



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F11-03

CITY OF SURREY

Michael McEvoy, Adjudicator

January 25, 2011

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Summary: The City launched court proceedings against the applicant relating to the apprehension of one of his pet dogs and what it alleged was the applicant's illegal occupation of a City road allowance. Subsequently the applicant requested information relating to himself, his two pet dogs and the City. The City provided a number of records but refused disclosure of others under ss. 14, 15 and 22 of FIPPA. Solicitor-client privilege applied to most of the records in dispute thereby authorizing the City to withhold them under s. 14. Litigation privilege applied to some of these records because even though the two court proceedings were concluded, litigation related to them was reasonably apprehended by the City. The City was authorized to withhold the balance of the records because they could reveal the identity of a confidential source of law enforcement and thereby could reasonably be expected to harm law enforcement.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, and 15(1)(d).

Authorities Considered: B.C.: Order 02-28, [2002] B.C.I.P.C.D. No. 28; Order 00-01, [2000] B.C.I.P.C.D. No. 1; Order No. 39-1995, [1995] B.C.I.P.C.D. No. 12.

Cases Considered: *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC); *College of Physicians & Surgeons of British Columbia v. British Columbia (Information & Privacy Commissioner)* 2002 BCCA 665, [2002] B.C.J. No. 2774; *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39.

1.0 INTRODUCTION

[1] This Order arises from a request on November 10, 2008 by the applicant under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) to the City of Surrey for “all documentation” relating to himself, his two pet dogs and the City of Surrey and various other bodies.

[2] The City responded by providing a number of records, indicating that it did not have custody or control of others¹ and withholding the rest of the responsive information under ss. 14, 15 and 22 of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (“OIPC”) to review this decision on June 12, 2009. Mediation did not resolve the matter and the applicant asked, on June 7, 2010, that the matter proceed to inquiry. On June 21, 2010, the applicant agreed that the inquiry would not include information withheld under s. 22. The OIPC received the final submissions of the parties on November 2, 2010.

2.0 ISSUE

[4] The Notice of Inquiry states the issues in this inquiry to be as follows:

1. Whether the City of Surrey is authorized to refuse access to information under s. 14 of FIPPA;
2. Whether the City of Surrey is authorized to refuse access to information under ss. 15(1)(a), (d) and (f) of FIPPA.

[5] Under s. 57(1) of FIPPA it is up to the City of Surrey to prove the applicant has no right of access to the withheld information under ss. 14 and 15. The City did not make submissions about s. 15(1)(f) in this inquiry. I conclude it abandoned this argument and will therefore not consider it below.

3.0 DISCUSSION

[6] **3.1 Background**—The City and the applicant have been involved in two separate legal matters. The first involved allegations that one of the applicant’s dogs bit someone. The British Columbia Society for the Prevention of Cruelty to Animals (“SPCA”), acting as the City’s Animal Control Officer, seized the dog and then applied to the Provincial Court on July 23, 2008, for an order that the dog be destroyed (“dog application”). The Provincial Court dismissed the dog application on December 17, 2009, and the dog was returned to the applicant.

¹ This included records in the custody and control of the RCMP and a church. These records are not at issue here.

[7] The City also commenced an action (“petition”) in the Supreme Court of British Columbia on July 24, 2008, regarding what the City described as the applicant’s occupation of a road allowance. The City says the applicant is a homeless man who was living on the road allowance with his two dogs. The Court heard the matter on August 18, 2008, and, according to the City,² issued an order that day prohibiting the applicant from, among other things, throwing or leaving refuse on the City’s highway or obstructing it.³

[8] The City utilized the advice of both its staff lawyers and Don Howieson, a lawyer with the law firm Young Anderson, with respect to both legal actions. The SPCA, as agent for the City, assisted in the preparation and commencement of both legal actions.

[9] **3.2 Solicitor-Client Privilege**—My count indicates that information contained in 158 of the 164 of the disputed records⁴ is subject to the City’s claim of solicitor-client privilege and for that reason I will deal with this issue first.

[10] Section 14 of FIPPA reads as follows:

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

[11] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal professional privilege (sometimes referred to as legal advice privilege) and litigation privilege. The City applies the former branch of the test to some records and the latter to others. It describes each of the disputed records for which privilege is claimed.⁵ The description includes the date of the record; whether it is an email, letter or notes; the parties to the communication; what the communication relates to in general terms; and which of the two branches of the solicitor-client privilege test the City believes applies.

Legal professional privilege

[12] I begin with those records for which the City claims legal professional privilege. Decisions of this office have consistently applied the test for legal advice privilege at common law. Thackray J. (as he then was) put the test this way:⁶

[T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a

² This was not challenged by the applicant.

³ City’s initial submission, para. 19.

⁴ Based upon Exhibit “L” and “R” to the Affidavit of Kelly Rayter.

⁵ Exhibit “L” to the Affidavit of Kelly Rayter.

⁶ *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC).

further four conditions must be established. Those conditions may be put as follows:

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

If these four conditions are satisfied then the communication (and papers relating to it) are privileged.

[13] The City argues the records for which this branch of privilege is claimed are confidential communications that contain legal advice or references to legal advice with respect to the applicant and the two court actions. The City provided detailed affidavit evidence that the severed portions of these records contain communications that request legal advice or are advice formulated or provided by the City's legal counsel.⁷ The communications involve either Don Howieson or the City's internal legal counsel with various City employees or the contracted enforcement officers of the SPCA. In some instances, the communications are between Don Howieson and the City internal counsel to discuss legal advice relating to the dog application and petition.

[14] The applicant asserts the City is "hiding behind" the solicitor-client privilege issue.⁸ Beyond this, he does not specifically address s. 14. He does say that the City violated his basic Charter rights and that its failure to release more information is wrong. He says he is homeless, has limited money and education and does not possess the capability or funds to fight through a process he does not understand.

[15] I have carefully considered the City's claims concerning legal professional privilege. The City describes the records in sufficient detail to persuade me they meet the four-part test for solicitor-client privilege cited above. I am satisfied that the communications were of a confidential character between lawyer and client and were directly related to the seeking, formulating or giving of legal advice. The communications between Don Howieson and the SPCA enforcement officers bear specific mention here, because these enforcement officers are not City employees and, therefore, may be considered strangers to the privilege. However, solicitor-client privilege does protect communications between a lawyer and a third party in the legal professional context where "the third party is

⁷ Affidavit of Kelly Rayter and Exhibit "L" to the Affidavit.

⁸ Applicant's reply submission.

performing a function, on the client's behalf, which is integral to the relationship between the solicitor and the client."⁹ That is the case here. The evidence establishes the SPCA is acting as agent on the City's behalf to carry out animal control enforcement.¹⁰ For the reasons given, I find the City properly applied s. 14 to those records for which it claims legal professional privilege.

Litigation privilege

[16] The City claims litigation privilege for other responsive records.

[17] The law has long recognized that communications with third parties do not generally enjoy privilege unless they occur in the contemplation of, or for the purpose of, litigation. Litigation privilege protects records where the dominant purpose for creation of the records was to prepare for or conduct litigation under way or in reasonable prospect at the time the records were created.¹¹

[18] The sworn affidavit evidence establishes that the records in issue here encompass communications between the City's solicitor and potential witnesses to the litigation between the parties. The purpose of the communications was the preparation of the City's dog application and petition.¹² In the result, I have no difficulty concluding that the records were prepared for the dominant purpose of, and in the contemplation of, the two litigation matters described above.

[19] It is important to note that the litigation privilege ends when the parties' litigation ends but that the privilege may be extended where related litigation remains pending or "may be reasonably apprehended."¹³

[20] The dog application and petition have concluded and there is no indication either is under appeal, or could be appealed.

[21] However, the City submits that related litigation is likely in this instance. It submits the applicant has threatened legal action against it in response to the two legal actions the City took against him.

[22] I have reviewed the evidence and I conclude that the City reasonably apprehends the possibility of related litigation to its two previous actions. Following the City's unsuccessful bid to apprehend the applicant's dog, the applicant threatened litigation and stated among other things the potential claims

⁹ *College of Physicians & Surgeons of British Columbia v. British Columbia (Information & Privacy Commissioner)* 2002 BCCA 665, [2002] B.C.J. No. 2774, at para. 50.

¹⁰ See Exhibit "H" to the affidavit of Kelly Rayter.

¹¹ Numerous previous orders have affirmed this test. See for example Order 02-28, [2002] B.C.I.P.C.D. No. 28.

¹² Affidavit of Don Howieson, para. 7.

¹³ *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39 at paras. 38, 39 and 40.

related to the dog application and petition.¹⁴ Indeed the applicant served a notice of claim on the City in accordance with the *Local Government Act*.¹⁵ Moreover, the applicant, in his reply submission to this inquiry, believes the disclosure of the disputed records will assist his case against the City for among other things malicious prosecution and abuse of power.

[23] In the circumstances, it is clear that litigation related to the two concluded cases “may be reasonably apprehended.” Therefore, I conclude the City properly applied the litigation privilege to the records in question and I find that s. 14 applies to them.

[24] **3.3 Harm to Law Enforcement**—The City asserts that information in six records, if disclosed, could reasonably be expected to be harmful to law enforcement under s. 15 of FIPPA. The relevant provisions of s. 15 for this case are as follows:

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

...

(d) reveal the identity of a confidential source of law enforcement information

"law enforcement" means

(a) policing, including criminal intelligence operations,

(b) investigations that lead or could lead to a penalty or sanction being imposed, or

(c) proceedings that lead or could lead to a penalty or sanction being imposed;

[25] The City withheld four of the six records in their entirety while withholding some information in another two.¹⁶ The City numbers the records in issue as 54, 66, 265, 266, 534 and 541.¹⁷ It asserts that s. 15(1)(d) applies to the withheld

¹⁴ Affidavit of Jeff Schaafsma, Exhibit “E” wherein the applicant outlines in an email to the City the basis for possible legal actions.

¹⁵ Section 286 of the *Local Government Act* requires a potential claimant to provide notice in writing to a municipality within two months of the events underlying their claims.

¹⁶ These are numbered.

¹⁷ Exhibit “R” to the Affidavit of Kelly Rayter.

information in all six records, while s. 15(1)(a) applies to information in only the latter five.

[26] I will deal first with the City's s. 15(1)(d) submission because it encompasses the information in all six records.

[27] The City argues that the withheld information in the six records identifies a confidential source of law enforcement information. The City says the law enforcement matter here relates to the provisions of s. 49 of the *Community Charter Act* that give special powers to a municipality animal control officer in respect of dogs alleged to be dangerous.

[28] The City describes records 54 and 66 as relating to an individual who contacted the City expressing concerns about the applicant. The City states it has a policy, stated on its website, of maintaining the confidentiality of complainants with respect to by-law enforcement matters, unless the matter proceeds to court. It also describes records 534 and 541 as emails between the RCMP and the City's senior by-law enforcement officer. I received additional submissions and affidavit evidence about these records *in camera* because those submissions and evidence would have revealed the very information the City claims could cause harm to law enforcement. I am therefore constrained from describing the records or the City's argument in more detail.

[29] The applicant says the City has already released some details of the dealings City by-law officers have had with him but that these are "miniscule [*sic*] parts of their notes or none at all in some cases."¹⁸ The applicant argues that not releasing more of the disputed information is wrong.

[30] I have carefully reviewed the withheld information in the six records at issue and conclude that it falls within the ambit of s. 15(1)(d). As noted, much of the submissions and affidavit evidence on this matter was received *in camera*. These circumstances circumscribe me in providing reasons that are more detailed. What I am able to say is that the material the City withheld would, if released, disclose a confidential source of information related to the dog application and the petition. Both the dog application and the petition concern the enforcement of City by-laws. Previous orders¹⁹ have determined that the enforcement of municipal by-laws is a "law enforcement" matter for the purposes of s. 15. For all of the above reasons, the City satisfies me that the criteria for withholding information under s. 15(1)(d) are met in this case. It is therefore unnecessary for me to consider the City's s. 15(1)(a) submission.

¹⁸ Applicant's initial submission.

¹⁹ In particular Order 00-01, [2000] B.C.I.P.C.D. No. 1, at p. 4 and Order No. 39-1995, [1995] B.C.I.P.C.D. No. 12, at pp. 5 and 6.

4.0 CONCLUSION

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

1. I confirm the City is authorized by s. 14 of FIPPA to withhold the records identified in Exhibit "L" of the Affidavit of Kelly Rayter.
2. I confirm the City is authorized by s. 15(1)(d) of FIPPA to withhold the records identified in Exhibit "R" of the Affidavit of Kelly Rayter.

January 25, 2011

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

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