to establish that specific inferences about privileged information are reasonably possible; the burden is on the Union to establish that there is no reasonable possibility that disclosing the dates and amounts would reveal privileged information.[38] I am not persuaded that the Union has met that high standard in this case.

[48] The Union says, and I accept, that it is seeking the information to hold the City accountable for its spending and "not with any intention or ability to make

[36] See, for example, *CCF* BCCA, *supra* note 13 at para. 82.
[37] *CCF* BCCA, *ibid*.
[38] *Ibid* at para. 85; *CCF* BCSC, *supra* note 14 at para. 58.

deductions about privileged communications". However, I do not consider the Union's motives relevant to the privilege analysis. The test set out in *CCF* is whether there is no reasonable possibility that disclosing the legal billing information *could* allow an assiduous inquirer to deduce privileged information, regardless of whether the inquirer *would* do so.[39] At any rate, I do not see why the Union needs the dates and amounts to hold the City accountable. It seems to me that a single lump-sum figure would do for that purpose, but that is not what the Union requested.

[49] As the Court of Appeal reaffirmed in *CCF*, solicitor-client privilege is a fundamental principle of our legal system, with a constitutional dimension, and its protection must be as close to absolute as possible. As such, the burden is on the party seeking to rebut the presumption of privilege that applies to legal billing information and that burden is high. For the reasons provided above, I am not satisfied that the Union has met this burden in the specific circumstances of this case. Accordingly, I conclude that the presumption has not been rebutted and the disputed information is privileged.

CONCLUSION

[50] For the reasons given above, under s. 58(2)(b) of FIPPA, I confirm the City's decision that it is authorized under s. 14 to refuse access to the disputed records and information.

October 29, 2021

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F19-78158

[39] *CCF* BCCA, *ibid* at paras. 76-77.