Order F07-05

VILLAGE OF SAYWARD

Justine Austin-Olsen, Adjudicator

March 12, 2007

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Summary: The applicant requested a copy of a legal opinion over which the Village claimed solicitor-client privilege. Parts of the opinion were publicly disclosed during an open council meeting and the opinion was also referred to by the Mayor in a letter to a local newspaper. Notwithstanding these disclosures, the Village did not waive privilege over the entire opinion. In circumstances where a public body makes partial disclosure of privileged communications in an effort to give effect to the principle of transparency this will not, without more, result in waiver of privilege over the entire communication. The conduct of the Village did not evidence an intention to waive privilege over the legal opinion and the partial disclosure was not misleading.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 14.

Authorities Considered: B.C.: Decision F06-01, [2006] B.C.I.P.C.D. No. 1; Order 00-06, [2000] B.C.I.P.C.D. No. 6; Order 00-07, [2000] B.C.I.P.C.D. No. 7; Order 00-23, [2000] B.C.I.P.C.D. No. 26.

Cases Considered: *S & K Processors Ltd v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (B.C.S.C.); *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, [2002] B.C.J. No. 2779; *Stevens v. Canada (Prime Minister)*, [1998] F.C.J. No. 794 (F.C.A.).

Authors Cited: Manes, Ronald D. & Michael P. Silver. *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993).

1.0 INTRODUCTION

[1] This inquiry relates to a decision by the Village of Sayward ("Village") to refuse the applicant access under s. 14 of the *Freedom of Information and*

Protection of Privacy Act ("FIPPA") to a four-page letter from its solicitor, which the Village says is a legal opinion that is subject to solicitor-client privilege (the "opinion"). The applicant takes the position that, in the circumstances of this case, the Village has, through action taken by the Mayor and the Chief Administrative Officer ("CAO"), waived any privilege over the opinion.

[2] In April 2005 the Village held a public hearing relating to a proposed amendment to its Official Community Plan Bylaw No. 308 and its Zoning Bylaw No. 309, to change the zoning of a fifty-acre piece of property owned by Weyerhaeuser to allow for residential use (the "amendment").[1]

[3] According to the affidavit evidence of the Mayor of the Village, Heather Sprout, there were some "concerns raised by members of the public" about the process that was followed regarding the amendment, so the Village decided to seek legal advice.[2] On May 11, 2005 the Village Council had an open meeting and, among other things, the meeting minutes indicate a motion was made that a "report dated May 2, 2005 received from the CAO clarifying the issues raised at the April 27, 2005 public hearing be received for information" (the "CAO's report").[3] The minutes go on to describe the CAO's report, which apparently was also subsequently made available to the public, as follows: [4]

- Report outlined that requests to appear as a delegation to Council regarding the public hearing process had been denied as advised by the Village Solicitor
- Outlined Solicitor's opinion in regards to the concerns expressed by the residents regarding Bylaw No. 310 and how it pertains to the public hearing process
- Advised Council of request for a new public hearing.

[4] At the end of May 2005, after the amendment was passed, the Mayor wrote a letter to a local newspaper, the *Sayward News*, (the "Mayor's letter") in which she referred to the opinion that had been obtained by the Village as follows:[5]

> Prior to contacting a solicitor Council had been advised by the Administrator regarding the conflict of interest issue and the requirement for reports. Council decided to contact a solicitor as it was obvious at the public hearing that a number of taxpayers were not satisfied with the information given them regarding the conflict of interest or the provisions of geotechnical

[1] Affidavit of Heather Sprout, paras. 1-2.
[2] Affidavit of Heather Sprout, para. 3.
[3] Minutes of Council Meeting dated May 11, 2005; Applicant's initial submission, appendix B; Affidavit of Laurie Taylor, exhibits D and E.
[4] Minutes of Council Meeting dated May 11, 2005; Applicant's initial submission, appendix B; Affidavit of Laurie Taylor, exhibits D and E; Decision F06-01, [2006] B.C.I.P.C.D. No. 1 at para. 13.
[5] Affidavit of Heather Sprout, exhibit A; Applicant's initial submission, appendix A.

> reports at time of subdivision application. It was felt by Council that those taxpayers may be satisfied with the same information coming from a solicitor. At no time was Council concerned that what they were doing was "illegal" and they now have the legal opinion to reinforce their decision. Granted this legal opinion was obtained at a cost to the taxpayers but it was only because of a vocal few that it was necessary.

[5] After the Mayor's letter was published, the applicant wrote to the Village referring to it and requesting access to the relevant records under FIPPA:

> Because the Mayor has deemed this information necessary to satisfy the taxpayers, we are requesting a complete and unedited copy of the solicitor's opinion and reports regarding the conflict of interest or the provisions of geotechnical reports at the time of subdivision application as requested by the Village of Sayward as well as any other related legal advice with regard to these issues.

[6] The Village refused access to the opinion under FIPPA s. 13 (advice, recommendations or draft regulations), s. 14 (legal advice), and s. 17 (disclosure harmful to the financial or economic interests of a public body). This prompted the applicant to seek a review of the Village's decision from this Office.

[7] An attempt at mediating a settlement of the issues between the parties was unsuccessful, so the matter was referred for an inquiry under Part 5 of FIPPA. The Village then requested, under s. 56 of FIPPA, that the discretion under that provision be exercised to not hold an inquiry.

[8] In that application, the Village took the position that the opinion clearly met the legal test for solicitor-client privilege and that s. 14 authorized the Village to refuse the applicant access to it. The applicant argued that any solicitor-client privilege in the opinion had, in the circumstances, been waived by, among other things, the CAO's report, which referred to the opinion and was discussed in the open Council meeting, and the Mayor's letter to the *Sayward News*.

[9] Adjudicator Francis denied the Village's s. 56 application because, in her view, there was an arguable issue about whether privilege over the opinion had in fact been waived as a result of the Mayor's letter and by the public discussion of the CAO's report. In doing this, Adjudicator Francis expressly refrained from making any findings or expressing any opinion about the merits of the case.[6]

2.0 ISSUE

[10] Although the Village originally refused access on the basis of ss. 13, 14 and 17 of FIPPA, in its initial submissions in this inquiry the Village withdrew its

[6] Decision F06-01, [2006] B.C.I.P.C.D. No. 1 at paras. 14 and 15.

reliance on ss. 13 and 17.[7] As such, the sole issue in this inquiry is whether the Village is authorized by s. 14 of FIPPA to refuse the applicant access to the opinion.

[11] Under s. 57(1) of FIPPA, the Village has the burden of proof with respect to the application of s. 14.

3.0 DISCUSSION

[12] 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.

[13] It has been well established by previous orders of this Office and decisions of the courts that s. 14 incorporates the common law rules of solicitor-client privilege.[8] The kind of privilege known as solicitor-client privilege, or legal professional privilege, protects a confidential communication between a lawyer and a client that is related to the giving or receiving of legal advice, unless that privilege is waived, either expressly or impliedly, by the client.[9] There is no real disagreement between the parties that the opinion the applicant seeks is in fact a legal opinion, *i.e.*, a communication from lawyer to client expressing legal advice. The real point of contention is whether the opinion is privileged in view of the surrounding circumstances.

[14] The Village's position is that neither the CAO's report, which was introduced and discussed by Council at the open meeting, nor the statements in the Mayor's letter published in the media constitute waiver of privilege over the opinion. The Village submits that disclosure of conclusions, a summary, or part of a legal opinion does not necessarily result in waiver of privilege over the whole of the opinion.[10] The Village says that both the CAO's report and Mayor's letter went no further than this. The Village notes that the CAO kept the opinion itself confidential and that it was only introduced and discussed by Council during an *in camera* meeting. The Village submits that this evidences an intention by Council to keep the undisclosed details of the opinion confidential and to maintain privilege overall.

[15] The applicant grounds much of his argument on the reason for which the Village obtained the legal opinion in the first place, and on what he suggests are the reasons behind the Mayor's subsequent letter to the *Sayward*

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[7] Village's initial submission, at para. 5.

[8] See, for example, Order 00-06, [2000] B.C.I.P.C.D. No. 6 at para. 26; and, *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, [2002] B.C.J. No. 2779 at paras. 21-24.

[9] See Order 00-07, [2000] B.C.I.P.C.D. No. 7 at para. 31; Order 00-23, [2000] B.C.I.P.C.D. No. 26 at para. 18.

[10] Village's initial submission at para. 29.

News.[11] In her affidavit, the Mayor describes her reasons for writing the letter as follows:[12]

> After Council approved the Amendment, I was aware that there were still concerns among certain members of the public that the Village had not followed the proper process and I was also aware of criticisms by certain members of the public of Council's decision to request the Legal Opinion given the cost involved.
>
> Therefore, I wanted to clarify for the members of the community why the Village had requested a legal opinion and I submitted [the] letter….

[16] Although the applicant ascribes a great deal of importance to it, the fact that the Village sought legal advice because of public concerns about the amendment process does not by itself affect privilege. The motivation of the Village in this regard is immaterial. The same can be said for the motivation behind the Mayor's letter. The question is whether the actions of the Village, evidenced by the introduction and discussion of the CAO's report at the open Council meeting and the Mayor's letter to the *Sayward News*, resulted in that privilege being waived.

[17] The general principle of waiver is set out by R.D. Manes and M.P. Silver in *Solicitor-Client Privilege in Canadian Law*:[13]

> Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
>
> …
>
> Generally, waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

[18] In Order 00-07 Commissioner Loukidelis discussed in great detail the proper approach to the issue of waiver in the context of FIPPA.[14] Among other things, he considered whether, by revealing a part or a summary of legal advice received, privilege was waived over the whole of the legal opinion. Referring to *S & K Processors Ltd v. Campbell Avenue Herring Producers Ltd.*,[15] the Commissioner observed:[16]

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[11] Applicants initial submission at paras. 2.1-2.4
[12] Affidavit of Heather Sprout, paras.4-5.
[13] Ronald D. Manes & Michael P. Silver, *Solicitor-Client Privilege in Canadian Law*, (Toronto: Butterworths, 1993) at p. 189, 191.
[14] Order 00-07, [at paras. 19-44.
[15] *S & K Processors Ltd v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (B.C.S.C.).
[16] Order 00-07, at para. 24.

> … waiver of privilege respecting part of a communication can be held, in the interests of fairness, to require waiver in respect of the whole communication. It is clear, however, that there are circumstances in which disclosure of part of a privileged communication does not constitute waiver of privilege over all of the communication.

[19] After considering several court decisions the Commissioner concluded that, in determining whether privilege has been waived over the whole of records that have been disclosed in part, it is appropriate to look at the surrounding circumstances to determine whether the conduct of the public body evidenced an intention to waive privilege and whether the partial release of information would cause unfairness or was misleading.[17]

[20] The conduct of the Village in this case does not evidence an intention to waive privilege over the opinion. Indeed, I accept the submission of the Village that the fact that the CAO's report was prepared for discussion at the open Council meeting, while the opinion itself was separately introduced and discussed at the *in camera* Council meeting, evidences an intention to retain privilege over the opinion.[18]

[21] The Mayor's letter reveals very little about the content of the legal advice contained in the opinion except to say that, in her view, it reinforced Council's position that there was nothing illegal about the way the amendment process was conducted. The Mayor's letter speaks more to the underlying motivation of Council for seeking the opinion, which, as I have already said, is immaterial to whether or not the opinion itself remains privileged.

[22] The CAO's report reveals much more than the Mayor's letter, in that it specifically reveals part of the advice given in the opinion. I disagree with the Village's characterization of what was disclosed in the CAO's report as merely the "'bottom line' of part of the legal advice".[19] In my view, it is more accurate to say that a detailed portion of the advice drawn from the opinion is disclosed in the CAO's report. However, even this more extensive disclosure does not necessarily result in waiver over the whole of the opinion.

[23] In Order 00-07 the Commissioner considered cases where the result of a legal opinion, or a summary or the "gist" of a legal opinion, had been disclosed and determined that this would not conclusively result in a loss of privilege over the entire opinion.[20] Although the Village's disclosure through the CAO's report was more than simply the "bottom line", and perhaps more than what occurred in other cases referred to in Order 00-07, the test of whether the surrounding

[17] Order 00-07, at paras. 26-28.
[18] Village's initial submission at para. 28.
[19] Village's initial submission at para. 32.
[20] Order 00-07, at paras. 38-42.

circumstances and the conduct of the party evidences an intention to waive privilege is more robust than that.

[24] As mentioned earlier, fairness is the touchstone of the inquiry about whether, on an objective basis, an intention to waive privilege can be implied by the conduct of the client. Within the context of FIPPA, however, there is an added dimension that must be considered when assessing whether the conduct of a public body amounts to an implied waiver of privilege. In particular, if a public body decides to disclose part of a privileged communication to the public—either generally or in response to an access request—should this necessarily result, without more, in a loss of privilege over the entire communication?

[25] This aspect of access to information as it interacts with the common law of solicitor-client privilege was adverted to by Linden J.A. in *Stevens v. Canada (Prime Minister)*.[21] In that case, the Federal Court of Appeal upheld the decision of Rothstein J. that disclosure of portions of a solicitor's account under the federal *Access to Information Act* did not constitute waiver of solicitor-client privilege over the whole of the records. Linden J.A., writing for the court, said this:[22]

> With respect to the release of portions of the records, a similar view has been adopted in British Columbia. In *Lowry v. Canadian Mountain Holidays Ltd.* [(1984), 59 B.C.L.R. 137 at 143] Finch J. [now C.J.B.C.] emphasized that *all the circumstances must be taken into consideration and that the conduct of the party and the presence of an intent to mislead the court or another litigant is of primary importance*. I believe that this approach is appropriate in this case, particularly in light of section 25 of the [federal *Access to Information*] *Act*, which allows the disclosure of portions of privileged information. This is an attempt to balance the rights of individuals to access to information, on the one hand, while maintaining confidentiality where other persons are entitled to that confidentiality on the other hand. It would be a perverse result if the operation of section 25 of the *Act* were thereby to abrogate the discretionary power given to the Government head under section 23 of the *Act*.
>
> I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. *But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. As I mentioned earlier, a Government body may*

[21] [1998] F.C.J. No. 794 (F.C.A.).
[22] [1998] F.C.J. No. 794 (F.C.A.) at paras. 51-52.

> *have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients*.
>
> [emphasis added]

[26] If a public body makes partial disclosure of privileged material in an effort to follow a "policy of transparency", this should not be weighed against it in terms of assessing the public body's conduct for the purpose of determining an intention to waive privilege. In this sense, the underlying motivation of the public body for partially disclosing privileged legal advice, as opposed to its motivation for seeking it in the first place, is relevant to an assessment of whether waiver of privilege has occurred. To hold otherwise would prejudice the public body for taking action which is in fact consistent with the express purpose of FIPPA, which is "to make public bodies more accountable to the public."[23]

[27] In the circumstances of this case, I find that the Village did not intend to waive privilege over the opinion by publicly disclosing part of the legal advice received through the CAO's report. Adopting the words of Linden J.A. quoted above, it is the Village as client which enjoys the privilege over the legal advice it received; the Village may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the advice the Village was merely exercising its discretion in that regard. It did not, by exercising that discretion, lose its ability to maintain privilege over the whole of the opinion.

[28] The Village disclosed the advice that it did in an effort to respond to concerns that were voiced about the process that was followed surrounding the amendment. I accept the evidence of the Mayor and of the CAO in this regard. In my view, the conduct of the Village is evidence of its effort to give effect to the principle of transparency and, as I have said above, I decline to weigh this conduct against the Village in determining whether it intended to waive privilege.

[29] In light of what I have said above, it should be clear that the more important issue in determining whether the Village has lost privilege over the opinion is whether the partial disclosure was unfair or intended to mislead. My review of the opinion in question—which the Village provided to this Office for the purposes of this inquiry—leads me to conclude that the partial disclosure did not result in unfairness or mislead anyone.

[30] For these reasons, I find that s. 14 authorized the Village to refuse the applicant access to the opinion.

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[23] FIPPA, s. 2(1).

4.0 CONCLUSION

[31] For the above reasons, under s. 58 of FIPPA I confirm the decision of the Village to refuse the applicant access to the opinion under s. 14 of FIPPA.

March 12, 2007

ORIGINAL SIGNED BY

Justine Austin-Olsen
Adjudicator

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