Order F11-24

MINISTRY OF ENVIRONMENT

Michael McEvoy, Adjudicator

August 24, 2011

Quicklaw Cite: [2011] B.C.I.P.C.D. No. 30
CanLII Cite: 2011 BCIPC No. 30
Document URL: http://www.oipc.bc.ca/orders/2011/OrderF11-24.pdf

Summary: The applicant requested information relating to his participation in a Liquid Waste Management Plan process. The Ministry disclosed some records and withheld others on the basis they were subject to solicitor-client privilege. The adjudicator found the records were communications between the Ministry and its solicitor seeking and providing legal advice. The adjudicator also determined there was no evidence that the Ministry either explicitly or impliedly waived privilege in this case.

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

Authorities Considered: B.C.: Order 02-38, [2002] B.C.I.P.C.D. No. 38.

Cases Considered: *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

INTRODUCTION

[1] The applicant is a citizen concerned about sewage effluent and facilities near his residence. These concerns relate to a nearby real estate development and date back to at least the mid-1990s. More recently, a Liquid Waste Management Plan process ("planning process") connected with this development has commenced and caused the applicant to request information to assist his participation in that process. He requests among other things information pertaining to the waste management sewage permit held by the Ministry of Environment ("Ministry") and, "a copy of the Emergency Preparedness Plan pertaining to the permit."

[2] The Ministry disclosed some records to the applicant but withheld others on the basis they were subject to solicitor-client privilege. The Ministry also said the Emergency Preparedness Plan did not exist, explaining that there had been no past requirement to prepare one. The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review the Ministry's decision to withhold the records and parties completed submissions for this inquiry on June 15, 2011.

ISSUE

[3] The issue as set out in the notice of inquiry is whether the Ministry properly applied solicitor-client privilege to the records it withheld in response to the applicant's request.

DISCUSSION

[4] **Solicitor-Client Privilege**—Section 14 of *Freedom of Information and Protection of Personal Act* ("FIPPA") reads as follows:

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

[5] This section encompasses two kinds of privilege recognized at law: legal advice privilege and litigation privilege. The Ministry argues that legal advice privilege applies to information at issue. Under s. 57(1) of FIPPA the Ministry must prove this.

[6] Previous orders have consistently applied the test for legal advice privilege at common law. Thackray J. (as he then was) put the test this way:[1]

> [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.

[1] *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.

[7] I have reviewed the five records. They are all written communications. Four are from the Ministry's solicitor to a Waste Management Officer of the Ministry, while the fifth is from that same Officer to the Ministry's solicitor. Further, the affidavit evidence of the Ministry's solicitor confirms that the Ministry was his client.[2]

[8] With respect to the balance of the four-part test above, it is apparent on the face of the records they were confidentially provided. Finally, I find the four records authored by the solicitor provided legal advice while the fifth, written by the Officer to the solicitor, sought legal advice.

[9] Given these findings, I conclude the Ministry has established the records are privileged. The applicant questions how the Ministry can continue to maintain this claim when, he says, it pledged to be "open and transparent"[3] with respect to the planning process. In essence, the applicant is suggesting that the Ministry has waived solicitor-client privilege.

[10] R.D. Manes and M.P. Silver set out the general principle of waiver in *Solicitor-Client Privilege in Canadian Law:*[4]

> 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.

[11] I find nothing about the Ministry's actions to indicate an intention, either explicitly or impliedly, to waive solicitor-client privilege. First, I observe that comments the applicant attributes to the Ministry in para. 9 above were actually made by a representative of the Columbia Shuswap Regional District ("CSRD")[5]. Second, even if the Ministry were to have made such comments, their very general nature does not demonstrate an intention to waive privilege.

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[2] I note here that the applicant says the "public" is the client because it pays the legal bills and as a member of the public, he has a right to see the records. However, it is the Ministry, in effect representing the public interest, that is, legally speaking, the client in this matter. Section 14 provides that it is only the head of the Ministry, who is entitled to assert or waive solicitor-client privilege under FIPPA.

[3] Applicant's initial submission, para. 4.

[4] Ronald D. Manes & Michael P. Silver, *Solicitor-Client Privilege in Canadian Law*, (Toronto: Butterworths, 1993) at pp. 189, 191.

[5] See the March 3, 2003 letter of Gary Holte, Deputy Manager Works Services of the CSRD.

[12] Finally, the applicant's reply submission argues that issues of public safety related to this case override solicitor-client privilege. This really amounts to an argument under s. 25 of FIPPA. That section reads in part:

> **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 …

[13] The inquiry notice did not identify s. 25 as an issue. There is no evidence before me that mediation dealt with the matter. Indeed the applicant waited until his reply submission to raise it. With all submissions to the inquiry complete, the Ministry could not respond to the applicant's new arguments. It is clear from previous decisions issued by this Office, that a party cannot introduce a new issue at this stage of the inquiry process unless permitted to do so and I see no reason to do so here.

[14] Moreover, even if I were required to address s. 25 I would reject the applicant's argument. In Order 02-38[6], former Commissioner Loukidelis established the standard for the application of ss. 25(1)(a) and (b) which I adopt here:

> [53] As the applicant notes, in Order 01-20 and other decisions, I have indicated that the 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.

[15] This matter has been ongoing for almost 20 years. The disclosed portion of the records indicates they date back 18 years. Both the applicant's submission and my review of the disputed records fail to identify any element of temporal urgency referred to by former Commissioner Loukidelis. On this basis, I would have rejected the applicant's "public safety" arguments were I required to address them.

[6] [2002] B.C.I.P.C.D. No. 38.

CONCLUSION

[16] For all of the reasons stated above I find that solicitor-client privilege applies to all of the records in dispute. Therefore, under s. 58 of FIPPA, I confirm that s. 14 of FIPPA authorizes the Ministry to withhold them.

August 24, 2011

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC File No.: F10-43269