



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

Decision F06-01

VILLAGE OF SAYWARD

Celia Francis, Adjudicator
January 10, 2006

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Summary: The public body's request that an inquiry under Part 5 of the Act not be held is rejected. Without holding an inquiry under Part 5, it is not clear that there has been no waiver of solicitor-client privilege. An inquiry under Part 5 will therefore be held.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 56.

Authorities Considered: B.C.: Order 02-57, [2002] B.C.I.P.C.D. No. 59; Order 01-03, [2001] B.C.I.P.C.D. No. 3; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 00-07, [2000] B.C.I.P.C.D. No. 7.

1.0 INTRODUCTION

[1] This decision deals with the request of the Village of Sayward ("Village") that I decline, under s. 56 of the Act, to proceed with an inquiry under Part 5 of the Act in relation to an access to information request, described further below, that the respondent applicant ("respondent") made to the Village under the *Freedom of Information and Protection of Privacy Act* ("Act").

[2] For the reasons given below, I have decided to reject the Village's request and direct that this matter proceed to inquiry under s. 56 of the Act.

2.0 DISCUSSION

The access request

[3] The respondent made a request to the Village in June 2005. He referred to "taxpayer concerns" regarding possible bylaw violations and allegations of conflict of interest raised at a public meeting on proposed amendments to a local zoning bylaw and to the Official

Community Plan (“OCP”). He noted that the Village had engaged the services of a solicitor to provide advice and opinions on these issues and asked for a copy of “a complete and unedited copy of the solicitor’s opinion and reports regarding the conflict of interest or the provision of geotechnical reports at the time of the subdivision application”.

[4] The Village denied access to the requested record under ss. 13, 14 and 17 of the Act. The respondent requested a review of that decision, saying that, despite concerns that members of the public had raised at a public meeting of April 27, 2005, the Village had approved the proposed amendments to the OCP and zoning bylaw. Because of the public’s concerns, however, he said, the Village soon after obtained a solicitor’s opinion. The respondent said that the mayor of the Village had said in the local newspaper that the Village had asked for an opinion from the solicitor so that “those taxpayers may be satisfied with the (same) information coming from a solicitor”. (The respondent attached a copy of a notice of public hearing on the proposed bylaw amendments and what he said was a copy of the mayor’s letter to the local newspaper.) He also raised concerns about possible conflicts of interest on the part of certain Village officials. As a taxpayer, the respondent said, he wished to be “satisfied” by reading the solicitor’s opinion. He concluded by suggesting that the local taxpayers were clients in the solicitor-client relationship, just as the Village was.¹

[5] Mediation of the respondent’s request for review was unsuccessful. The matter was therefore set down for a written inquiry, at which point the Village wrote to this Office requesting that the Information and Privacy Commissioner exercise his discretion under s. 56 of the Act not to hold an inquiry. It said that it felt strongly about the importance of upholding the principle of solicitor-client privilege and that the record in question, a letter of May 9, 2005 from a law firm (a copy of which it provided), met the four conditions for establishing privilege, which it listed.² The Village then said that it had sought legal advice from its solicitor in response to objections from some Village residents that an OCP amendment and related zoning bylaw amendment were not done correctly. It said its Council received the letter at an *in camera* Council meeting on May 11, 2005.³

Parties’ arguments

[6] In his submission, the respondent again refers to the local newspaper in which he said the Village’s mayor had “stated publicly” in a letter the reason (as set out above) for obtaining the solicitor’s opinion. He suggests that the mayor effectively waived privilege over the “solicitor opinion” in doing so and that the Village did the same again in its letter requesting that no inquiry take place on this matter. The respondent expresses concern about the process for amending the bylaws and argues that solicitor-client privilege is not a tool for use by elected officials to hide or withhold information from taxpayers.

[7] The Village says that the information obtained from its “solicitor in response to specific taxpayer questions was addressed in a report of May 9, 2005 from its CAO [Chief Administrative Officer] to the Mayor & Council”. It says that the report was read and

¹ Letter of June 20, 2005.

² It is, of course, open to the Village, as the client, to waive privilege at its discretion, in accordance with the principles of solicitor-client privilege.

³ Letter of October 6, 2005.

received by the Council at its May 11, 2005 regular meeting, a meeting at which the respondent was present. It says that the respondent later came to the Village office to review the report.

[8] The Village attaches copies of the report of May 9, 2005 and the relevant extract from the minutes of its May 11, 2005 regular meeting which record the Council receiving the report for information. The Village says that its mayor and Council are “not attempting to hide or withhold information that was in response to *specific* taxpayer questions regarding whether or not the Village had complied with” a Village bylaw.⁴ The Village does not comment on the respondent’s argument on waiver of privilege but repeats the four conditions for establishing the first branch of solicitor-client privilege and says the record meets those conditions.

Discussion

[9] Section 56(1) of the Act reads as follows:

Inquiry by Commissioner

56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[10] Section 56 confers discretion as to whether to hold a Part 5 inquiry respecting a request for review. As noted in earlier decisions, there may be a variety of reasons why this discretion might be exercised in favour of not holding an inquiry. These include the factors expressed in Order 02-57⁵ and Order 01-03⁶.

[11] Section 14 of the Act authorizes a public body to refuse to disclose “information that is subject to solicitor-client privilege”. It is well-established that s. 14 incorporates both branches of solicitor-client privilege.⁷ The first branch of privilege, legal professional privilege, protects confidential communications between a lawyer and client related to the seeking or giving of legal advice. The second kind of privilege, litigation privilege, protects information in records where the dominant purpose for creation of the records was to prepare for or to conduct litigation under way or in reasonable prospect at the time the records were created. Although the Village does not say so explicitly, its submissions suggest that it regards the first branch of solicitor-client privilege as applying to the disputed record.

[12] The record in dispute is a letter on certain matters from a law firm to the Village. This is not the end of the matter, however. The applicant has raised the issue of whether the mayor waived privilege over the lawyer’s letter in what she said in her letter to the newspaper. It is not possible to address this issue without an inquiry under Part 5 of the Act.

⁴ Letter of November 3, 2005; italics in original.

⁵ [2002] B.C.I.P.C.D. No. 59.

⁶ [2001] B.C.I.P.C.D. No. 3.

⁷ See Order 02-01, [2002] B.C.I.P.C.D. No. 1, and Order 00-07, [2000] B.C.I.P.C.D. No. 7, for example.

[13] The Village has also said that the lawyer’s letter “was addressed” in a report to Council in a regular meeting. More significant, in my view, however, is that the report itself, which the Village says the respondent has reviewed and which is apparently publicly available, draws on the lawyer’s letter. In my view, this, independently from the mayor’s letter, also raises the question of whether the Village has waived privilege over the lawyer’s letter. Again, this issue can only be resolved with an inquiry under Part 5 of the Act.

4.0 CONCLUSION

[14] Given the material at hand, it is not plain and obvious that the disputed record is protected under s. 14 of the Act. I have therefore decided this is not an appropriate case in which to decline to hold an inquiry under Part 5 of the Act. This matter will proceed to an inquiry.

[15] I make no finding and express no view as to whether the disputed record’s contents are in whole or in part protected under s. 14 of the Act, including on the issue of any possible waiver of solicitor-client privilege by the Village. The issues will be decided in the Part 5 inquiry, on the basis of the evidence and argument submitted by the Village and the respondent.

January 10, 2006

ORIGINAL SIGNED BY

Celia Francis
Adjudicator

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