Order F25-87

DISTRICT OF NORTH VANCOUVER
Allison J. Shamas
Adjudicator

November 3, 2025

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Summary: An individual (applicant) asked the District of North Vancouver (District) for access to records relating to an injury they sustained on District property. The District disclosed responsive records but withheld some information from those records under s. 14 (solicitor-client privilege). The adjudicator held that the District was authorized to withhold most of the information in dispute under s. 14 on the basis that litigation privilege applied and ordered the District to disclose the balance of the information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165 s. 14.

INTRODUCTION

[1] An individual (applicant) asked the District of North Vancouver (District) for access to records and information[1] relating to an injury they sustained at a District facility. The District disclosed responsive records to the applicant but withheld some information from them under s. 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the District's decision. Mediation by the OIPC did not resolve the matter and it proceeded to this inquiry.

[1] Some of what the applicant requested is framed in terms of information rather than documents. FIPPA gives individuals a right of access to records, not to specific information. I raise this distinction to make clear that while the applicant has a right of access to records containing the information they have identified, FIPPA does not give the applicant a right to have their questions answered or to know whether the District withheld the actual information they requested from the responsive records.

PRELIMINARY MATTERS

New issue – s. 6(1)

[2] The fact report prepared by the OIPC investigator who conducted the mediation describes the records as 66 pages of email threads. In their inquiry submission, the applicant says that they requested a review by the OIPC because they still want access to certain records and information described in their access request.[2] If this statement is intended to refer to records beyond the 66 pages of emails described in the fact report, it raises s. 6(1) of FIPPA. Section 6(1) requires public bodies to, among others, perform an adequate search for records in response to an access request.

[3] As s. 6(1) is not listed in the notice of inquiry, it is a new issue. Previous OIPC orders have consistently held that new issues raised in a party's inquiry submission without the OIPC's prior authorization will not be considered except in exceptional circumstances.[3] The applicant did not request the OIPC's consent to add s. 6(1) as an issue. Nor did the applicant explain why they did not request consent to add s. 6(1) prior to the inquiry or identify any exceptional circumstances which would warrant a departure from the OIPC's usual approach. In the circumstances, I decline to add s. 6(1) as an issue in this inquiry. Accordingly, in adjudicating the parties' dispute, I will only consider the 66 pages of responsive records that are before me.

What remains in dispute?

[4] In their inquiry submission, the applicant says that because of the District's assertion of litigation privilege, they no longer seek all emails and correspondence pertaining to the incident (Incident). The applicant also says that they continue to seek any email pertaining to how the District's insurer determined that there was no evidence of negligence on the part of the District,[4] and certain other information and records described in their access request.[5]

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[2] See paragraph 4 below.

[3] For examples where the OIPC has refused to permit a party to add a s. 6(1) issue without prior permission, see for example Order F25-52, 2025 BCIPC 60 (CanLII) at paras 12-15, Order F21-23, 2021 BCIPC 28 (CanLII) at para 7, Order F18-11, 2018 BCIPC 14 (CanLII) at para 3, Order F23-31, 2023 BCIPC 37 (CanLII) at para 5, Order F23-101, 2023 BCIPC 117 (CanLII) at para 9; and Order F24-10, 2024 BCIPC 14 (CanLII) at paras 4-10. See also the OIPC's Instructions for Written Inquiries at p. 3. For an explanation of the OIPC's reasons for refusing to add new issues raised for the first time in a party's inquiry submission, see for example Orders F25-59, 2025 BCIPC 68 (CanLII) at paras 15 and 16 and F25-52, 2025 BCIPC 60 (CanLII) at paras 12-15. I also note that the OIPC warned the parties of this approach in the notice of inquiry and that the OIPC's *Instructions for Written Inquiries* contains a similar warning: https://www.oipc.bc.ca/documents/guidance-documents/1658 at p 3.

[4] Page 2 of the applicant's response submission.

[5] *Ibid*.

[5] While the applicant accepts that litigation privilege may apply to some of the responsive records, they also continue to seek access to specific information which may be found in those records. I cannot reveal whether the records contain the information the applicant continues to seek without risk of revealing the information in dispute and undermining the District's assertion of litigation privilege. In my view, the best way to resolve the parties' dispute without risk of revealing privileged information is to consider the District's application of s. 14 to all of the information in dispute. This approach will give the applicant access to all the information the District is not authorized to withhold, including any that the applicant still wants access to, without risk of revealing privileged information. Accordingly, notwithstanding the applicant's submission, I will decide the District's application of s. 14 to all the information in dispute.

ISSUE

[6] The issue before me is whether the District is authorized to refuse to disclose the information in dispute under s. 14 of FIPPA. Section 57(1) puts the onus on the District to prove that it is authorised to withhold information under s. 14.

BACKGROUND

[7] The applicant alleges that they sustained an injury while using a springboard in a recreation facility operated by the District on September 3, 2022.[6]

[8] On September 21, 2022, the applicant sent an email to a District supervisor explaining that they were injured on District property, off work due to the injury, and requesting information about the District's maintenance of the springboard (Notice Email).[7] On that same day another District official sent the applicant's email to the District's internal insurance advisor,[8] and the District's internal insurance advisor began gathering information about the Incident.

[9] On October 13, 2022 and November 2, 2022, the District supervisor provided information to the applicant in response to their September 21, 2022 email and a subsequent email from the applicant requesting additional information.[9]

[10] On November 3, 2022, the applicant sent a claim letter to the District, taking the position that the District was liable for the Incident and advising that

[6] Applicant's submission at page 1.
[7] Email marked "Evidence 1" attached to District's initial submission.
[8] *Ibid*.
[9] Records at pages 21, 22 and 33.

they were prepared to resolve the Claim for $73,700.00 (Claim Letter).[10] On that same day, the District's internal insurance advisor advised the applicant that the District could no longer continue to answer their questions.[11]

[11] On November 4, 2022, the District sent the Claim Letter to its insurer, the Municipal Insurance Association of British Columbia (MIABC),[12] and MIABC commenced an investigation into the matter.

[12] On January 23, 2023, a MIABC insurance adjuster wrote to the applicant and advised that based on its investigation, MIABC had decided to deny the claim.[13]

[13] On January 24, 2023 the applicant made the FIPPA access request that is the subject of this inquiry to the District. The request was for documents and information related to the purchase and install date, resurfacing, inspections, and care and maintenance for the springboard, as well as all emails and correspondence pertaining to the Incident.[14]

[14] To date, the applicant's claim has not been resolved and the applicant has not initiated a court proceeding in respect of the claim.

RESPONSIVE RECORDS AND INFORMATION IN DISPUTE

[15] The responsive records consist of 66 pages of emails between District officials and MIABC officials. The District withheld information from 26 of those 66 pages. The District withheld the body of or excerpts from 15 individual emails, and with the exception of the to, from, and subject line of the first email in the chain, the entirety of one eight-page email chain.

SOLICITOR-CLIENT PRIVILEGE – S. 14

[16] The term "solicitor-client privilege" under s. 14 encompasses both legal advice privilege and litigation privilege.[15] The District relies exclusively on litigation privilege.

[17] Litigation privilege protects a party's ability to effectively conduct litigation. Its purpose is "to create a 'zone of privacy' in relation to pending or apprehended

[10] Email marked "Evidence 3" attached to District's initial submission.
[11] Records at page 32.
[12] District's inquiry submission.
[13] Email marked "Evidence 4" attached to District's initial submission.
[14] Fact report para 1.
[15] Order P06-01, 2006 CanLII 13537 at para 53.

litigation."[16] Given the purpose of the privilege, once the litigation ends, so does the privilege, unless related litigation is ongoing or reasonably apprehended.[17]

[18] The test for litigation privilege is well-established. The party asserting the privilege must establish two elements for each document over which the privilege is claimed:

1. Litigation was ongoing or was in reasonable prospect at the time the document was created; and
2. The dominant purpose of creating the document was to obtain legal advice or to conduct or aid in the conduct of litigation.[18]

Litigation in reasonable prospect

[19] The threshold for determining whether litigation is "in reasonable prospect" is a low one. It does not require certainty, but the party asserting the privilege must establish something more than mere speculation.[19] The essential question is would a reasonable person, being aware of the circumstances, conclude that the claim will not likely be resolved without litigation?[20]

Parties' submissions

[20] The District says that litigation was in reasonable prospect from September 21, 2022 when it received the applicant's Notice Email. It says that upon receiving the Notice Email, its internal insurance advisor warned that the matter was likely heading toward litigation.

[21] The applicant does not dispute the District's submission that litigation was in reasonable prospect. As discussed above, other than to make clear that they continue to seek specific types of information, the applicant does not dispute the District's assertion of litigation privilege.

Findings and analysis

[22] The emails at issue are dated between September 21, 2022 and March 23, 2023. I find that they were produced on the dates they were sent.

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[16] *Raj v. Khosravi,* 2015 BCCA 49 [*Raj*] at para 7 citing *Blank v. Canada (Minister of Justice),* 2006 SCC 39 (CanLII) at paras 27-28 and 34.
[17] *Blank ibid* at paras 34 – 39.
[18] See *Hamalainen (Committee of) v. Sippola (1992),* 1991 CanLII 440 (BC CA); *Gichuru v British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (CanLII) at para 32; and *Raj supra* note 16 at paras 12 and 20.
[19] *Raj supra* note 16 at para 10.
[20] *Raj supra* note 16 at para 11 citing *Sauvé v. ICBC,* 2010 BCSC 763 at para 30.

[23] The applicant's Notice Email informs the District that the applicant was injured on District property, continuing to sustain losses as a result of the injury, and requests information that clearly relates to the District's liability for the injury. In my view, a reasonable person reading the Notice Email would conclude that the applicant was contemplating litigation and gathering information that might assist them if they decided to pursue litigation. In response to the Notice Email, the District immediately commenced an internal investigation and District officials focus turned to how to communicate with the applicant.[21] Based on the District's response, I find that upon receiving the Notice Email, the District officials involved began taking their own steps to protect the District's interest in any such litigation. I accept that a reasonable person, aware of the circumstances and both parties' conduct, would conclude that from the time the District received the Notice Email, the issue of the District's liability for the applicant's injury would not likely be resolved without litigation.

[24] There is no information before me to suggest that the applicant's claim was resolved by March 23, 2023. Furthermore, in the period between the applicant's initial email and March 23, 2023, it is my view that the parties' actions – the applicant's Claim Letter, the District's decision to cease informal communications and involve MIABC, MIABC's decision to deny the applicant's claim, and the applicant's access request – formalized the parties' dispute and moved them closer to litigation. For these reasons, I find that a reasonable person, being aware of the circumstances, would conclude that the applicant's claim would not likely be resolved without litigation through to March 23, 2023.

[25] Thus, I find that litigation was in reasonable prospect from September 21, 2022 through to March 23, 2023. As a result, I conclude that all the emails containing the information in dispute satisfy the first branch of the test.

Dominant purpose to prepare for or aid in the conduct of litigation

[26] The second part of the test requires the party claiming the privilege to prove that the "dominant purpose" of the document, at the time it was produced, was to obtain legal advice or to conduct or aid in the conduct of litigation.[22] The dominant purpose analysis is a "factual determination to be made based on all of the circumstances and the context in which the document was produced. The privilege applies only if the primary reason for creating the document was litigation.[23]

Parties' submissions

[21] I cannot provide more detail because much of the evidence is found in the information in dispute. Records pages 3, 6, 8, 21, and 55.
[22] *Hamalainen* at para 21, cited in *Raj supra* note 16 at para 12.
[23] *Raj supra* note 16 at para 17.

[27] The District submits all the emails containing the information in dispute came into existence for the sole purpose of responding to and preparing for contemplated litigation. In this regard, it says that its internal investigation was carried out for the purpose of gathering and preserving evidence for MIABC, so MIABC could process the applicant's claim and if necessary, defend the District in litigation. It also says that all the emails were created for and formed part of MIABC's insurance defence file.

[28] Again, the applicant did not dispute the District's position about the dominant purpose of the emails.

Findings and analysis

[29] Neither party provided affidavit evidence to support their submissions. In making the findings below I have considered the records and the parties' submissions.

[30] **Internal Investigation Emails:** The District withheld information from five emails and one email chain that, I find, were sent as part of the District's internal investigation.[24] These are emails between District officials that were sent between the applicant's September 21, 2022 Notice Email and November 4, 2022, when the District sent the applicant's claim to MIABC. In these emails, District officials gather information about the Incident and discuss strategies for communicating with the applicant (the Internal Investigation Emails).

[31] I find that the Internal Investigation Emails were created for two purposes – to respond to the applicant's questions and to protect the District's interests in anticipated litigation, or to aid in the conduct of anticipated litigation. In this first respect, I can see that the District did use the information it gathered to answer the applicant's questions.[25]

[32] Several factors lead me to conclude that another purpose was to protect the District's interests in anticipated litigation. For the reasons set out above, I find that it was clear from the time that the District received the Notice Email that the applicant and the District were in an adversarial position.[26] This circumstance establishes a likelihood that litigation would be a consideration in any investigation. In addition, statements made throughout these emails about how to communicate with the applicant make clear a focus at the time was to protect the District's interests in litigation.[27] Finally, consistent with the District's submission that the purpose of its internal investigation was to preserve evidence for MIABC,

[24] Records at pages 6, 8, 11, 12, 13, and 55-62.
[25] Records at pages 40 and 41.
[26] See paragraph 23.
[27] I cannot reveal specifics without revealing the information that is in dispute. Examples are found on pages 6, 8, 12, and 55.

the District contacted MIABC immediately upon receiving the applicant's Claim Letter, and did in fact provide the information it gathered to MIABC.[28]

[33] Considering the circumstances as a whole, I find that the dominant purpose for which the Internal Investigation Emails were created was to protect the District's interests in potential litigation. Taking steps to protect one's interest in anticipated litigation is, in my view, an example of aiding in the conduct of litigation. I make this finding because, in my view, it is clear from the circumstances as a whole that the primary concern of the District officials who authored the emails at issue was to ensure the District's interests were protected in any future litigation the applicant may initiate.

[34] **MIABC Investigation emails:** The District also withheld seven emails related to its engagement of MIABC. All seven emails are dated November 4, 2022 (MIABC Investigation Emails).[29]

[35] A number of recent BC court decisions provide guidance about whether the dominant purpose of documents relating to an insurance investigation is investigation or litigation. In *Raj v Khosavri* [*Raj*]*,* the BC Court of Appeal framed the issue in terms of a continuum where at some point, the focus shifts from investigation to litigation,[30] while emphasising that the analysis remains a fact-specific one.

[36] In *Plenert v. Melnik Estate* [*Plenert*], the BC Supreme Court added a gloss to the analysis in *Raj,* explaining that where the investigation is into a third party claim, as opposed to a claim by an insured against their insurer, there may be circumstances where there is no purely investigative phase, and the purpose of the investigation is litigation from the outset. However, the court made clear that the analysis remains a fact-specific one.[31]

[37] Most recently, in *Reed v Canadian National Railway Company* [*Reed*], the BC Supreme Court held that while the context-based analysis in *Raj* remains the rule, where the parties are adversarial from the outset, insurance investigations are presumptively undertaken with litigation in mind.[32]

[38] By the time the MIABC Investigation Emails were created, the District had received the applicant's Claim Letter. There is no question that the applicant and MIABC were in an adversarial position from the start of MIABC's investigation. The District submits that the sole purpose for the MIABC investigation was to gather evidence to protect the District's position in anticipated litigation. Given the

[28] Records at pages 25 and 31.
[29] Records at pages 25, 26, 27, 31, 37, 38, 46, and 47.
[30] *Raj supra* note 16 at paras 16-17.
[31] 2016 BCSC 403 at paras 40-42.
[32] 2025 BCSC 907 (CanLII) at paras 28-34.

circumstances, it is difficult to conceive of a circumstance where MIABC's primary purpose in its investigation would be other than to prepare for litigation, and there is no evidence to suggest otherwise. Applying the approach in the authorities discussed above, I find that the dominant purpose for which the MIABC Investigation Emails were created was to aid in the conduct of anticipated litigation.

[39] **Post Investigation Emails:** Finally, the District withheld three emails that post-date MIABC's decision to deny the applicant's claim. These emails are dated between January 23, 2023 and March 23, 2023 (Post Investigation Emails).[33]

[40] The first relates to the applicant's position about MIABC's decision to deny their claim and suggests next steps. It is clear on the face of this email that its author drafted it with the intention of providing guidance to the recipients that would assist in litigation. I find that the dominant purpose for which this document was created was to aid in the conduct of litigation.

[41] The remaining two Post Investigation Emails are about MIABC's internal operating procedure.[34] It is not clear, and the District does not explain how these emails relate in any way to litigation. I am not persuaded that the dominant purpose of these emails relates to litigation.

[42] To conclude, I find that with the exception of the two Post Investigation Emails that relate to MIABC's operating procedure,[35] all the emails containing the information in dispute satisfy the dominant purpose step of the test.

Has the litigation the privilege is intended to protect come to an end?

[43] After reviewing the parties' inquiry submissions, I wrote to the parties to ask whether the anticipated litigation that gave rise to the District's assertion of litigation privilege had come to an end given that three years had passed without the applicant commencing a court proceeding.[36]

Parties' submissions

[44] The District took the position that the litigation had not yet come to an end. In its initial submission, the District said that although the basic two-year limitation period in s. 6 of the *Limitation Act*[37] had passed without the applicant

[33] Records at page 1, 4, 48, and 19.
[34] Records at pages 1 and 4.
[35] Records at pages 1 and 4.
[36] My letter of October 2, 2025.
[37] SBC 2012, c 13.

initiating a court proceeding, the ultimate limitation period in s. 21 of the *Limitation Act* had not yet passed.[38]

[45] In response, the applicant said:

> I have not filed a Notice of Claim in the BC Small Claims Court or a Notice of Civil Claim in the BC Supreme Court nor have I sought out legal advice pertaining to proceeding with litigation against the District of North Vancouver. Having said this, it is my understating that the basic limitation period would have expired two years after the date of my injury and along with it the District's litigation privilege. Because I am not proceeding with litigation, there should be no "zone of privacy" pertaining to … the records I seek.[39]

[46] In reply, the District submitted that because the two-year basic limitation period is defined in terms of when the applicant knew or reasonably ought to have known that they had a potential claim, the District cannot know with any degree of certainty whether the basic limitation period has expired.[40]

Findings and analysis

[47] The Incident took place on September 3, 2022. More than three years have passed since that date. To date, the claim has not been resolved, and the applicant has not initiated a court proceeding.

[48] The relevant question is whether the anticipated litigation the privilege is intended to protect has come to an end.

[49] The *Limitation Act*[41] establishes timelines by which certain kinds of court proceedings in BC must be commenced. However, as is clear from the language of the *Limitation Act* a determination as to whether any of the time periods contained therein have expired is a matter of interpretation.[42] This inquiry is not the appropriate forum to decide whether the relevant limitation period has expired on the applicant's claim.

[50] The applicant says they are not proceeding with the litigation, and the fact that they have not yet filed a claim supports this statement.

[51] The District, on the other hand, remains concerned about the possibility of litigation. In this regard, I observe that the applicant's claim has not been resolved or litigated. As a practical matter, the parties' disagreement about

[38] District's email dated October 10, 2025.
[39] Applicant's email dated October 17, 2025.
[40] District's email dated October 28, 2025.
[41] SBC 2012, c 13.
[42] See for example Division 2 and 3 and 21(3) of the *Limitation Act.*

liability for the applicant's injury remains outstanding. The applicant is still pursuing the access request which relates to the District's liability for the injury that they filed the day after MIABC denied their claim. The applicant does not explain why they continue to be interested in the information if not to pursue their claim. Finally, I can understand why the applicant's submission that it is their understanding the basic limitation period has expired does not resolve the District's concerns.

[52] Ultimately, considering the circumstances and the parties' submissions as a whole, I find that the anticipated litigation the privilege is intended to protect has not come to an end for the purpose of the District's claim of litigation privilege. Therefore, I find that litigation privilege continues to apply to all the information at issue, except for the information in the two Post Investigation Emails that relate to MIABC's operating procedure.[43]

CONCLUSION

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

1. Subject to item 2 below, I confirm the District's decision to withhold information under s. 14.
2. The District is not authorized to withhold the information in dispute on pages 1 and 4 of the records. For clarity, a copy of pages 1 and 4 accompany the District's copy of this order.
3. I require the District to give the applicant access to the information it withheld from pages 1 and 4.
4. I require the District to provide the OIPC registrar of inquiries with a copy of its correspondence to the applicant and the accompanying information sent in compliance with item 3, above.

[54] Pursuant to s. 59(1) of FIPPA, the District is required to comply with this order by December 16, 2025.

November 3, 2025

ORIGINAL SIGNED BY

Allison J. Shamas, Adjudicator

OIPC File No.: F24-95932

[43] Records at pages 1 and 4.