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Order F12-05

CITY OF FORT ST. JOHN

Michael McEvoy, Senior Adjudicator

February 28, 2012

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Summary: An applicant asked for records that related to an investigation of the City Mayor that resulted in sanctions against the Mayor. The City withheld those records on the grounds that they were subject to solicitor-client privilege and local government confidences and because disclosure would be an unreasonable invasion of third party personal privacy. The Senior Adjudicator found that the lawyer's communications with the City, which included a legal opinion, the Summary Report of the investigation of the Mayor and the complaint letters, were subject to solicitor-client privilege. The Senior Adjudicator also determined that the complaint letters received prior to the City's request for a legal opinion had an independent existence in City files, having been collected by the City prior to it seeking legal advice. However, the City was still required to withhold the complaint letters because their disclosure would unreasonably invade third-party privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(3)(b), 14, 22(1) and 25(1)(a), (b).

Authorities Considered: B.C.: Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order F10-18, [2010] B.C.I.P.C.D. No. 29; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F11-32, [2011] B.C.I.P.C.D. No. 38.

Cases Considered: *Hodgkinson v. Simms* (1988), CanLll 181 (B.C.C.A.); *Gower v. Tolko Manitoba Ltd.,* 2001 MBCA 11 (CanLII); *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

INTRODUCTION

[1] This inquiry concerns a request for records related to a decision by the City of Fort St. John Council ("Council") to impose sanctions on its Mayor. Among other things, Council resolved that the Mayor would not be permitted to meet or travel alone with any female employee of the City of Fort St. John ("City"). The applicant, a lawyer in the City, ("applicant") requested records related to Council's investigation of the Mayor.

[2] The City identified records it believed were responsive to the request but withheld them on three grounds: they were protected by solicitor-client privilege; their disclosure would reveal the substance of the City's *in camera* meetings; and the disclosure of the records would be an unreasonable invasion of third-party privacy.

[3] The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review the decision and an inquiry was held under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). He also argued that the records should be disclosed in the public interest under s. 25 of FIPPA.

ISSUES

[4] The issues before me are:

1. Whether the records must be disclosed in the public interest under s. 25(1)(a) or (b) of FIPPA.

2. Whether the City is authorized by s. 12(3)(b) to refuse access to the records because their disclosure would reveal the substance of the City's *in camera* meetings.

3. Whether the City is authorized by s. 14 to refuse access to the records because they are protected by solicitor-client privilege.

4. Whether the City is required by s. 22(1) of FIPPA to withhold the records because their disclosure would be an unreasonable invasion of third-party privacy.

DISCUSSION

[5] **Background**—In September 2010, the Chief Administrative Officer ("CAO") for the City received multiple complaints in writing from women regarding the Mayor's conduct. None were employees of the City. The CAO contacted the City's lawyers for advice, and subsequently an investigator was retained to look

into the allegations. The City says it chose the investigator because she was a lawyer and it knew they would require legal advice through the investigation process given the nature of the allegations. The City did not specify whether the investigator was actually retained to give legal advice.

[6] The investigator recommended a two-step process, as the particular nature and number of allegations against the Mayor were still unknown. The investigator suggested that the first step involve determining the nature and scope of the alleged objectionable conduct on the part of the Mayor and to determine whether the individuals alleging this conduct wished to proceed further. The investigator then proposed providing her findings to the City's lawyers so they could provide legal advice to the City. Part of that advice would relate to whether the City wished to conduct a formal investigation into the allegations and, if so, the second step of the process would be engaged and involve the investigator conducting further personal interviews, gathering relevant information and preparing a report to Council with her findings of fact. She proposed that the City's lawyers would use her findings to provide legal advice.

[7] The City agreed to this process, and but the investigator was unable to continue before the first step was completed. The City was already concerned about the length of time the initial review was taking. This led to the City's lawyers preparing a "Summary Report" based on the complaints[1] and that Summary Report was then attached to the City lawyer's legal opinion dated January 21, 2011. Council considered the legal opinion and attached the Summary Report at a closed meeting on January 24, 2011. The Council resolution ("resolution") that followed from this meeting was made public March 14, 2011. The preamble to the resolution explained that Council considered the complaints and the Mayor's response before finding the Mayor's conduct unacceptable. The resolution censured the Mayor and provided for other sanctions including, as noted, he not be permitted to meet or travel alone with any female employee of the City.

[8] After the public disclosure of the resolution, the City issued a press release on April 4, 2011, explaining the process it followed in the sanctioning of the Mayor and what it said were its obligations to protect the privacy of the third parties involved. This press release referenced an "investigative report" leading to the sanctions.

[9] **The Records in Dispute**—The applicant's request for records referred to in the Notice of Inquiry is not entirely clear. However, the applicant's submissions identify the "investigative report" or a "redacted" version of it as the information he seeks. This is presumably a reference to the investigative report the City referred to in its press release. The City identified two records it believes

[1] The exact number was received *in camera*.

are responsive to the request and provided them to me *in camera*. Having reviewed the records, I believe it is more accurate to say there are four records. The first is a letter from the City's lawyers to the City ("covering letter"). The second is an attachment to the covering letter, the previously referred to Summary Report. The Summary Report, in turn, attaches two written complaints ("complaint letters") of an individual, one in her own handwriting and the other typed. These are the documents I will consider in this inquiry.

[10] **Is Disclosure Required in the Public Interest?**—If s. 25(1) applies in this case, it overrides any other exceptions to the disclosure of the requested records. Section 25 reads as follows:

> **Information must be disclosed if in the public interest**
>
> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[11] Former Commissioner Loukidelis stated the following in Order 02-38[2] in relation to the application of this section:

> [T]he disclosure duty under s. 25(1)(b) is triggered where there is an urgent and compelling need for public disclosure. The s. 25(1) requirement for disclosure "without delay", whether or not there has been an access request, introduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.

[12] The applicant argues that s. 25 applies for two reasons. The first is that the women of Fort St. John are an "affected group" whose safety is at risk by not releasing the records. The second reason is that "given the amount of monies spent on legal fees and investigations…" public disclosure is warranted.

[13] The applicant bases his first argument on the City's press release, and, although he does not say so specifically, the Council resolution that says the Mayor is not permitted to meet or travel alone with female City employees. Based on this, the applicant argues that the safety of all women in Fort St. John

[2] [2002] B.C.I.P.C.D. No. 38.

is at significant risk. In addressing this argument, I am restrained in what I can say, because providing any substantive reasons would reveal the very information in the records at issue. Suffice it to say, I am not persuaded there is anything in the records to indicate the women of Fort St. John are at significant risk of harm. Therefore, their disclosure under s. 25(1)(b) is not required.

[14] The second argument, concerning monies the City expended on the investigation of the Mayor, also does not constitute a basis for the application of s. 25. While the amount of funds spent may be of public interest generally, the applicant makes no case, and I see no basis, as to why there is a grave need to produce the records on an urgent basis. I also note that the City did disclose what was spent on the matter to March 24, 2011.[3] If the applicant wants to know about additional expenditures he can make this request to the City.

[15] In summary, I reject the applicant's argument that the City must, without delay, disclose the records under s. 25 of FIPPA.

[16] **Solicitor-Client Privilege**—Section 14 of FIPPA states:

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

[17] This provision encompasses two kinds of privilege recognized at law: legal professional privilege (sometimes referred to as legal advice privilege) and litigation privilege.[4] The City argues that legal advice privilege applies here.

[18] Decisions of this office have consistently applied, as I do here, the test for legal advice privilege at common law. Thackray J. (as he then was) put the test this way:[5]

> [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 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.

[3] Hunter affidavit, Exhibit S.
[4] See for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56.
[5] *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.
>
> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

[19] The burden is on the City, under s. 57(1) of FIPPA, to show why the applicant has no right of access to the withheld information in the records under s. 14 of FIPPA.

[20] I begin my analysis of s. 14 with the covering letter, dated January 21, 2011, that the City says is a communication to it from its lawyers that contains legal advice. The City says it required that advice because it was concerned about its potential liability respecting complaints made by members of the public against the Mayor. The City did not provide me the covering letter but describes *in camera* the general nature of the advice given in this letter. Based on these submissions, I am satisfied the letter was provided in confidence and relates to the giving of legal advice.

[21] The Summary Report is also privileged in my view because it is, in the final analysis, the work of the City's lawyers that is inextricably linked to its legal opinion. While an investigator began the investigatory process, she was not able to continue and the City's lawyers became the authors of the Summary Report and the legal opinion based on that Report. This specific set of circumstances distinguishes this case from Order F10-18[6] where the person conducting the investigation of a school district matter happened to be a lawyer but was not retained as a lawyer to give legal advice to the Board of Education. In that case, the lawyer's task was to make findings of fact and to offer policy advice. The result was that no solicitor-client relationship was established and therefore no privilege attached to the investigation report he produced.

[22] The facts in this case are more analogous to those in the Manitoba Court of Appeal judgment in *Gower v. Tolko Manitoba Ltd.*[7]

> 37 In the situation at hand, it is clear from the evidence that Janzen was asked to investigate and perform a fact-finding function. If that is all she was asked to do then, regardless of the fact that she is a lawyer, she would not have been providing legal advice and would have been acting as an investigator, not as a lawyer. Consequently, legal advice privilege would not have been available.

[6] [2010] B.C.I.P.C.D. No. 29.
[7] 2001 MBCA 11 (CanLII).

> 38 However, there is strong evidence that she was asked to do more. The investigation to determine the veracity of the allegations made against the plaintiff was only one part of her tasks. It is clear that the client requested Janzen make recommendations based on the facts that she gathered and provided advice with respect to the legal implications of those recommendations. Thus, the fact gathering was inextricably linked to the second part of the tasks, the provision of legal advice.
>
> 39 The appropriate test is not whether the investigative function performed by Janzen could have been performed by a non-lawyer. It clearly could have, but as the motions judge held, relying on Wigmore on Evidence, 1999 supplement (New York: Aspen Law & Business, 1999) at para. 2296, and In Re Allen, 106 F.3d 582 (4th Cir. 1997) at para. 26:
>
> - The relevant question is not whether Allen was retained to conduct an investigation, but rather, whether this investigation was "related to the rendition of legal services."

[23] The evidence in this case is that the City's lawyers were asked to do more than summarize the history of the matter and the complaints. The City's lawyers were asked specifically to provide legal guidance in respect of the matter and the factual summary they authored was the basis for their legal opinion. Given the integral and inextricable relationship between the factual summary and the provision of legal advice in this case, I find both the covering letter written by the City's lawyers and the attached Summary Report are privileged. The two complaint letters were also attached to the covering letter and Summary Report and because they are attached and form part of the communication to the City from its lawyers, they are also privileged.

[24] **Would Disclosure be an Unreasonable Invasion of Privacy?**—While the complaint letters, attached to the lawyer's correspondence to the City, are part of a privileged communication, the originals or copies of the complaints have an independent existence in City files. Those complaint letters were collected by the City prior to legal advice being sought.[8] Previous decisions have held that, simply because a public body turns records over to a solicitor, it does not cloak them with privilege.[9]

[8] City's initial submission, para. 6.

[9] In Order F11-32, [2011] B.C.I.P.C.D. No. 38, I noted McEachern C.J.B.C. made clear in *Hodgkinson v. Simms* (1988), CanLll 181 (B.C.C.A.), that records collected this way that end up in a lawyer's hands do not form part of the "solicitor's brief" that is subject to privilege. He stated: ... "I agree that a document or a copy of a document in the possession of a party before litigation, or 'ingathered' by a party before that time in the ordinary course of events and not for the dominant purpose of litigation, does not become privileged just because it or a copy of it is later given to a solicitor."

[25] However, I find that even if the applicant's request applies to the copies of the complaint letters in other City files, the City is still required to refuse to disclose them. This is because their release would constitute an unreasonable invasion of the privacy of third parties.

[26] The test for determining whether disclosure would be an unreasonable invasion of privacy is contained in s. 22 of FIPPA. Under s. 57(2) of FIPPA, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of third-party privacy.

[27] Numerous orders have considered the application of s. 22, for example, Order 01-53.[10] First, the public body must determine if the information in dispute is personal information. Then, it must consider whether disclosure of any of the information is not an unreasonable invasion of third-party privacy under s. 22(4). If s. 22(4) does not apply, then the public body must determine whether disclosure of the information is presumed to be an unreasonable invasion of third-party privacy under s. 22(3). Finally, it must consider all relevant circumstances, including those listed in s. 22(2), in deciding whether disclosure of the information in dispute would be an unreasonable invasion of third-party privacy.

[28] I take the same approach here.

Do the complaints contain personal information?

[29] The complaint letters contain the personal information of the complainant and the Mayor. There are also references to other third parties in these records. I note that none of the personal information relates to the applicant.

Not an unreasonable invasion of privacy

[30] The second step in applying s. 22 is to determine whether any of the provisions of s. 22(4) apply. The City says no part of s. 22(4) applies. The applicant says the City should have considered s. 22(4)(b) "which mandates that disclosure of the information…given the necessity to afford the female citizens of Fort St. John the same level of protection and awareness as the employees of the public body."[11]

[31] Section 22(4)(b) applies where there are compelling circumstances affecting anyone's health or safety and notice of disclosure "is mailed to the last known address of the third party." As the City has not mailed a notice of disclosure letter, s. 22(4)(b) cannot apply. Moreover, no other parts of s. 22(4) apply either.

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[10] [2001] B.C.I.P.C.D. No. 56.
[11] Applicant's initial submission, para. 15.

Presumed unreasonable invasion of privacy

[32] Neither of the parties cites any of the circumstances that would presume that disclosure of the personal information would be an unreasonable invasion of third-party privacy. I also find that none of these circumstances apply.

Relevant circumstances

[33] Section 22(2) of FIPPA enumerates a list of relevant circumstances to take into account in making a decision under this provision. It is not meant to be exhaustive.

[34] The provisions the parties have identified as relevant are as follows:

Public scrutiny

[35] The applicant argues that disclosure of the information is desirable for the purpose of subjecting the Mayor's activities to public scrutiny. The applicant says the Mayor "must be assumed" to have been acting in his official capacity when the "events occurred" that lead to his censure. The applicant argues that disclosing the Mayor's actions accords with the principles and purposes of FIPPA and in particular s. 22(2)(a).

[36] Whether the disclosure of the information at issue is desirable, in part relates to whether it would assist citizens in holding their public bodies and officials accountable. Information that allows citizens to make informed judgements also empowers them to utilize the mechanisms that the democratic system of government provides to hold those public bodies and their officials accountable.

[37] In this case, it is likely correct to say that disclosing the complaint letters about the Mayor would permit the public to judge for itself whether the Mayor acted appropriately. However, I give minimal weight to this circumstance here. While disclosing the complaint letters might well allow more specific scrutiny of the Mayor's actions, the degree to which he may be held to account for his actions is somewhat circumscribed given that he chose not to seek re-election this past November and no longer holds public office.

[38] Disclosing the complaint letters might also, by some small measure, provide insight into why Council took the action it did regarding the Mayor. I use the term "by some small measure" because Council has already disclosed considerable information about its handling of the matter. It acknowledged receiving complaints about the Mayor's conduct and detailed the steps it took to address those complaints. This involved making sure all relevant information was considered and that the complainants involved in the process remained

confidential. It stated that it wanted to ensure the matter did not result in litigation and financial liability to the City. It has also publically disclosed the costs associated with its process as earlier described. According to the material provided to me, all of this and other details have been the subject of considerable media scrutiny both locally in Fort St. John and provincially. What also followed according to these media reports was a public apology from the Mayor, as well as a public confession of his struggles with alcohol. As noted above, the Mayor chose not to seek re-election in the November 2011 municipal elections.

[39] In summary, while I find disclosing the woman's complaint letters would add to public scrutiny of the actions of Mayor and Council, I give little weight to this circumstance.

Promoting public safety

[40] The applicant argues that the "protection afforded to all female employees" of the City set out in Council's resolution "should have been afforded to the female population of Fort St. John." He says the City has a duty to "protect its citizens and its failure to disclose the Mayor's actions is a "deliberate dereliction" of its duty to promote the safety of its female citizens under s. 22(2)(b) of FIPPA. Underlying this proposition is of course the assertion that citizen safety is at issue. I can only say, as I did with respect to a similar argument the applicant advanced under s. 25, that there is no merit in this assumption and it is not possible to explain this without disclosing the contents of the records at issue. I would also add that it is not clear how the simple fact of disclosure to the applicant would directly increase the security of all women in the region.

Exposure to harm

[41] The City argues that the risk of mental harm that could result from identifying third parties is a circumstance under s. 22(2)(e) that weighs against disclosure of the information in question. I agree that in this case this circumstance weighs against disclosing the complaint letters. The personal information contained in the complaint letters in particular is very sensitive. Again, providing more specific description of this information or giving more detailed reasons in explaining how s. 22(2)(e) applies here would disclose the content of the withheld records.

Information supplied in confidence

[42] Though neither of the records is marked "confidential", it is clear to me from the words and their context they were provided by a complainant to Council on that basis. As noted they contain highly sensitive personal information about one of the complainants. Providing additional details beyond this is not possible

without disclosing the records themselves, something I am prohibited from doing. My conclusion that this sensitive material was supplied in confidence to Council is a circumstance under s. 22(2)(f) that weighs significantly against disclosure of the records.

Unfair damage to reputation

[43] The City submits that the disclosure of the information might also unfairly damage the reputation of the Mayor under s. 22(2)(h).[12] There might be some merit to this argument in relation to certain information in the Summary Report. However, I have already found the Summary Report to be protected by solicitor-client privilege and it is therefore no longer at issue. Based on the *in camera* evidence the City provided me, I am not persuaded the disclosure of the complaint letters would unfairly damage the reputation of the Mayor.

[44] Therefore, I find this is not a factor weighing in favour of withholding the information.

Section 22 Conclusion

[45] I have found that disclosure of the woman's complaint letters would add in a minor way to the scrutiny of the actions of the Mayor and Council. However, in my view this is substantially outweighed by the harm created by releasing the complainant's highly sensitive personal informational contained in the complaint letters that were provided to Council in confidence. I would also add here that given the nature of these letters it is not possible to sever them under s. 4 of FIPPA without disclosing the identity of the complainant.

[46] Taking all of these circumstances into account, I find that disclosure of the records would be an unreasonable invasion of third-party privacy.

Duty to provide a summary

[47] I would add here that the applicant also argued the City is compelled by s. 22(5) of FIPPA to provide a summary of the personal information at issue. This is not correct because s. 22(5) only applies to circumstances where the information at issue is the applicant's own personal information. That is not the case here.

[48] **Local Public Body Confidences**—Given the above conclusions concerning ss. 14, 22 and 25, I do not find it necessary to deal with the City's application of s. 12 to the records.

[12] Hunter affidavit, para. 28.

CONCLUSION

[49] For the reasons set out above I make the following orders under s. 58 of FIPPA:

1. No order respecting s. 25(1)(b) is necessary.

2. I confirm that the City is authorized to withhold the communications from the City's lawyers to the City that includes the covering letter, Summary Report and attachments to the Summary Report under s. 14 of FIPPA.

3. I confirm that the City is authorized to withhold the two complaint letters concerning the Mayor at issue in the matter under s. 22(1) of FIPPA.

February 28, 2012

ORIGINAL SIGNED BY

Michael McEvoy
Senior Adjudicator

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