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Order F13-10

DISTRICT OF NORTH SAANICH

Hamish Flanagan, Adjudicator

May 2, 2013

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Summary: The District of North Saanich withheld records requested by a resident relating to the District's review of an appointment of a person to the Peninsula Recreation Commission. The District said the records would reveal the substance of an *in camera* District council meeting, and were subject to solicitor-client privilege. The adjudicator found some records were appropriately withheld because solicitor-client privilege applied, and the remaining records were ordered released.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* ss. 12(3)(b) and 14.

Authorities Considered: B.C.: Order 00-14, [2000] B.C.I.P.C.D. No. 17; Order 00-07, [2000] B.C.I.P.C.D. No. 7; Order F07-05, [2007] B.C.I.P.C.D. No. 7; Order 01-53, [2001] B.C.I.P.C.D. No. 56.

Cases Considered: *Hunter v. Chandler* 2010 BCSC 729; *Imperial Parking Canada Corp. v. Toronto (City),* [2006] O.J. No. 3792; *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC); *Peach v. Nova Scotia (Department of Transportation and Infrastructure Renewal)* 2010 NSSC 91; *Peach v Nova Scotia (Department of Transportation and Infrastructure Renewal)* 2011 NSCA 27; *Chaplestone Developments Inc. v. Canada,* [2004] N.B.J. No. 450 (N.B.C.A.); *Guelph v. Blue Box* 2004 CanLII 34954 (ONCA); *1784049 Ontario Ltd. (c.o.b. Alpha Care Studio 45) v. Toronto (City),* 2010 ONSC 1204; *Elliott v. Toronto (City)*, [2001] O.J. No. 5784; *Stevens v. Canada (Privy Council)* 161 D.L.R. (4th) 85; *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.,* [1989] 2 W.W.R. 679. Review Report F1-08-47(M); The Municipality of East Hants, [2010] N.S.F.I.P.P.A.R. No. 4.

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

INTRODUCTION

[1] A North Saanich resident ("applicant") requested records from the District of North Saanich ("District") relating to the District's review of an appointment of a person to the Peninsula Recreation Commission. The District withheld the responsive records because it said they would reveal the substance of an *in camera* District council meeting and because solicitor-client privilege applied – both exceptions to disclosure under the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review the District's decision. Mediation did not resolve the matter, and a written inquiry was held.

ISSUES

[3] Is the District authorized to refuse access to the records because they would reveal the substance of an *in camera* council meeting protected by s. 12(3)(b) of FIPPA?

[4] Is the District authorized to refuse access to the records the District claims contain legal advice under s. 14 of FIPPA?

DISCUSSION

[5] **Records at Issue**—The records at issue in this inquiry are minutes from a May 5, 2008 District council *in camera* meeting ("minutes") and other information the District says comprises legal advice ("Other Information"). The nature of the Other Information was described in more detail in the District's *in camera* submission, and for that reason I cannot describe it more precisely here. What I can say is that all the above records relate to the appointment of an individual by the District to the Peninsula Recreation Commission.

[6] The District withheld the minutes in their entirety under s. 12(3)(b). It withheld a portion of those same records under s. 14. The Other Information was also withheld under s. 14.

Can the District withhold the in camera meeting minutes under s. 12(3)(b)?

[7] The City relies on s. 12(3)(b) of FIPPA to withhold the minutes. Section 12(3)(b) provides:

> 12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal
>
> …
>
> (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

[8] Previous orders[1] have articulated the three conditions that must be met in order for a public body to apply s. 12(3)(b):

> (1) statutory authority to meet in the absence of the public;
>
> (2) a meeting was actually held in the absence of the public; and
>
> (3) the information would, if disclosed, reveal the substance of deliberations of the meeting.

[9] Whether the relevant provisions authorizing the meeting in the absence of the public have been satisfied is a matter for the adjudicator to determine, as former Commissioner Loukidelis stated in Order 00-14[2]:

> It is my function to determine whether a meeting met the requirements of s. 12(3)(b). Section 56(1) of the Act says the commissioner has the power to decide all questions of fact and law arising in the course of an inquiry. The s. 12(3)(b) issue just described is a question of law, or mixed fact and law, that I may decide under s. 56(1). It is not to be left to a local public body alone. This view is similar to that taken in Ontario Order M-802 (July 9, 1996). If any part of a disputed record deals with matters which do not qualify under s. 12(3)(b), then a public body cannot invoke that exception in respect of that information.

[10] Public bodies should provide evidence that the relevant statute actually authorized the holding of the *in camera* meeting in respect of all matters dealt with in the disputed records.[3]

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[1] See, for example, Order 00-14, [2000] B.C.I.P.C.D. No. 17.
[2] Supra.
[3] Supra.

[11] In this case, the *Community Charter* establishes the circumstances where the District can hold council meetings *in camera*. Section 92 of the *Community Charter* states:

> 92 Before holding a meeting or part of a meeting that is to be closed to the public, a council must state, by resolution passed in a public meeting,
>
> (a) the fact that the meeting or part is to be closed, and
>
> (b) the basis under the applicable subsection of section 90 on which the meeting or part is to be closed.

[12] The relevant subsection of s. 90 for this inquiry states:

> 90(1) A part of a council meeting may be closed to the public if the subject matter being considered relates to or is one or more of the following:
>
> …
>
> (i) the receipt of advice that is subject to solicitor-client privilege, including communications necessary for that purpose
>
> …

[13] The District incorporates ss. 90 and 92 of the *Community Charter* in *North Saanich Council Procedure Bylaw No.1155 (2007).*[4]

[14] The District asserts that s. 90(1)(i) of the *Community Charter* authorized it to meet *in camera* to receive advice subject to solicitor-client privilege. While this may be so, the District nowhere points to a public resolution articulating this as the reason for closing the meeting to the public.[5] The requirement to do so in s. 92 of the *Community Charter* is not merely a technical or procedural option. It is a mandatory provision that provides an important accountability and transparency mechanism for citizens under local government. The District's after-the-fact submissions that s. 90(1)(i) applied in the circumstances are insufficient to comply with the council's obligations under s. 92 of the *Community Charter*. In summary, the District did not meet the requirements of s. 92 of the *Community Charter* that would have allowed it to meet *in camera* on May 5, 2008. I therefore find that s. 12(3)(b) does not authorize the District to refuse access to the minutes of that meeting.

[4] Clauses 11.1 and 11.2 respectively.

[5] In addition to the District's submissions and affidavits, I considered Council meeting minutes, publicly available on the District website and held the same day as the *in camera* meeting. Nowhere in these minutes is there any indication that the s. 92 requirements were met.

Do the records contain privileged information under s. 14?

[15] As I noted above, the District claims there is a portion of the minutes and some Other Information that is protected by solicitor-client privilege.

[16] Section 14 of FIPPA states:

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

[17] This provision encompasses two kinds of privilege recognized at law: legal professional privilege (sometimes referred to as legal advice privilege) and litigation privilege.[6] The District argues legal advice privilege applies here.

[18] Decisions of this office have consistently applied the test for legal advice privilege at common law. Thackray J. (as he then was) put the test this way:[7]

> [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.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.

[19] I will deal with the s.14 arguments regarding the minutes and the Other Information in turn.

The Minutes

[20] The District submits that s. 14 applies to a part of p. 2 of the minutes. The applicant's submissions did not challenge the claim of privilege, but rather focused on whether the District waived the privilege. I will address that issue separately after I first determine whether a legal privilege exists.

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[6] See for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56.
[7] *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

[21] Without revealing the District's *in camera* argument on this issue, I can say that the part of p. 2 for which s. 14 is claimed consists of three communications related to issues arising from a District appointment of an individual to the Peninsula Recreation Commission. I will deal with each of the three communications sequentially.

[22] The first communication is from the (then) District Chief Administrative Officer ("CAO") to the District councillors about a meeting the CAO was facilitating. This does not meet the test for legal advice privilege because the communication is not between a lawyer and client. It is between the (then) CAO and the District councillors. The minutes also reveal that the communication is not directly related to the seeking, formulating or giving of legal advice.

[23] The second communication is a statement by a councillor raising an issue for discussion by the District council. This is neither a communication between a legal advisor and client, nor does it reveal the seeking, formulating or giving of legal advice.[8] Therefore it does not meet the test above for privilege.

[24] The third communication referenced in the minutes qualifies as a communication between the District and their lawyer, and is directly related to the council seeking of legal advice. This, along with the fact that steps were taken to exclude the public from the meeting, supports the conclusion that the communication was intended to be, and was, confidential. The fact that the District failed to properly exclude the public under the *Community Charter* does not render all communications made in that meeting non-confidential. In summary, all the elements of privilege are met for this third communication contained on p. 2 of the minutes.

Other Information

[25] The District also claims that s. 14 applies to the Other Information relating to an individual's appointment to the Peninsula Recreation Commission. The District claims that the Other Information comprises legal advice. The District provided me with a redacted version of the records containing the disputed information and a description of the Other Information *in camera* sufficient to allow me to make a finding in this matter. The *in camera* evidence satisfies me that the four requirements for legal advice privilege are present and the Other Information is privileged.

[8] I also note that the British Columbia Supreme Court in *Hunter v Chandler* 2010 BCSC 729 cited by the District also concluded this same communication was not between a client and its lawyer. This case involved a successful action for defamation brought against a District councillor by a third party.

Has privilege been waived?

[26] The applicant argues that privilege has been waived over both the legal advice in the minutes and the Other Information I have described above as being privileged.

[27] The applicant says on numerous instances privilege was waived when advice was disclosed publicly. The applicant says these include:

a. a November 2010 email sent to the applicant by District Councillor Green ("Councillor Green email");

b. a District resident speaking with another District resident at a public meeting about having read some advice;

c. a discussion the applicant had with the District Mayor;

d. legal advice being shared with other public bodies;

e. instances relating to a BC Supreme Court proceeding in *Hunter v. Chandler*[9] [Hunter]. This case involved an action in defamation by a third party against a (then) District councillor. The applicant argues that:

   i. some advice connected with the case was not shared with (then) District Councillor Chandler's lawyer but should have been, and had that occurred it would have become public;

   ii. some legal advice, including the minutes, was shared with (then) District Councillor Chandler's lawyer in preparation for the case;

   iii. advice was disclosed during the proceeding; and

   iv. evidence of the District handling advice in a manner that waived privilege became a matter of public record as a result of the proceeding.

[29] The District submits that:

- if advice was disclosed, the parties who purported to have waived the privilege on behalf of the District did not have the authority to do so;
- the actions of the parties did not amount to waiver;
- any waiver that did occur was only partial waiver that did not waive privilege over all the legal advice; and
- some of the acts of waiver alleged by the applicant did not occur.

[9] 2010 BCSC 729. The Court's Reasons for Judgment were provided to me in submissions.

[30] The nature of waiver is described in Order 00-07:[10]

> A good starting point for an analysis of waiver is the following passage from the judgment of McLachlin J. (as she then was) in *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd.* (1983), 35 C.P.C. 146 (B.C.S.C.):
>
> > Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication.
> >
> > In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says in fairness and consistency it must be entirely waived.

[31] I apply this approach to the information at issue.

I. Minutes

1. Knowledge of the existence of the privilege

[32] It is apparent from reading the minutes that the parties attending the meeting understood them to be privileged. The District believed the meeting had been held *in camera* under the provision of s. 90(1)(i) of the *Community Charter*, which allows a meeting to be closed if the subject matter relates to "the receipt of advice that is subject to solicitor-client privilege, including communications necessary for that purpose."

2. Intention to waive the privilege

[33] The applicant points to affidavit evidence of former Councillor Peter Chandler supporting its argument that the privilege was waived. Mr Chandler deposes that a letter written by his lawyer states that the District's (then) CAO disclosed the minutes to the lawyer. There is no direct evidence from the lawyer on this point. Given that the applicant's evidence is hearsay, I accord it little weight. The direct evidence of the current District CAO is that he has no knowledge of the lawyer's letter referred to in Mr Chandler's affidavit, and that, as far as he is aware, the District never provided the lawyer with copies of any documents that are protected by solicitor-client privilege. He says that to the best of his knowledge, the District has had no involvement with Mr Chandler's lawyer.

[10] [2000] B.C.I.P.C.D. No. 7, at para. 22.

[34] The District acknowledges that some information concerning the *in camera* meeting was made public in the *Hunter* court decision. However, the District submits that only it can waive the privilege and there is nothing in the Judge's reasons in *Hunter* suggesting that the District voluntarily disclosed the information or waived the privilege. Having considered the submissions, I am not persuaded that the District demonstrated an intention to waive privilege over the minutes. How some *in camera* information came to be referred to in the *Hunter* decision remains a matter of speculation. There is a passing reference in the applicant's submissions to a *District Bylaw on Indemnification*, which may have required or permitted disclosure of records for the *Hunter* litigation, but I have no evidence before me on this issue. I conclude that that the District did not intend to waive privilege over the portion of the minutes I have found is privileged.

3. Fairness and consistency: Implied Waiver

[35] As noted above, waiver can occur without intention when fairness requires it. Implied waiver of privilege can occur where disclosure happens inadvertently with:

a) knowledge and silence on the part of the person claiming privilege; and

b) reliance on the part of the person in receipt of the privileged information that was disclosed. [11]

[36] In the present case, there is insufficient evidence to conclude that the District disclosed advice, let alone whether disclosure was inadvertent. Therefore, a claim that privilege was waived inadvertently is not sustainable.

[37] In conclusion, I find the District has properly applied privilege to the third communication for which s. 14 is claimed on p. 2 of the minutes of the May 5, 2008 meeting, and that privilege has not been waived.

II. Other Information

1. Knowledge of the existence of the privilege

[38] Without disclosing the contents of *in camera* submissions, I find that the District knew that the Other Information was privileged.

[11] See *Peach v. Nova Scotia* 2010 NSSC 91 quoting from *Chaplestone Developments Inc. v. Canada*, [2004] N.B.J. No. 450. *Chapelstone* provides a good summary of the authorities and requirements for inadvertent disclosure to constitute waiver.

2. Intention to waive the privilege

[39] The applicant says there are several instances that demonstrate an intention on the part of the District to waive privilege with respect to the Other Information.

a. Councillor Green email (November 2010)

[40] The applicant says that an email from District Councillor Green to a District resident, copied to the applicant and (then) Councillor Chandler, refers to the "discovery of a legal opinion which had been requested by Council, which found there was potential for [a named individual] to be in a conflict…"[12] The District says the comment does not constitute waiver, and, if it does, it was only a partial waiver that does not necessitate full disclosure of any legal advice. It also submits that the email is not a "discussion" because of its limited circulation.

[41] The District says that in any event Councillor Green had no authority to waive privilege, even if the email comment is otherwise considered waiver. The District submits that it is governed by its Council and, as the governing body of the District, only the Council can waive privilege. The District refers to s. 122 of the *Community Charter* that says the District can exercise its powers only through resolution or bylaw.

[42] In my view, who has the authority to waive privilege is a question decided on the facts of each case. The District's resolutions and bylaws assist in determining if someone is authorized to waive privilege, but they are not the only consideration. In *Guelph v. Blue Box* ("*Blue Box")*[13] cited by the District, the court stated:

> And it is City Council that has the ultimate responsibility and has the authority to make decisions respecting the case. No doubt some responsibility has been delegated to City officials on a day-to-day basis, but overall responsibility rests with City Council, which in turn is responsible to Guelph voters at election time. Not all members of City Council will necessarily hold the same views. As discussed above, individual members of Council may well hold particular views, but the intention of the City, as a whole, is not divined by conducting a poll of City Councillors, but rather by examining what the City actually did and said through its authorized agents.

[44] Therefore, whether the District waived privilege is determined by examining what the District did and said through its authorized agents, and what responsibility has been delegated to City officials on a day-to-day basis. This approach is referred to as the concept of distributed governmental authority,

[12] Email from Councillor Green of November 30, 2010.
[13] 2004 CanLII 34954 (ONCA).

sometimes known as the *Carltona* principle. The principle is explained (in the context of solicitor client privilege) in *Peach v. Nova Scotia (Department of Transportation and Infrastructure Renewal)* ("*Peach"),*[14] a case about waiver of privilege:

> 34 …it is necessary to good government that the authority to release solicitor and client privilege is distributed throughout the apparatus of government with the division of areas of authority. The concept of distributed governmental authority was recognized in *Carltona Ltd. v. Commissioners of Works*, [1943] 2 All E.R. 560 (C.A.) and accepted by the Supreme Court of Canada in *R. v. Harrison*, [1976] S.C.J. No. 22 at para. 14. Marshall, J.A. of the Newfoundland Court of Appeal wrote of the gridlock that would result if it were not for the *Carltona* principle: *R. v. NDT Ventures Ltd.*, [2001] N.J. No. 363 (C.A.) at para. 47.
>
> 35 Most of the case law on waiver and inadvertence comes out of litigation, often after a blunder made in the course of litigation. As Mr. Choo points out, protection of solicitor and client privilege is fundamentally important. However, the ability to voluntarily waive privilege is so often necessary to good business and good government that Justice Marshall's point about gridlock is applicable to reserving waiver to the authority of cabinet, or even a minister.
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> 36 Every day people negotiating contracts must, directly or through their lawyers, choose to divulge legal advice in order to explain their position on some term under negotiation, as do people performing contracts in order to explain why some action does or does not constitute performance, as do fiduciaries who must fully explain why they did or did not do something. There are endless examples in business, and ordinary life, of situations in which to waive privilege is good judgment.

[45] The judge in *Peach* considered the job description and responsibilities of an employee in determining whether the employee alleged to have waived privilege had the requisite authority. The Nova Scotia Court of Appeal in *Peach* affirmed the framework or test to determine whether an individual has the authority to waive privilege to be:

> a court should look at the authority of a particular government actor and determine whether the advice sought and any waiver "follow" or is "coextensive" with that person's subject matter and/or territorial responsibilities.

[46] Whether an individual councillor has the authority to waive privilege has been the subject of several cases, including the Ontario decisions in *Blue Box* and *Imperial Parking Canada Corp. v. Toronto (City).*[15] Those cases concluded

[14] 2010 NSSC 91.
[15] [2006] O.J. No. 3792.

that individual councillors did not have the authority to waive privilege because privilege belongs to Council in the absence of other authorization. Other decisions suggest it is unlikely a city councillor could waive privilege contained in a report by secretly releasing or "leaking" it[16] or by attaching it to an affidavit.[17]

[47] The District's Bylaws reinforce the view that the Council as a whole exercises its powers and not individual Council members.[18] Section 114(3) of the *Community Charter* states that the powers, duties and functions of a municipality are to be exercised and performed by its Council, except as otherwise provided under the *Community Charter* or another Act. *North Saanich Council Procedure Bylaw No.1155 (2007)* replicates s. 115 of the *Community Charter* regarding the powers of individual councilors and provides:

> **8. Roles and Responsibilities of Members of Council**
>
> 8.1 Every member of Council has the following responsibilities:
>
> (a) to consider the well-being and interests of the District and its community;
>
> (b) to contribute to the development and evaluation of the policies and programs of the District respecting its services and other activities;
>
> (c) to participate in Council meetings, Committee of the Whole meetings, committee meetings and meetings of other bodies to which the member is appointed;
>
> (d) to carry out other duties assigned by the Council; and
>
> (e) to carry out other duties assigned by or under the *Community Charter* or any other Act.

[48] In this case, the power to waive privilege did not follow from, and was not co-extensive with, Councillor Green's scope of authority. I therefore conclude that even if Councillor Green's action could be construed as waiving privilege, she did not have the authority to do so.

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[16] *1784049 Ontario Ltd. (c.o.b. Alpha Care Studio 45) v. Toronto (City)*, 2010 ONSC 1204.

[17] *Elliott v. Toronto (City)*, [2001] O.J. No. 5784. A recent Review Report of the Nova Scotia Freedom of Information and Protection of Privacy Review Office, 2010 CanLII 50195, found a councillor to have waived privilege by discussing a legal opinion with a member of the public, but no argument about councillors' authority to waive was raised or considered.

[18] Councillor Green states in her affidavit that she does not believe she had the authority to waive privilege over the record, although I do not give this view much weight because waiver attracts an objective test. See, for example, Order F07-05, [2007] B.C.I.P.C.D. No. 7; *Peach v. Nova Scotia (Department of Transportation and Infrastructure Renewal)* 2011 NSCA 27 at para. 33.

[49] Having reached this conclusion, it is not strictly necessary that I deal with the District's remaining arguments, however I will do so for the sake of completeness. I conclude that even if Councillor Green did have authority to waive privilege, she did not do so in this case. The councillor's email refers to advice "which found there was potential for [a named third party] to be in a conflict… ." While this statement goes further than simply stating that advice was sought or received, and therefore might be construed as a partial waiver, previous orders and cases[19] are clear that disclosing part of a privileged communication does not necessarily constitute waiver over the entire communication, particularly outside of the context of litigation. In Order 00-07[20], disclosure of part of a privileged communication did not constitute waiver over the entire communication, and in Order F07-05[21] a public body that publicly disclosed more than the gist of a legal opinion was also found not to have shown an intention to waive privilege on the facts.

[50] In Order 00-07, 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. As set out by R.D. Manes and M. P. Silver in *Solicitor-Client Privilege in Canadian Law*[22] and paraphrased in Order F07-05:[23]

> 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.

[51] I find that Councillor Green's statement falls short of disclosing intent to waive privilege, if authority to waive privilege had existed. Councillor Green's statement encouraged the residents to seek disclosure of the advice, but it did not indicate an intention to supply or waive privilege over that advice if that were within her authority. Councillor Green's affidavit, although only evidence of her subjective intention, supports the view that she had no intention to waive privilege over any advice, and a subsequent District Council meeting affirmed the District's position that it would not waive privilege over any legal advice it may have received. I see no evidence of unfairness or a misleading result arising

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[19] See Order 00-07 [2000] B.C.I.P.C.D. No. 7 and Order F07-05 [2007] B.C.I.P.C.D. No. 7; *Stevens v Canada (Privy Council)* 161 D.L.R. (4th) 85; *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment. Corp.*, [1989] 2 W.W.R. 679 at 682 (B.C.C.A.); *Chaplestone Developments Inc. v. Canada,* [2004] N.B.J. No. 450 (N.B.C.A.).

[20] [2000] B.C.I.P.C.D. No. 7.

[21] [2007] B.C.I.P.C.D. No. 7.

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

[23] At para. 24.

from the statement by Councillor Green that would support waiver of privilege over the entirety of the legal advice.

b. Discussion of legal advice by a resident at a public meeting

[52] The applicant supplies an affidavit from a North Saanich resident stating another North Saanich resident advised the deponent at a public meeting that the other resident had read the Other Information. This affidavit evidence is hearsay and insufficient to support a claim of waiver. If the other resident was aware of the Other Information there is no indication of the source of this purported knowledge. Based on the *in camera* submissions, I am also satisfied that any legal advice the resident may have been privy to is not legal advice in issue in this inquiry.

c. Applicant's discussion with Mayor

[53] The applicant asserts that two discussions she had with the Mayor of the District also form the basis for waiver of privilege over the Other Information. The District disagrees with the applicant's evidence. However, even if the discussions took place as the applicant described, they do not constitute waiver of privilege over the Other Information. I make this finding because the alleged statements attributed to the Mayor by the applicant don't disclose the contents of any legal advice, they merely state that it exists. Moreover, the alleged statements indicate that the Mayor believed that she did not have the power to waive privilege over any legal advice. She only purportedly promised to attempt to have the contents of any legal advice disclosed. Therefore, the statements, even if proven, are insufficient to meet the requirement for an objective intention to waive privilege over legal advice.

[54] Courts have stated that simply revealing that legal advice was received and relied upon is not enough for a waiver of privilege, pointing to the need for public bodies to be able to refer to the fact they have made a decision based on legal advice for accountability and transparency purposes without that necessarily triggering release of the advice.[24] A similar statement is found in *The Law of Privilege in Canada,*[25] and applied in Decision F08-04.[26] In the case before me, the reference by the Mayor is a reference to the existence of the advice, not disclosure of even the gist of its content. It is not evidence of intent to waive privilege.

[24] See *Blue Box* supra at para. 87.
[25] *The Law of Privilege in Canada* at para. 11.220.10, pp. 11-56.
[26] [2008] B.C.I.P.C.D. No. 11. In that Decision, the adjudicator stated that the CRD was entitled to exercise its discretion to share the gist of a legal opinion without waiving privilege over the entire document. The adjudicator noted that sharing the gist of the opinion added an element of transparency to its communication with the respondent.

d. Legal advice shared with other public bodies

[55] The applicant relies on the affidavit evidence of former Councillor Chandler to assert that privilege was waived because the District shared legal advice with the Capital Regional District and the Peninsula Recreation Commission.

[56] The District takes issue with the assertions in this affidavit, saying they lack supporting evidence and are inconsistent with other statements in former Councillor Chandler's affidavit. The District also claims the affidavit discloses information which the former councillor was required to keep confidential. The District points to s. 117 of the *Community Charter* which requires that former councillors keep in confidence any record held in confidence by the municipality.

[57] The affidavit evidence of former Councillor Chandler contains inconsistent statements on whether legal advice was disclosed by the District. Former Councillor Chandler's affidavit asserts that advice was shared but then later says he was not aware of any legal advice. The affidavit claims that there are meeting minutes that support that advice was shared, but I have not been provided with a copy of them. There is no other evidence that disclosure of legal advice occurred in the manner claimed by the applicant. The affidavit evidence of the District is that no advice was shared with the Capital Regional District or the Peninsula Recreation Commission. In considering the inconsistent evidence of the former Councillor and the direct affidavit evidence of the District that it did not share the advice, I prefer the District's evidence. Therefore I reject the applicant's submission that waiver occurred through advice being shared with other public bodies.

e. Waiver issues arising from Hunter case

[58] As noted above, matters related to the records in issue were canvassed in *Hunter*, a defamation action involving former District Councillor Chandler. Several arguments for waiver relate to this case, and I will deal with each in turn.

- *Non-provision of legal advice in response to lawyer's request for documents*

[59] The applicant submits that the District waived privilege to the legal advice by refusing to disclose to Mr Chandler's lawyer any legal advice pertaining to the defamation action when the lawyer legitimately was entitled to the advice. The inference is that if the advice had been provided it would subsequently have become public during *Hunter*. However, the applicant has not provided evidence

to show Mr Chandler's lawyer was entitled to receive the advice, and then to make it public. In this context, not disclosing legal advice is not a basis for waiver in the advice.

- *Sharing of legal advice with councillor's lawyer*

[60] The applicant submits that the District shared the Other Information with Councillor Chandler's lawyer in the *Hunter* action. The applicant quotes purported correspondence from Councillor Chandler's lawyer in which the lawyer says he has seen some or all of the legal advice. However, there is no direct evidence from the lawyer himself supporting this hearsay evidence. Moreover, the applicant does not provide the letter, which was apparently written for some other purpose. The argument has even less credence, in my view, given the applicant's submission that the District refused to provide the legal advice to the lawyer. The current District CAO attests that the District knows nothing of the solicitor's letter, and denies that any privileged documents were ever provided to him. I find there is insufficient evidence to support a finding that privilege was waived on this ground.

- *Waiver through disclosure of information during Hunter case*

[61] The applicant argues that waiver also occurred during the litigation process in *Hunter* because the following information was made public:

a) Council direction to CAO to seek legal advice

[62] The court's judgment contains a statement that Council directed their (then) CAO to receive legal advice. This is not evidence that the District intended to waive privilege over any information held by the District. A public statement by a third party who is not the client, without evidence that they were authorized to waive privilege for the client, and that points to the possible existence of privileged materials, cannot establish waiver of privilege over any documents referred to. Waiver requires proof of explicit or implicit waiver by the client or someone authorized by the client to waive privilege.[27] No such evidence of waiver exists on the facts before me.

b) Content of advice received

[63] The applicant provides no evidence that the content of any advice was made public during the court process in *Hunter*, and the reasons for judgment do not support this assertion either.

[27] *Chapelstone Developments Inc. v. Canada,* [2004] N.B.J. No. 450 (C.A.).

- *Manner in which legal advice was handled*

[64] The applicant asserts[28] that various ways advice was handled by the District amounting to waiver of privilege are a matter of public record as a result of *Hunter*. However, the applicant provided no evidence from the public record of these alleged actions, and there are none in the reasons for judgment in *Hunter*.

Summary regarding waiver over advice

[65] In summary, I find that the District has not waived privilege over any legal advice.

CONCLUSION

For the reasons set out above I make the following orders under s. 58 of FIPPA:

1. The District is not authorized under s. 12(3)(b) to refuse to disclose the minutes of its May 5, 2008 *in camera* meeting.

2. The District is authorized under s. 14 to refuse to disclose the portion of the minutes of its May 5, 2008 *in camera* meeting I have highlighted in yellow.

3. The District is authorized under s. 14 to refuse to disclose the Other Information.

4. The District must give the applicant a copy of the minutes minus the severed portion, on or before **June 14, 2013**. I also require the District to copy me on its cover letter to the applicant, together with a copy of the records.

May 2, 2013

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

OIPC File No.: F11-47697

[28] At para. 3(c) of her initial submission.