



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F26-31

CITY OF BURNABY

D. Hans Hwang
Adjudicator

April 24, 2026

CanLII Cite: 2026 BCIPC 39

Quicklaw Cite: [2026] B.C.I.P.C.D. No. 39

Summary: An applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the City of Burnaby (the City) for access to records about herself. The City withheld the records in dispute under ss. 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. The adjudicator found that the City was authorized to refuse to disclose the information in dispute under s. 14.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 14 and 22(1).

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant made an access request to the City of Burnaby (the City) for records relating to the City's investigation into allegations involving her.

[2] The City responded to the applicant's request by refusing access to the entire records under ss. 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA.¹

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the City's decision. The OIPC's mediation process did not resolve the dispute between the parties, and the matter was forwarded to this inquiry.

¹ From this point forward, unless otherwise specified, where I refer to section numbers, I am referring to sections of FIPPA.

ISSUES AND BURDEN OF PROOF

[4] The issues I must decide in this inquiry are as follows:

1. Is the City authorized to refuse access to the information in dispute under s. 14?
2. Is the City required to refuse access to the information in dispute under s. 22(1)?

[5] Under s. 57(1), the City has the burden of proving that the applicant has no right of access to the information in dispute under s. 14.

[6] Under s. 57(2), the applicant has the burden of proving that disclosing the information at issue under s. 22(1) would not unreasonably invade a third party's personal privacy. However, the City has the initial burden of proving that the information qualifies as personal information.²

BACKGROUND

[7] The applicant is a former employee of the City. In 2017, she left work on a medical leave of absence because of a condition which restricted her capacity to work. She was on long term disability benefits (LTD Benefits) which were exhausted by 2020 and temporarily extended after that. In 2021, the applicant became entitled to permanent LTD Benefits.

[8] In 2022, the City initiated an investigation into allegations about the applicant's eligibility for the LTD Benefits and the medical leave she had taken (the Investigation). For the Investigation, the City retained an external workplace investigator. As a result of the Investigation, the City terminated the applicant's employment in 2023. Following this, her union filed a grievance alleging that her employment had been wrongfully terminated.

[9] Between 2020 and 2023, the applicant filed several complaints with the BC Human Rights Tribunal against the City and City employees regarding allegations of discrimination.

RECORD AT ISSUE

[10] The responsive record consists of a report about the Investigation and accompanying indexes totalling 86 pages (Investigation Report).

SOLICITOR-CLIENT PRIVILEGE, S. 14

[11] Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. For the purpose of s. 14,

² Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.

solicitor-client privilege includes legal advice privilege and litigation privilege. In this case, the City claims both privileges.

Sufficiency of evidence to substantiate the s. 14 claim

[12] The City did not provide the information withheld under s. 14 for my review.

[13] Section 44(1)(b) gives me, as the Commissioner’s delegate, the power to order production of records to review them during an inquiry. However, given the importance of solicitor-client privilege, and in order to minimally infringe on that privilege, I will only order production of records being withheld under s. 14 when it is absolutely necessary to decide the issues in dispute.³

[14] Past court cases and OIPC orders have discussed the evidence required to establish solicitor-client privilege applies in the absence of the records.⁴ Although there are no steadfast rules and each case depends on its own facts, some general rules have been established, including that:⁵

- a party claiming privilege must list each disputed record separately and provide, without revealing privileged information, a description of the record in sufficient detail to allow one to assess the claim of privilege;
- the description of the record should include the date it was created or sent, the type of communication (e.g., “email”) and the names of the author and the recipient(s);
- in addition to a proper description of the disputed records, the party claiming privilege must provide evidence to substantiate the privilege claim;
- ideally, affidavit evidence in support of a privilege claim should avoid hearsay and come from an affiant with direct knowledge of the disputed records; and
- it is helpful, and in some cases even necessary, to have affidavit evidence from a lawyer, who is an officer of the court and has a professional duty to ensure that privilege is properly claimed.

[15] After a preliminary review of the City’s submissions and evidence, I determined it had not provided a sufficient evidentiary basis for me to determine whether the record that the City withheld under s. 14 is subject to solicitor-client privilege.

³ Order F14-19, 2014 BCIPC 16 at para 10; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 17; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 68.

⁴ *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 [*Minister of Finance*] at paras 76-93 and Order F20-16, 2020 BCIPC 18 at paras 8-10.

⁵ *Minister of Finance* at paras 76-93 and Order F20-16, 2020 BCIPC 18 at paras 8-10.

[16] Therefore, I provided the City with an opportunity to submit additional evidence in support of its privilege claim.⁶ In response to my request, the City provided further submissions on this issue and an affidavit from an external investigator who is also a lawyer (External Lawyer).⁷

[17] I can see that the External Lawyer has direct knowledge of the information on which the City claims solicitor-client privilege, and he was directly involved in generating the responsive records.⁸ He is also a practising lawyer and, as an officer of the court, he has a professional duty to ensure privilege is properly claimed.⁹ After reviewing the additional submissions and affidavit evidence, I find that I now have sufficient evidence to decide whether s. 14 applies.

Legal advice privilege

[18] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking, formulating, or providing legal advice, opinion, or analysis. For information to be protected by legal advice privilege it must be:

- a communication between a solicitor and client (or their agent);
- that entails the seeking or providing of legal advice; and
- that is intended by the solicitor and client to be confidential.¹⁰

[19] Not every communication between client and solicitor is protected by legal advice privilege. However, if the conditions set out above are satisfied, then legal advice privilege applies.

Parties' submissions on legal advice privilege

[20] The City submits that disclosing the Investigation Report would reveal communications between the City and its lawyer wherein the City sought and received legal advice from the External Lawyer.¹¹ The City submits that it retained the External Lawyer to conduct a privileged investigation, to gather and assess the facts, and to write a report and render legal advice.¹²

[21] To support its position, the City provided affidavits from an HR advisor and the External Lawyer. This combined evidence can be summarized as follows:

⁶ OIPC's March 20, 2026 letter.

⁷ The applicant provided a response to the City's additional submission and evidence.

⁸ External Lawyer's affidavit #1 at paras 5-11.

⁹ See *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 (CanLII) at para 86. See also Order F20-16, 2020 BCIPC 18 (CanLII) at para 10 and *Nelson and District Credit Union v. Fiserv Solutions of Canada, Inc. (Master)*, 2017 BCSC 1139 at para 54.

¹⁰ *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at p. 837.

¹¹ City's initial submission at para 54.

¹² City's initial submission at para 56.

- In 2022, the City learned of allegations regarding the applicant's eligibility for the LTD benefits and the medical leave she had taken;¹³
- Between 2020 and 2023, the applicant filed several complaints with the BC Human Right Tribunal against the City and City employees regarding discrimination, lack of accommodation and termination of her employment, and these remain active;¹⁴
- Considering the nature and seriousness of the allegations against the applicant and active complaint proceedings initiated by the applicant, the City retained the External Lawyer to investigate the allegations about the applicant and to provide the City with his findings, legal advice, and analysis and opinion and binding recommendations;¹⁵
- In February 2023, the External Lawyer delivered the Investigation Report to the City's internal legal counsel (Internal Lawyer), and this report contains the External Lawyer's findings of fact, legal advice, analysis, and recommendation, and was marked "privileged and confidential";¹⁶ and
- The External Lawyer did not provide a copy of the Investigation Report to any one other than the Internal Lawyer, and the City has not waived privilege over the report.¹⁷

[22] The applicant disputes the City's arguments and evidence about s. 14. She submits that the City did not provide a retainer agreement with the External Lawyer and did not provide a proof of legal fees paid to the External Lawyer; therefore, the City failed to establish a solicitor-client relationship with the External Lawyer.¹⁸ She submits that the content of the Investigation Report is not confidential legal advice but factual findings and recommendations about the applicant's alleged conduct; therefore, it cannot be withheld under s. 14.¹⁹

[23] In response, the City submits that it retained the External Lawyer as legal counsel to conduct a privileged investigation and provide legal advice, and the Investigation Report was marked privileged and confidential.²⁰ The City submits that a retainer agreement and legal invoices and fee documents which could allow for inferences about legal advice are privileged documents which cannot be disclosed.²¹ The City also submits that it treated the Investigation Report as privileged, and never waived privilege over the record.²²

¹³ HR Advisor's affidavit #1 at para 16.

¹⁴ *Ibid* at para 33.

¹⁵ External Lawyer's affidavit #1 at paras 5-7; HR Advisor's affidavit #1 at paras 18-19.

¹⁶ External Lawyer's affidavit #1 at paras 11-13.

¹⁷ *Ibid* at paras 17-18.

¹⁸ Applicant's response submission at paras 27 and 33; applicant's sur-reply at para 3.

¹⁹ Applicant's response submission at para 82.

²⁰ City's reply submission at paras 15 and 16.

²¹ *Ibid* at para 20.

²² *Ibid* at paras 24-29.

Analysis and findings on legal advice privilege

[24] With respect to the first part of the test, I accept that the External Lawyer provided the Investigation Report to the City, and that this qualifies as a communication.

[25] Next, for legal advice privilege to apply, there must be a solicitor-client relationship between the City and the External Lawyer. I accept the City's evidence that it hired the External Lawyer to conduct the Investigation. I have also considered the role of the External Lawyer during the Investigation. Legal advice privilege only arises when a solicitor is acting as a lawyer.²³ For instance, when a lawyer is hired only as an investigator, solicitor-client privilege does not apply to the communications between the lawyer and client; however, where a lawyer is conducting an investigation for the purpose of giving legal advice, privilege will attach to those communications.²⁴ In this case, the evidence persuades me that the External Lawyer was hired to investigate the allegations involving the applicant and to provide legal advice and recommendations with respect to the findings. Therefore, I find the City and the External Lawyer were in a solicitor-client relationship.

[26] I am not persuaded by the applicant's arguments that the City failed to establish a solicitor-client relationship with the External Lawyer because it had not provided a legal invoice and a retainer agreement. While these documents may assist with proving a solicitor-client relationship, it is not necessary to review them in this case because the City provided me with other evidence to prove it had a solicitor client relationship with the External Lawyer.

[27] In summary, I find the City was in a solicitor-client relationship with the External Lawyer regarding the Investigation Report; therefore, the first part of the test is met.

[28] With respect to the second part of the test, I find the External Lawyer's affidavit provides sufficient evidence that the Investigation Report entails the seeking or providing of legal advice. I accept the evidence that the External Lawyer provided the Investigation Report to the City, and this report contains his findings of fact, legal advice, analysis, and recommendations. I am not persuaded by the applicant's position that factual findings and recommendations are information that cannot be withheld under s. 14. The courts have held that legal advice privilege applies to the "continuum of communications" between lawyer and client that are "part of the necessary exchange of information

²³ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 32.

²⁴ *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11 at paras 37-38; *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 32.

between solicitor and client for the purpose of providing advice.”²⁵ In this case, I accept that the External Lawyer gave legal advice regarding the factual information he found from the Investigation, and this forms part of necessary exchange of information between the External Lawyer and the City for the purpose of providing legal advice. For these reasons, I find the Investigation Report entails the seeking and providing of legal advice; therefore, the second part of the test is met.

[29] Turning to whether the communications at issue were intended by the solicitor and client to be confidential, I accept the City’s evidence that the Investigation Report was intended by the City and the External Lawyer to be confidential.

[30] Considering all of the above, I conclude the Investigation Report is a confidential communication between a solicitor and their client which took place for the purpose of seeking and giving of legal advice, so legal advice privilege applies. Since I have found that legal advice privilege applies to the Investigation Report, I need not decide whether litigation privilege also applies to it.

Waiver of privilege

[31] The applicant submits the City has waived privilege over the Investigation Report because the City shared it with third parties in grievance proceedings.²⁶

[32] Privilege belongs to, and can only be waived by, the client.²⁷ To establish waiver, the party asserting it must show:

1. the privilege-holder knew of the existence of the privilege and voluntarily evinced an intention to waive it; or
2. in the absence of an intention to waive, fairness and consistency require disclosure.²⁸

[33] However, there is no waiver when privileged information is provided to a party outside the solicitor-client relationship “on the understanding that it will be held in confidence and not disclosed to others”.²⁹ This is because an understanding that the document is to be treated in confidence negates an

²⁵ For example, *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para 42.

²⁶ Applicant’s response submission at para 84. The applicant does not explain whether an entire report or certain part of it was shared.

²⁷ *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para 39.

²⁸ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd. (1983)*, 1983 CanLII 407 (BC SC), 45 B.C.L.R. 218 (S.C.) at para 6.

²⁹ *Malimon v. Kwok*, 2019 BCSC 1972 at para 21, citing *Kamengo Systems Inc. v. Seabulk Systems Inc. et al*, 1998 CanLII 4548 (BC SC) at paras 19-20.

intention to waive the privilege. There is also no waiver where a client discloses privileged information to a third party intending confidentiality and the third party has a common interest with the client sufficient to preserve the privilege.³⁰

[34] In my view, the City's evidence establishes that during the grievance proceedings the City shared the Investigation Report with third parties under a confidentiality agreement which allows, on a confidential basis, sharing of the information only for the purpose of settlement discussions between the parties.³¹ This satisfies me that the City shared the legal advice with third parties on the understanding that the advice will be held in confidence.

[35] Based on the materials before me, I am not persuaded by the applicant's assertion that the legal advice privilege that I found applies to the Investigation Report was waived.

[36] For the reasons provided, I conclude that s. 14 applies to the Investigation Report the City is withholding on the basis of legal advice privilege because it would reveal confidential legal advice between the City and the External Lawyer, and the City did not waive privilege by disclosing the legal advice to third parties.

UNREASONABLE INVASION OF THIRD-PARTY PERSONAL PRIVACY, S. 22

[37] Section 22(1) requires public bodies to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. As set out above, I have found that s. 14 applies to all the information withheld in the Investigation Report. As a result, it is not necessary for me to consider whether the City is also required to refuse to disclose that information under s. 22(1).

CONCLUSION

[38] For the reasons given above, under s. 58(2)(b) of FIPPA, I confirm the City's decision that it is authorized to refuse to disclose the Investigation Report to the applicant under s. 14 of FIPPA.

April 24, 2026

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File No.: F24-97946

³⁰ *Malimon v. Kwok*, 2019 BCSC 1972 at para 20.

³¹ HR Advisor's affidavit #2 at paras 11-16.