Order F24-62

CITY OF VANCOUVER

Erika Syrotuck
Adjudicator

July 16, 2024

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Summary: An applicant requested information from the City of Vancouver (City) under the *Freedom of Information and Protection of Privacy Act*. In response, the City provided over 500 pages of records but withheld some information under various exceptions to disclosure. Only s. 14 (solicitor-client privilege) is at issue in this inquiry. The adjudicator found that s. 14 applied to the information in dispute and confirmed the City's decision to withhold it.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 14, 44(1)(b), and 44(2.1).

INTRODUCTION

[1] An applicant requested records from the City of Vancouver (City) under the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant initially asked for the following records:

- All records about herself covering a one-year time span; and
- All records related to access restrictions imposed by the Vancouver Board of Parks and Recreation (Park Board) on individuals accessing City parks covering a two-year time span.

[3] Subsequently, the applicant narrowed the first part of the request to records held by certain Park Board areas. Additionally, the applicant limited the second part of the request to records to and from certain Park Board employees.

[4] The City provided over 500 pages of records in response to the narrowed access request, withholding some information under ss. 13(1) (advice or recommendations), 14 (solicitor client privilege), 15(1)(f) (danger to life or

physical safety), 15(1)(l) (harm to the security of a property or system), 16(1) (harm to intergovernmental relations) and 22(1) (unreasonable invasion of personal privacy).

[5] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the City's decision to withhold information.

[6] As a result of mediation by the OIPC, the City disclosed additional information, but continued to withhold information under multiple exceptions to disclosure.

[7] Mediation did not settle the matter and the applicant requested an inquiry. The applicant agreed to limit the issues at inquiry to a review of the City's decision to withhold information under s. 14.

[8] At the inquiry, the City said that it revisited the information at issue under s. 14 and elected to disclose information on two pages.[1] I can see that the City disclosed that information in the copy of the records provided as part of its inquiry submissions. As a result, I find that the information on those two pages is no longer in dispute. The remaining information in dispute under s. 14 comprises 63 pages.

Preliminary Issue - Mediation material

[9] The City asks that I disregard the portions of the applicant's submissions that contain mediation material.

[10] First, the City says that the OIPC's *Instructions for Written Inquiries* (Instructions) expressly states that the inquiry is not to be influenced by what happened during mediation and that the Commissioner will not consider these materials at inquiry. The City refers to the following portion of the Instructions:

> "Mediation material" refers generally to communications that relate to offers or attempts to resolve the matter during mediation. The Commissioner will not consider mediation materials in reaching a decision and issuing an order. To preserve the integrity of the "without prejudice" nature of the mediation process, a party may not, without the written consent of the other parties, refer to or include in its submissions any mediation materials, including any opinions or recommendations an investigator expressed during mediation. However, it is permissible to refer to information which is not mediation material, for instance an investigator's decisions about the issues and the scope of the records that will proceed to inquiry, or an investigator's decision in complaints. Parties may include information about such factual outcomes in their submissions.

[1] Affidavit of the City's Director, Access to Information and Privacy, at para 10.

[11] The City says that the applicant's use of the mediation process and materials is highly inappropriate due to the without prejudice nature of the process and should not be allowed. It says that the OIPC's mediation process is meant to be an entirely separate from adjudication. Further, the City says that the applicant's intended use of the mediation materials is contrary to the purpose of mediation, which is to encourage public bodies to attempt to resolve issues.

[12] The City says that the applicant has not sought its permission to include mediation material in her submissions.

[13] In my view, the applicant's submissions contain mediation material that is not permitted, namely:

- references to the City's position during mediation;[2]
- the OIPC investigator's opinions (or lack thereof);[3] and
- comments about the City's conduct during mediation.[4]

[14] Consistent with the Instructions and the approach in past orders, I will not consider mediation material in this inquiry.[5]

ISSUE AND BURDEN OF PROOF

[15] At this inquiry I must decide whether s. 14 authorizes the City to withhold the records in dispute. Under s. 57(1), the City has the burden of proving that the applicant has no right of access to the information in dispute.

DISCUSSION

Background

[16] The Park Board is an elected body created under s. 485 of the *Vancouver Charter*.[6] The Park Board sets policy for the City's parks. All Park Board staff are employees of the City.

[17] In 2021, the Park Board restricted the applicant's access to a City park.

Information at issue

[2] Paragraphs 2, 32 and 33 of the applicant's response submissions.
[3] Paragraphs 14, 15 and 34 of the applicant's response submissions and Legal Assistant's affidavit, Exhibit G.
[4] Paragraphs 4, 15, 35 and 36 of the applicant's response submissions.
[5] Order F24-04, 2024 BCIPC 5 (CanLII) for example.
[6] SBC 1953 ch 55.

[18] The information in dispute is contained in 63 pages of records. As I explain further below, the City did not provide the information in dispute for my review.

Section 14 – Solicitor Client Privilege

[19] Section 14 allows a public body to refuse to disclose information that is subject to solicitor client privilege. It is well-established that, in the context of s. 14, the term "solicitor client privilege" encompasses both litigation privilege and legal advice privilege. Only legal advice privilege is at issue in this inquiry.

[20] Before I assess whether s. 14 applies to the information at issue, I will first determine whether I should order production of the records in order to do so.

Should I order production of the records?

[21] Section 44(1)(b) gives the Commissioner the power to order a person to produce a record to the Commissioner. When read together with s. 44(2), this includes the power to order production of a record that is, or may be, subject to solicitor client privilege. In the context of s. 14, the Commissioner only uses the power to order production of the records in dispute when needed to fairly decide the issue.

[22] As I mentioned above, the City did not provide the records in dispute for my review. Rather, the City provided an affidavit from its Assistant Director, Regulatory Litigation (Assistant Director). The Assistant Director deposes that he is a practicing lawyer in the City's in-house legal department and was directly involved in the matters discussed in the information at issue. The Assistant Director's affidavit includes a table of records (Table).[7] With respect to each record, the Table lists the parties, date, page numbers and the basis for severing.

[23] The applicant argues the City's claim of privilege cannot be properly adjudicated without reviewing the records in dispute and, therefore, I should order their production. Specifically, the applicant says that I should order production for the following reasons:

- The "block nature" of the redactions, which "span many pages between many different individuals raise considerable doubt that all words in the underlying pages relate to legal advice";[8]
- The Assistant Director has worked for the City for a long time and "undoubtedly has "department know-how" that he offers to his colleagues, apart from his role providing legal advice";[9] and

[7] Exhibit A to the Assistant Director's affidavit.
[8] Applicant's response submissions, para 31.
[9] Applicant's response submissions, para 39.

- The Assistant Director offers legal conclusions rather than evidence, about the records at issue.

[24] For these reasons, the applicant says that the only way I can determine if the Assistant Director's conclusions are correct is by reviewing the records, similar to the process undertaken by courts.

[25] In response, the City says that the applicant is only speculating and has no real evidence that the OIPC should review the s. 14 information. In particular, the City says that the Assistant Director's use of legal terminology does not make it inappropriate for a court (and, I assume, the Commissioner) to defer to him. It says that Assistant Director has given express evidence that the advice at issue was legal advice given by him in a legal capacity.

[26] For the reasons that follow, I am not persuaded that I should order production of the records in dispute.

[27] With respect to the applicant's first point, I am not at all persuaded that the fact that the records in dispute include many pages and different individuals raises doubt about the City's claim of privilege and on this basis, I should order production. Similarly, in my view, the "block nature" of the severing is not, without more, a reason to order production.

[28] With respect to the applicant's second point, whether or not the Assistant Director also offers non-legal advice in his role is not, on its own, a reason to order production. Rather, as I explain below, each situation must be assessed to determine if privilege applies.

[29] Finally, I agree that the Assistant Director provides legal conclusions in his affidavit. For example, his statement that the records in dispute are part of the "continuum of communications" is, in my view, a legal conclusion. Even evidence that some information is "legal advice" is also a conclusion.

[30] However, the fact that a public body's affiant includes conclusions of law in their evidence is not a reason to order production of the records in dispute. In this case, the Assistant Director provided the Table, which details the parties, date, and type of communication/record. The Assistant Director also provided descriptions of the records in dispute in relation to the City's claim of privilege. In this way, the Assistant Director provided legal conclusions *in addition* to evidence. It is not as though the Assistant Director simply asserted the records in dispute are privileged without providing any further information.

[31] I am also mindful of the BC Supreme Court's statements in *British Columbia* (*Minister of Finance) v British Columbia (Information and Privacy*

Commissioner).[10] In this decision, Justice Steeves clearly said that the OIPC owes some deference to lawyers claiming privilege.[11] In my view, the fact that legal conclusions form part of the Assistant Director's evidence is not inappropriate and not a reason to order production.

[32] Finally, with respect to the applicant's comments that the OIPC should review the records in dispute similar to the way that a court would, I note that Justice Steeves said that "[e]ven the courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless there is evidence of the necessity to do so in order to fairly decide the case."[12]

[33] In summary, I reject the applicant's arguments that I should order production of the records in dispute under s. 44(1)(b). Rather, I find that the parties' evidence and submissions contain sufficient material for me to determine whether s. 14 applies to the disputed information without ordering production of the records.

Does s. 14 apply to the records in dispute?

[34] Legal advice privilege applies to communications that:

i) are between solicitor and client;
ii) entail the seeking or giving of legal advice; and
iii) are intended to be confidential by the parties.[13]

[35] In addition, legal advice privilege may extend to other kinds of documents and communications that do not strictly meet the above test. For example, legal advice privilege applies to the "continuum of communications" between lawyer and client that do not specifically request or offer advice but are "part of the necessary exchange of information between solicitor and client for the purpose of providing advice."[14]

[36] Legal advice privilege applies when in-house lawyers give legal advice. However, given that in-house counsel often have legal and non-legal responsibilities, each situation must be assessed to determine if privilege applies.[15]

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[10] *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner),* 2021 BCSC 266 (CanLII)
[11] *Ibid* at para 86.
[12] *Ibid* at para 51.
[13] *Solosky v The Queen,* 1979 CanLII 9 (SCC) at page 837.
[14] *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority* 2011 BCSC 88 (CanLII) at para 42.
[15] *Pritchard v Ontario (Human Rights Commission),* 2004 SCC 31 (CanLII) at para 20.

[37] The Assistant Director's evidence is that the records in dispute are emails, which in some cases include attachments. As I mentioned above, the Assistant Director provided the Table, which includes a list of the individuals involved in each email chain.

[38] The Assistant Director says, as an in-house legal counsel for the City, he provided legal advice to the City and Park Board staff within an established solicitor-client relationship.

[39] The Assistant Director says that all of the emails relate to the provision of legal advice. The Assistant Director deposes that some emails in the chains at issue contain his legal advice. With respect to the other emails at issue, the Assistant Director says that some emails were sent to him for the purpose of seeking his legal advice on a specific matter. The Assistant Director says that he gave legal advice on matters discussed in these emails and in response to these emails.

[40] The Assistant Director says that all but one of the attachments are drafts prepared by staff that he was asked to review and advise on in his legal capacity. He confirms that he provided legal advice in respect of these attachments.

[41] With respect to the remaining attachment, the Assistant Director says that it is a draft that he prepared for discussion. He says it contains both questions to the client for the purpose of refining the content and recommendations on wording and content that he made in his capacity as counsel to the Park Board. The Assistant Director says that he made changes to this document prior to it being made public, and therefore disclosure would allow a person to infer what changes he made by comparing the two versions.

[42] For these reasons, the Assistant Director says that disclosure of the records in dispute would reveal the legal issues on which he was consulted and on which he gave legal advice. He says that, in this way, the emails and the attachments were part of the continuum of communications between the City and Park Board and himself.

[43] The Assistant Director deposes that he understands the emails at issue were intended to be internally confidential.

[44] The applicant's submissions focus on production of the records and do not expressly address whether the records in dispute meet the test for privilege.

[45] For the reasons that follow, I find that the information in dispute is privileged.

[46] First, I am persuaded that there was a solicitor-client relationship between the Assistant Director and the City and the Park Board. I can see that some of the communications include the Assistant Director and Park Board staff only, while others include City staff that do not work for the Park Board. I recognize that, although the Park Board is a body elected separately from the City, Park Board staff are also employees of the City. Given this context, and the Assistant Director's evidence with respect to the specific records in dispute, I am persuaded that the communications at issue were made within a solicitor-client relationship.

[47] I also accept the Assistant Director's evidence that the email chains at issue consist of the Assistant Director's legal advice and other communications exchanged for the purpose of providing legal advice. Where the emails contain a request for legal advice, I accept the Assistant Director's evidence that he did provide legal advice in response to these requests.

[48] With respect to the attachments, I accept that the Assistant Director gave legal advice regarding the attachments and that these form part of the necessary exchange of information between lawyer and client for the purpose of providing legal advice.

[49] Finally, I accept the Assistant Director's uncontradicted evidence that the emails at issue were intended to be confidential.

[50] For these reasons, I am satisfied that the City has met its burden to establish that legal advice privilege applies to the records in dispute.

CONCLUSION

[51] Under s. 58(2)(b), and for the reasons above, I confirm the City's decision to refuse to disclose the information in dispute under s. 14 of FIPPA.

July 16, 2024

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F22-90799