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

Order F10-01

GREATER VANCOUVER REGIONAL DISTRICT

Michael McEvoy, Adjudicator

January 7, 2010

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Summary: The GVRD made successful representations to AG Canada urging it to stay proceedings of a private prosecution launched against it under the federal *Fisheries Act*. The applicant, an environmental group aiding in the private prosecution, later sought access to the records between the GVRD and the AG Canada concerning the stay decision. The GVRD refused on the basis that the records were protected by solicitor-client privilege and that disclosure would reveal information relating to or used in the exercise of prosecutorial discretion under s. 15(1)(g) of FIPPA. Disclosure of the records is ordered. Legal professional privilege does not apply because the records were communications between a lawyer and a third party. Litigation privilege, if it existed, expired because litigation between the parties ended and the possibility of future related litigation was entirely speculative. Section 15(1)(g) of FIPPA did not apply to discretion exercised by federal prosecutors.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(h), 14, 15(1)(g), 15(4); Schedule 1 definition "exercise of prosecutorial discretion"; *Crown Counsel Act*, ss. 4, and 4.1.

Authorities Considered: B.C.: Order F10-02, [2010] B.C.I.P.C.D. No. 2; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-28, [2002] B.C.I.P.C.D. No. 8.

Cases Considered: *R. v. Bernardo*, [1994] O.J. No. 1718 (Ont. Gen. Div.); *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC); *College of Physicians & Surgeons of BC v. BC (Information & Privacy Commissioner)*, 2002 BCCA 665, [2002] B.C.J. No. 2774; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39.

Authors Cited: Manes, Ronald D. & Michael P. Silver. *Solicitor-Client Privilege in Canadian Law* (Butterworths, 1993); Robert W. Hubbard, Susan Magotiaux and Suzanne M. Duncan, *The Law of Privilege in Canada*, (Canada Law Book, 2006).

1.0 INTRODUCTION

[1] The case relates to a decision by the Attorney General of Canada ("AG Canada") to stay a private prosecution of alleged violations of the federal *Fisheries Act*. Ecojustice Canada[1] ("applicant"), through its legal counsel, represented an individual who had launched a private prosecution[2] against the Greater Vancouver Regional District ("GVRD"), the Greater Vancouver Sewerage and Drainage District ("GVS&DD") and the Province of British Columbia. The applicant alleged these three bodies discharged, or permitted the discharge of, harmful sewage from the Lions Gate treatment plant into Burrard Inlet in Vancouver. AG Canada, through its counsel, John Cliffe, indicated it was considering assuming conduct of the prosecution and, if so, deciding whether the prosecution should proceed. The applicant made a submission to Cliffe urging him to pursue the prosecution and the GVRD and GVS&DD made a representation to the contrary. Subsequently, AG Canada decided to take carriage of the matter and stay the charges. The applicant asked AG Canada to disclose the information on which Cliffe based his decision. It refused.

[2] The applicant then requested the GVRD and GVS&DD's (to which I refer collectively as "GVRD")[3] records under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") as follows:

> All records in relation to the Lions Gate Waste Water Treatment Plant private prosecution…that were sent or provided by the Greater Vancouver Regional District…and/or the Greater Vancouver Sewerage & Drainage District...directly or through legal counsel, to Mr. John Cliffe of the Federal Prosecution Service, or any such records sent or provided to any other federal government official.
>
> All records in relation to the Lions Gate Waste Water Treatment Plant private prosecution…that were received by the GVRD and/or the GVS&DD from Mr. Cliffe or from any other federal government official.

[3] The GVRD declined to release any responsive records because it said they were subject to solicitor-client privilege. The applicant asked the GVRD to clarify its reasons and to consider severing the records pursuant to s. 4(2) of FIPPA. The GVRD refused, resulting in the applicant asking this Office to review the GVRD's decision. The GVRD declined mediation and added that it was also refusing under s. 15(1)(g) of FIPPA to release the information because it would

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[1] Formerly known as Sierra Legal Defence Fund.

[2] Subsequent references to the private prosecution will refer to the applicant as the body responsible for it. The evidence before me is that it was the body effectively undertaking it.

[3] Counsel for the GVRD makes its submissions on behalf of both entities, referring to them as "collectively 'the GVRD'". While both the GVRD and GVS&DD are public bodies, the GVRD was named as the public body in the Notice of Inquiry and there is no dispute that the GVRD has custody and/or control of the records in issue.

reveal information relating to, or used in, the exercise of prosecutorial discretion. A written inquiry was held under Part 5 of FIPPA. This Office gave notice of the inquiry to the applicant and GVRD along with AG Canada, as an appropriate person under s. 54(b) of FIPPA.

[4] The applicant made a similar request to the Province of British Columbia (represented in that case by the Ministry of Attorney General) related to the Lions Gate prosecution. I am issuing my decision in that case, Order F10-02[4], concurrently. Where the issues in both cases are the same, I have applied the same analysis and reasoning in each Order, though expressing it differently at points to account for some variances in the arguments of the respective public bodies.

2.0 ISSUES

[5] The issues in this inquiry are:

1. Is the GVRD authorized by s. 14 of FIPPA to refuse to disclose certain records?

2. Is the GVRD authorized by s. 15(1)(g) of FIPPA to refuse to disclose certain records?

3. Can the public body reasonably sever information from the records under s. 4(2) of FIPPA?

[6] Section 57(1) of FIPPA provides that, with respect to issues 1 and 2, it is up to the GVRD to prove that the applicant has no right of access. FIPPA is silent with respect to issue 3 and, as a practical matter, it is up to each party to provide evidence to support its arguments.

3.0 DISCUSSION

[7] **3.1 The Records in Dispute**—The GVRD describes the disputed information as having two parts. The first is a letter from Kevin Woodall, legal counsel to the GVRD, to John Cliffe, a lawyer with AG Canada ("Woodall letter"). The GVRD says the Woodall letter discloses information it provided to its legal counsel and "aspects of the approach [the GVRD] would take to defending the Lions Gate prosecution."[5] The second part is what the GVRD describes as "excerpts of documents" it provided to its legal counsel, who appended them to the Woodall letter.

[4] [2010] B.C.I.P.C.D. No. 2.
[5] GVRD initial submission, para. 7.

[8] Cliffe also describes the disputed information as composed of two parts. He deposes that the first is a 21-page letter from GVRD's legal counsel, the "thrust" of which, he says, is counsel's representations "that [AG Canada] should intervene in the … Private Prosecution and direct a stay of proceedings."[6] The second part of the records, Cliffe states, is a "cerlox bound document containing 10 documents of various kinds."[7]

[9] The package of disputed records provided me includes two additional pages[8] for which I assume the GVRD also claims solicitor-client privilege. These are two separate letters from GVRD's counsel to AG Canada concerning procedural matters related to the hearing before the Provincial Court of British Columbia on the stay proceeding. Because these are communications between counsel and a third party my conclusions with respect to the Woodall letter will apply to these two documents as well.

[10] **3.2 Solicitor-Client Privilege—**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.[9] GVRD argues that both branches of privilege apply here. I will deal with each in turn.

Legal Professional Privilege

[12] The test for legal advice privilege at common law has been applied consistently in decisions of this office. Thackray J. (as he then was) put the test this way:[10]

> [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:
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> 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

[6] AG Canada initial submission, para. 12.
[7] AG Canada initial submission, para. 12.
[8] These were provided by the GVRD to the Portfolio Officer June 20, 2008.
[9] See for example Order 01-53, [2001] B.C.I.P.C.D. No. 56.
[10] *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

> 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.
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> 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.

[13] The essence of the applicant's submission is that no privilege extends to the communications in issue here because those communications are not between GVRD and its counsel but rather between the GVRD and a third party, AG Canada. Further, the applicant asserts that these communications were not for the purpose of "seeking, formulating or giving of legal advice" but rather were "directly related to advocating that a third party, [AG Canada], make a statutory decision in favour of [GVRD], specifically directing a stay of the prosecution."[11]

[14] The GVRD argues that privilege does not just apply to solicitor-client communications themselves, but to materials that could reveal such communications:

> Counsel for the GVRD has deposed that the [Woodall] Letter disclosed portions of counsel's communications with and advice to its client. In the GVRD's respectful submission, the question is not whether the information is privileged, but rather whether privilege was waived.[12]

[15] In exercising its discretion under s. 14 of FIPPA to withhold the Woodall letter and attachments the GVRD submits:

> (c) the Disclosure of the [Woodall letter] could reveal the solicitor-client communications between counsel and the GVRD and advice given to the GVRD concerning the Lions Gate Prosecution.
>
> (d) Ecojustice had laid a second information charging the GVRD with environmental offences, this time in relation to the Iona Waste Water Treatment Plant. That prosecution, which raised a number of the same or similar factual and legal issues as the Lions Gate Prosecution, was ongoing at the time of the request.
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> (e) John Cliffe was a lawyer with the Federal Prosecution Service of Canada and had made the decision to stay the Lions Gate Prosecution.

[11] Applicant's initial submission, paras. 86 and 87.
[12] GVRD's reply submission, para. 18.

(f) Early in the proceedings, Mr. Cliffe had invited counsel for the GVRD to provide oral and written submissions concerning the Lions Gate Prosecution on the understanding that the submissions would be treated confidentially.

(g) Counsel for the GVRD in the Lions Gate Prosecution prepared the Cliffe Record and provided it to Mr. Cliffe in reliance on his assurance of confidentiality.

(h) Ecojustice asked Mr. Cliffe to provide it with a copy of materials he received in the Lions Gate Prosecution, which included the [Woodall letter], and he had refused to do so.

[16] The GVRD says that it considered severing the Cliffe letter's attachments and disclosing those, but did not do so "out of a concern that disclosure of part of the record could be construed as waiver over the whole of the record."[13]

[17] Kevin Woodall, GVRD's counsel, deposed that the letter sent to AG Canada was based on discussions his law firm had with its client, as well as advice the firm gave to its client concerning the Lions Gate prosecution, including the following:[14]

(a) whether the Lions Gate Prosecution met charge approval standard;

(b) possible defences the GVRD could raise if the Lions Gate Prosecution went to trial;

(c) evidence that would be relevant to the defence and sentencing, and potential outcomes if the Lions Gate Prosecution went to trial.

[18] The GVRD contends that had its counsel set out these points in a memorandum to it, "there is no question but that they would have been protected by solicitor-client privilege."[15] The GVRD further submits its submissions were made to AG Canada on the basis that they were confidential and used only for the purposes of AG Canada exercising its prosecutorial discretion.[16]

[19] After carefully reviewing the submissions of all parties including AG Canada, I conclude, for the following reasons, that legal professional privilege does not apply in this case.

[20] The Woodall letter is correspondence to a third party, AG Canada, a fact not disputed by the GVRD. Solicitor-client privilege protects third-party communications "only where the third party is performing a function, on the

[13] GVRD's reply submission, para. 12.
[14] Woodall affidavit, para. 9.
[15] GVRD initial submission, para. 40.
[16] GVRD initial submission, para. 11.

client's behalf, which is integral to the relationship between the solicitor and the client.[17]

[21] AG Canada was not performing a function on the GVRD's behalf. Nor do I understand the GVRD to argue this. The AG Canada's role was to decide independently whether to prosecute or stay charges. Indeed, AG Canada was potentially adverse in interest at the time GVRD made submissions to it.

[22] The comments of the General Division of the Ontario Superior Court in *R. v. Bernardo*[18] are relevant in this regard:

> Solicitor-client privilege applies to communications between counsel and the client and to communications that are necessarily incidental to the client's representation. They would not normally apply to a situation such as this where it has been divulged to a party adverse in interest, i.e. the Crown. I am satisfied that the solicitor-client privilege would not apply to the information here sought by the defence.[19]

[23] The Woodall letter, whatever gloss the GVRD puts on it, is simply a written argument by a lawyer on a client's behalf. In this case, it is counsel's plea to AG Canada to assume conduct of a private prosecution and stay the charges—that much is known from Cliffe's evidence. The GVRD's assertions boil down to a proposition that, because lawyer and client discussed what ought to go into the submission, it is privileged. One could argue on this basis that any representation made by a lawyer on a client's behalf to a court or tribunal would be privileged because it is based on and might reflect prior consultations with, and the instructions of, that client. Lawyers take instructions from clients; they act only on instructions. One would therefore expect that written arguments, submissions or representations that lawyers make to decision-makers, courts or tribunals reflect client instructions in some sense. That fact, however, no more cloaks the disputed records with privilege than it does the GVRD's written submissions to this inquiry. Nor do cases cited by the GVRD support its assertions that solicitor-client privilege applies. I observe that in the Reid[20] case, on which the GVRD relies, the letter written by the lawyer on his client's behalf to the Minister of Justice seeking a stay of proceedings, correspondence analogous to the Woodall letter, was found not to be privileged. I also note that

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17 *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.

18 *R. v. Bernardo*, [1994] O.J. No. 1718 (Ont. Gen. Div.).

19 The GVRD has not argued that a 'common interest privilege' exists here between it and AG Canada. In any case, for common interest privilege to exist, "the parties must share a common goal, seek a common outcome or have selfsame interest." [*The Law of Privilege in Canada*, by Robert W. Hubbard, Susan Magotiaux and Suzanne M. Duncan, (Canada Law Book, 2006), p. 11-52]. As noted already, far from sharing a common interest with the GVRD, AG Canada's role was potentially adversarial and, at the very least, it was an independent decision-maker.

20 *Reid v. Manitoba (Minister of Justice),* [1994] 1 W.W.R. 159, 89 Man R. 92d) 259.

other non-disclosable records in that case were protected by the "Wigmore confidentiality privilege," a dictum not encompassed by s. 14 of FIPPA.

[24] To summarize, legal professional privilege applies only to communications between client and lawyer. The Woodall letter is a communication between a client's lawyer and a third party who is not performing a function on the client's behalf, much less one that is integral to the relationship between the solicitor and the client. I would add that none of the attachments to the Woodall letter are communications between client and solicitor either. Without disclosing the specific contents of the attachments, I can say they are of a factual nature, most being technical reports concerning sewage management. I therefore reject the GVRD's argument that legal professional privilege applies to the Woodall letter and attachments.

Litigation Privilege

[25] 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.[21]

[26] The GVRD submits that, at the time the applicant applied to the GVRD for disclosure of the Woodall letter, which related to the Lions Gate prosecution, it was also pursuing a private prosecution against the GVRD concerning the Iona sewage treatment plant. The GVRD asserts the Iona proceeding involved the same AG Canada prosecutor, the same accused and the same charges. It also contends that the applicant stated it wanted disclosure of the GVRD material in the Lions Gate prosecution to assist it in the Iona prosecution. The GVRD argues this is precisely the kind of situation litigation privilege is meant to address, namely, where one party seeks to gain access to opponents' confidential communications in order to gain an advantage in the same or related proceedings. While noting that the AG Canada stayed the Iona prosecution, and conceding that litigation privilege is "generally lost"[22] when the litigation is complete, the GVRD submits that:[23]

> …it is reasonable to infer that the Applicant is pursuing disclosure of the documents to assist it in further prosecutions it may commence against the GVRD and other accused concerning sewage treatment. The GVRD submits that if that were the case, the materials should be covered by the litigation privilege, even though the Lions Gate and Iona Prosecution has been stayed.

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[21] Numerous previous orders have affirmed this test. See for example Order 02-28, [2002] B.C.I.P.C.D. No. 8.
[22] GVRD initial submission, para. 71.
[23] GVRD initial submission, paras. 71 and 72.

> The GVRD respectfully requests that the Applicant clarify whether it is seeking disclosure of the materials to assist it in further private prosecutions against the GVRD and, if so, the GVRD asks that it be at liberty to address that issue in further submissions.

[27] The applicant says it does not know if the dominant purpose of the records is to aid in litigation, having not seen them, but concedes that the GVRD's representations to AG Canada were for the dominant purpose of litigation. However, the applicant argues the GVRD must still establish that the third party, to whom the records were supplied, has a common interest with the GVRD. The applicant reasserts that AG Canada did not have a common interest with the GVRD; it was at best a neutral authority in relation to the GVRD and potentially an adversary.

[28] Finally, the applicant argues, whatever litigation privilege may have attached to the records at the time of their creation and conveyance to AG Canada has now expired because the Lions Gate prosecution is at an end, AG Canada having stayed it. The applicant submits the 30-day limitation period for judicially reviewing AG Canada's decision to stay the prosecution has expired and it directly informed the GVRD of this fact some time ago.[24] The applicant also says the Iona Plant private prosecution, which might be characterized as a related proceeding, is also at an end, having been stayed by AG Canada. The 30-day limitation period for challenging the decision also expired, it says.[25]

[29] The applicant submits it is not contemplating bringing any further proceedings in relation to these two sewage treatment plants and has provided sworn evidence to this effect.[26] The applicant submits that, while it has no general duty to indicate its purpose for seeking records, it wishes to have these records to inform "its participation in the ongoing mandatory 5 Year Review of Metro Vancouver's Liquid Waste Management Plan."[27]

[30] The applicant argues that the wording of s. 3(1)(h) of FIPPA supports its position in this regard. That provision states that FIPPA does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed. The applicant argues that "logic suggests that the converse is also true: [FIPPA] applies to all records in the custody or under the control of a public body, including a record relating to a prosecution, if all proceedings in respect of the prosecution have been completed."[28] I will say here that s. 3(1)(h) defines the scope of FIPPA's application to records. The question here, rather, is whether s.14 exempts information from disclosure.

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[24] Applicant's initial submission, para. 102 and specifically the Affidavit of Tina Reale, Exhibit "O".
[25] Applicant's initial submission, para. 103.
[26] Affidavit of Tina Reale, para. 22, wherein she deposes that, "Ms. Tessaro [applicant's counsel] advises me, and I believe, that Ecojustice lawyers are not contemplating bringing any further proceedings in relation to these sewage treatment plants".
[27] Applicant's reply submission, para. 22.
[28] Applicant's initial submission, para. 104.

[31] It is fair to say that the Woodall letter and other records in dispute are not typical of the kinds of records for which litigation privilege claims are made. The need for litigation privilege has been described in *Solicitor-Client Privilege in Canadian Law* like this:[29]

> The contemplation of litigation as a basis for privilege is required for derivative communications [i.e. not direct communication between lawyer and client] such as:
>
> (a) Communications between the client (or the client's agents) and third parties for the purpose of obtaining information to be given to the client's solicitor's to obtain legal advice
>
> (b) Communications between the solicitor (or the solicitor's agents) and third parties to assist with the giving of legal advice, or
>
> (c) Communications which are created at their inception by the client including reports, schedules, briefs, documentation etc.

[32] There is no doubt the Woodall letter (though not its attachments) was created because of the then-pending private prosecution. However, the purpose of this communication was not to obtain legal advice or to assist the solicitor with the giving of legal advice. The federal prosecutor, John Cliffe, characterizes the communications as "representations" designed to persuade him to intervene and direct a stay of charges. It was not some kind of information-gathering exercise connected with formulating legal advice. Cliffe's role here is analogous to that of a prosecutor asked by defence counsel to drop charges against his client. Those communications might be in some sense without prejudice, but one would not think of them as covered by litigation privilege. For this reason, I have serious doubts whether litigation privilege would cover the records in dispute. It is not necessary to make a finding on this issue because I have concluded that, even if one assumes for discussion purposes only, as I do, that litigation privilege exists here, it has ended in this case.

[33] The Supreme Court of Canada recently canvassed the issue of when litigation privilege ends in *Blank v. Canada (Minister of Justice)*:

> As mentioned earlier, however, the privilege may retain its purpose - and, therefore, its effect - where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining ... litigation more broadly than the particular proceeding which gave rise to the claim" (at para. 89): see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.).

[29] Manes, Ronald D. & Michael P. Silver. *Solicitor-Client Privilege in Canadian Law* (Butterworths, 1993), pp. 89-90, para. 0.01.

> At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.
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> As a matter of principle, the boundaries of this extended meaning of "litigation" are limited by the purpose for which litigation privilege is granted, namely, as mentioned, "the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (Sharpe, p. 165)…. *30*

[34] The Court also stated:

> The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose—and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.
>
> Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary", to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.[31]

[35] The outstanding litigation between these parties has ended. There is no dispute that AG Canada stayed the Iona and Lions Gate prosecution.

[36] I do not accept the GVRD's claim that it is "reasonable to infer" the applicant may commence action against the GVRD in future concerning sewage treatment. The applicant's previous attempt to gain access to the Lions Gate material, referred to by the GVRD, predates the end of the Iona prosecution and the applicant's representations that it will no longer pursue it. There is no evidence before me that the applicant intends to pursue any future action against the GVRD concerning "sewage treatment" and I find the GVRD's assertion in this regard to be entirely speculative and without evidentiary basis.

[37] Moreover, the GVRD does not explain what it means in referring to future action by the applicant. It does not allege, for example, the existence of other sewage plants as potential targets for prosecution. Even if this were the case,

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[30] [2006] S.C.J. No. 39 at paras. 38, 39 and 40.
[31] [2006] S.C.J. No. 39 at paras. 34 and 35.

and the applicant intended to pursue prosecutions respecting incidents involving those plants, the GVRD does not explain how details about a past prosecution regarding events and circumstances relating to the Iona and Lions Gate sewage treatment facilities have relevance to other plants, events and circumstances for the purposes at hand. In short, the GVRD's claim that the applicant will seek future prosecutions and that such prosecutions would constitute a related cause of action or raise issues common to the Iona or Lions Gate matters is not at all persuasive.

[38] The Supreme Court of Canada specifically addressed this kind of speculative claim in the context of access legislation in *Blank*:[32]

> The extended definition of litigation, as I indicated earlier, applies no less to the government than to private litigants. As a result of the Access Act, however, its protection may prove less effective in practice. The reason is this. Like private parties, the government may invoke the litigation privilege only when original or extended proceedings are pending or apprehended. Unlike private parties, however, the government may be required under the terms of the Access Act to disclose information once the original proceedings have ended and related proceedings are neither pending nor apprehended*. A mere hypothetical possibility that related proceedings may in the future be instituted does not suffice.* [Emphasis added]

[39] All of this is in contrast to the applicant's submissions and sworn evidence. The applicant did not pursue a judicial review of either the Iona or Lions Gate prosecution decisions. The applicant's sworn evidence[33] is that it does not intend to pursue any further action with respect to those facilities. In fact, while the applicant was not obligated to disclose its reasons for seeking the records in this inquiry, it did say it was doing so to inform its participation in the review process concerning the management of liquid waste in Metro Vancouver.[34]

[40] For all of the reasons set out above, even assuming for discussion purposes only, as I do, that litigation privilege did exist in this case, it is now at an end and does not apply to any of the records in dispute in this case.

[41] I therefore find that s. 14 of FIPPA does not authorize the GVRD to withhold the records in dispute.

[42] Having found s. 14 does not apply it is not necessary for me to consider the issue of waiver of privilege.

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[32] *Blank v. Canada* 2006 SCC 39 at para. 9.
[33] Affidavit of Tina Reale, para. 72.
[34] Affidavit of Tina Reale, Exhibit "P".

[43] **3.3 Prosecutorial Discretion—**Section 15(g) of FIPPA states:

> ***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
>
> …
>
> (g) reveal any information relating to or used in the exercise of prosecutorial discretion,

[44] The GVRD argues that it provided the requested records to AG Canada, in confidence, for purposes of exercising its prosecutorial discretion. The GVRD asks that I consider several facts including these: that the records were created for the sole and limited purpose of the Lions Gate prosecution; the AG prosecutor gave assurances the submissions would remain confidential; and that the applicant requested and was refused access to the records by AG Canada.

[45] The GVRD argues that, "[o]n its surface", s. 15(1)(g) applies here since the AG Canada prosecutor reviewed the requested records in the course of exercising prosecutorial discretion. However, the GVRD notes that Schedule 1 of FIPPA defines the term "exercise of prosecutorial discretion" as the exercise of prosecutorial duties under the provincial *Crown Counsel Act.* The GVRD acknowledges that John Cliffe is a federal prosecutor and not a provincial Crown counsel referred to in the *Crown Counsel Act*. The GVRD contends that FIPPA is "silent" as to what should occur in the case of a federal prosecutor's exercise of prosecutorial discretion.

[46] The GVRD submits that Canadian courts have long recognized a public interest in protecting prosecutorial discretion and that there is a critical connection between confidentiality and the effective exercise of prosecutorial discretion. The GVRD argues that s. 15(1)(g) should be interpreted consistently with this principle and that a contrary interpretation would lead to an irrational and illogical result. It argues this would be the case because a public body could refuse to disclose materials provided to a provincial Crown prosecutor and the federal Crown could withhold material it reviewed. However, the federal Crown could no longer give assurance of confidentiality to provincial public bodies over materials provided to it during the exercise of its discretion. The GVRD also argues the AG Canada should make the decisions concerning disclosure of materials, even if, as in this case, a provincial public body retains a copy.[35]

[47] The applicant argues that FIPPA is not silent with respect to the exercise of prosecutorial discretion by a federal prosecutor. The applicant submits the Legislature specifically confined the application of FIPPA to the exercise of discretion by provincial Crown counsel. In doing so, the applicant asserts, it

[35] GVRD's initial submission, paras. 73-85.

expressly and intentionally excluded the exercise of prosecutorial discretion by federal counsel from FIPPA.

[48] The applicant submits that, in enacting FIPPA, the Legislature never intended to extend s. 15(1)(g) to cover federal prosecutors. Nor could it do so, the applicant argues:[36]

> Put simply, the provincial Legislature has no constitutional power to legislate on the topic of the public's right to access records used in federal decision-making. To interpret FIPPA so as to govern the exercise of discretion by federal prosecutors or other federal official would bestow upon the Legislature powers not granted by the Constitution.

[49] The applicant notes that, had the provincial Attorney General appointed a special prosecutor in relation to this private prosecution, the applicant would likely not have had to request these records from the GVRD. Instead, the applicant argues, s. 15(4) of FIPPA would entitle it to a statement of reasons for any decision to stay the prosecution.

[50] I have carefully considered the submissions of all the parties, including that of AG Canada on how it exercised its discretion in this case. I conclude that s. 15(1)(g) does not apply because it relates only to "the exercise of prosecutorial discretion", which is defined in Schedule 1 of FIPPA as:

> …the exercise by Crown counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*…

[51] There is no suggestion that Cliffe, on behalf of AG Canada, exercised a duty or power under the provincial *Crown Counsel Act*. Nor is there any suggestion that Cliffe acted as a "special prosecutor", a term defined in the *Crown Counsel Act* to mean a lawyer, appointed by the Assistant Deputy Attorney General of British Columbia who is not employed by the Ministry of the Attorney General. Nor is he said to be a "Crown counsel", as that term is defined in ss. 4(1) and 4.1 of the *Crown Counsel Act.*

[52] **3.4 Severing of Records**—Given my findings above, it is not necessary to determine whether the GVRD could reasonably sever information from the records under s. 4(2) of FIPPA.

4.0 CONCLUSION

[53] For the reasons set out above, I make the following orders:

1. I require the head of the GVRD to give the applicant access to the information it withheld under ss. 14 and 15(1)(g) of FIPPA including the

[36] Applicant's initial submission, para. 76.

two separate letters from GVRD's counsel to AG Canada, concerning procedural matters related to the hearing before the Provincial Court of British Columbia referred to at paragraph [9] above.

2. I require the head of the GVRD to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before February 18, 2010 and, concurrently, to copy me on its cover letter to the applicant.

January 7, 2010

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC File No. F08-35049