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Order F14-35

MINISTRY OF FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS

Ross Alexander, Adjudicator

September 8, 2014

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Summary: The applicant requested records related to the removal of a dam, including its environmental impacts on a nearby lake. The Ministry of Forests, Lands and Natural Resource Operations disclosed most of the records, but withheld two email chains on the basis that they were subject to solicitor client privilege (s. 14 of FIPPA). The applicant alleges that s. 25 of FIPPA requires disclosure of this information on the basis that it is about a risk of significant harm to the environment or that disclosure is clearly in the public interest. The adjudicator found that s. 25 does not apply and the Ministry was authorized to withhold the records because they are subject to solicitor client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14 and 25.

Authorities Considered: B.C.: Order F09-04, 2009 CanLII 14731; Order 02-38, 2002 CanLII 42472; Order F14-17, 2014 BCIPC 20 (CanLII); Order F07-13, 2007 CanLII 30398.

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

INTRODUCTION

[1] This inquiry relates to an applicant's request for information about the removal of the Leighwood Lake Dam in 2011,¹ as well as a risk assessment and

¹ The dam was an earthfill dam.

other information about environmental impacts the removal of the dam would potentially have on fishing areas in Leighwood Lake. The applicant also requested information relating to the original construction and classification of the dam.

[2] The Ministry of Forests, Land and Natural Resource Operations (“Ministry”) responded to the applicant by releasing most of the responsive records, but withholding some information under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) on the basis that the information is subject to solicitor-client privilege (s. 14) or that disclosure would be an unreasonable invasion of a third party’s personal privacy (s. 22).

[3] The applicant made a request to the Office of the Information and Privacy Commissioner (“OIPC”) to review the Ministry’s decision to deny access to the information. During the OIPC review process, the applicant stated that he no longer sought the information withheld under s. 22, but he raised the issue that the withheld information under s. 14 must be disclosed because it is about a significant environmental harm or disclosure is clearly in the public interest, under s. 25 of FIPPA.

[4] The review process did not resolve the matter, and the applicant requested an inquiry under Part 5 of FIPPA.

ISSUES

[5] The issues in this inquiry are:

1. Is the Ministry required by s. 25 of FIPPA to disclose the requested information without delay?
2. Is the Ministry authorized by s. 14 of FIPPA to refuse access to the requested information?

DISCUSSION

[6] **Background**—Leighwood Lake is located near Clinton, BC. This area is marketed by various tourism organizations as an excellent place to fish, both in the summer and for ice-fishing over the winter months. The Province of BC has stocked Leighwood Lake with fish since the mid-1970s, but the number of fish it is stocking in the lake has significantly decreased in recent years.²

² Between 1976 and 2004, the province stocked the lake with between 15,000 and 20,000 fish each year. From 2005 to 2011, the number was reduced to 10,000 fish per year. In 2012, the lake was stocked with 6,000 fish.

[7] In 1980, a dam was constructed near Leighwood Lake without authorization from the Province. The dam raised the water level of the lake. Ranchers in the area accessed and used the water behind the dam for their own benefit.

[8] In 1981, a portion of the dam washed away, resulting in damage to public and private property downstream. In the following years, beavers plugged the breach in the dam and the ranchers continued to use the water behind it. From time-to-time the ranchers would have the water behind the dam released, resulting in differing lake water levels depending on when water was released.

[9] The Ministry has responsibility for the *Water Act*, including a dam safety regulation.³ The Ministry advised the dam owners that they were required to either rebuild the dam or remove it due to safety concerns related to potential flooding. The dam owners opted to remove the dam.

[10] In October 2011, the dam was decommissioned.⁴ In the applicant's view, this was done in contravention of the federal *Fisheries Act*. Further, the applicant and the Ministry have differing views about how removal of this dam is impacting Leighwood Lake.

[11] According to the Ministry, the removal of the dam initially decreased the lake water level by 18 cm, which it says returned the lake to the water level it was at before the dam was built in 1980. The Ministry states the lake has since risen to the levels it was at when the dam was in place because beavers have built a small dam at the outlet of the lake. In contrast, the applicant and other people who deposed affidavits in support of the applicant state the lake water level has dropped by approximately 12 to 14 inches (30 to 36 cm).

[12] According to the applicant, the lake is no longer suitable for fishing because the loss of water depth is resulting in the destruction of fish habitat and the loss of fish. The applicant states that the reduction in water depth has resulted in the proliferation of plant species that are choking the lake, and that the lake will eventually turn into an oxygen depleted swamp. Conversely, the Ministry states that a dam safety officer confirmed the existence of several fish in the lake when he inspected it at the time of this inquiry, and there were no signs that the lake was “choking” during this inspection. The Ministry submits that the lake continues to be a natural body of water that is available for fish stocking.

³ The Ministry of Environment had responsibility for the *Water Act* until 2009. This included the *British Columbia Dam Safety Regulation*. In 2010, the Ministry of Natural Resource Operations was created, which became the Ministry of Forests, Lands and Natural Resource Operations in 2011: the Ministry's initial submissions at para. 4.03.

⁴ The removal of the dam was overseen by the dam safety officer and the water stewardship office. The timing of this work was approved by the Ecosystem Protection Branch of the Ministry.

[13] **Records in Dispute**—The records in dispute are two email chains that contain mostly the same information.⁵ They consist of emails between the Ministry and its lawyer at the Ministry of Justice, as well as emails that are not written by or addressed to a lawyer.⁶

Disclosure in the Public Interest — s. 25

[14] I will address s. 25 first because the Ministry must disclose the withheld information if s. 25 applies, even if other provisions in FIPPA require or authorize it to refuse to disclose the information.⁷ Subsection 25(1) states:

- (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
 - (b) the disclosure of which is, for any other reason, clearly in the public interest.

[15] Previous orders have stated that s. 25(1) requires an urgent and compelling need for disclosure before it is triggered.⁸ As former Commissioner Loukidelis stated in Order 02-38:

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.⁹

[16] Order 02-38 further stated with respect to ss. 25(1)(a) and (b) that:

...The circumstances of each case will necessarily drive the determination [of s. 25(1)(a)], but information “about” a risk of significant harm to the environment or to the health or safety of the public or a group of people may include, but will not necessarily be limited to:

- information that discloses the existence of the risk,

⁵ One of the email chains is withheld in its entirety. For the other email chain, the majority of the two most recent emails in the chain have been disclosed to the applicant, while the remainder of email chain is withheld.

⁶ Affidavit of L. Meret #1 at para. 4.

⁷ Section 25(2) states that s. 25(1) applies despite any other provision of FIPPA.

⁸ Order F09-04, 2009 CanLII 14731.

⁹ Order 02-38, 2002 CanLII 42472.

- information that describes the nature of the risk and the nature and extent of any harm that is anticipated if the risk comes to fruition and harm is caused,
- information that allows the public to take or understand action necessary or possible to meet the risk or mitigate or avoid harm.

...

Section 25(1)(b) does not compel disclosure of any and all policy and political advice or recommendations, and associated legal advice, in relation to a matter of significant public concern and debate. In addition to the element of need for disclosure without delay, consideration must also be given to whether the information in issue contributes, in a substantive way, to the body of information that is already available to enable or facilitate effective use of various means of expressing public opinion and making political choices.¹⁰

[17] I adopt the above principles from Order 02-38 and apply them in this case.

[18] **Positions of the parties**—The applicant submits that the removal of the dam is causing significant environmental harm by resulting in the loss of fish, the destruction of fish habitat, and the proliferation of plants that are reducing oxygen levels and “choking” the lake into a swamp. He also submits that the loss of fishing at the lake is a matter of public interest because it is a popular fishing spot for residents, fishing is marketed to tourists, and the value of properties on the lake have been negatively impacted by the loss of fishing. In the applicant's view, the Ministry failed to have any public notification or discourse, or discuss alternate actions to mitigate or avoid environmental harm. He also alleges that the Ministry failed to obtain a permit under the federal *Fisheries Act* to remove the dam (which the applicant submits was required before the dam could be legally removed). He likens the removal of the dam to the Ministry acting “as a thief in the night”. The applicant specifies the outcomes he is seeking, which are findings that:

- The loss of Leighwood Lake as a fishing area is a significant environmental harm under s. 25 of FIPPA.
- The loss of Leighwood Lake as a fishing area is a matter of public interest under s. 25 of FIPPA.
- The Ministry's contravention of the *Fisheries Act* is a matter of public interest under s. 25 of FIPPA.

[19] The Ministry submits that the records at issue do not deal with environmental risk issues, and that s. 25 clearly does not apply given the nature of the records at issue. As to the substance of the applicant's submissions about environmental harm, the Ministry submits it is not aware of any environmental

¹⁰ Order 02-38, 2002 CanLII 42472 at paras. 56 and 66.

issues relating to the lake at this time. It states that its dam safety officer inspected the lake at the time of this inquiry, and he confirmed the existence of several fish in the lake and found no signs of the lake “choking” as alleged by the applicant. The Ministry submits that the dam needed to be rebuilt or removed to address safety concerns, and that the decision to remove the dam was made by the dam owners. The Ministry also submits that it has the regulatory authority under the *Water Act* and its regulations to require the removal of unauthorized works from public streams.

Analysis

[20] The issue before me in this inquiry is whether the Ministry must disclose the information in the two email chains that is withheld under s. 14. Therefore, for s. 25 to apply, this withheld information must be about a risk of significant harm or disclosure of this information must be clearly in the public interest.

[21] The applicant, who of course does not have the benefit of knowing the contents of the withheld information, states the Ministry knew that removing the dam was an environmental risk and he surmises that the information at issue relates to environmental harms. He believes the withheld information is the type of information described in Order 02-38¹¹ as falling under s. 25(1)(a), in that it discloses the existence of the risk, the nature of the risk, and it would allow the public to take or understand the necessary or possible actions to meet the risk or mitigate or avoid harm. However, the applicant is mistaken as to the content of the records. In fact they do not deal with environmental risk issues at all, let alone have the element of temporal urgency that is also required for s. 25 to apply.

[22] I also find that the Ministry is not compelled to disclose the withheld information under s. 25(1)(b) because it does not meet the public interest disclosure threshold in that section. Further, there is nothing about these records that introduces an element of temporal urgency for disclosure. I also note that to the extent the records refer to the potential removal of the dam, the dam has now been removed. Therefore, this fact does not contribute in a substantive way to the body of information that is already available to the public, and it does not result in s. 25(1)(b) applying to this information.

[23] The applicant further submits that for the Ministry to “engage in and expend legal resources in support of a legal strategy to circumvent a federal statute (*Fisheries Act*) is egregious.” In his view, disclosure of a contravention of federal statute by a public body is in the public interest pursuant to s. 25(1)(b) of FIPPA. I can say, having reviewed the records in detail, the applicant is mistaken in his belief that they somehow relate to the issue of whether the

¹¹ 2002 CanLII 42472.

Fisheries Act has been contravened. They do not. I also do not see any other basis that s. 25 might apply to these records.

[24] Based on my review of the records, I find that the withheld information is not about a risk of significant harm and that disclosure is not clearly in the public interest. I therefore find that s. 25 does not apply.

Solicitor-Client Privilege — s. 14

[25] The Ministry is withholding the records in dispute under s. 14 of FIPPA. This section states:

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

[26] Section 14 incorporates the common law rules of solicitor-client privilege. Legal advice privilege is a type of privilege, and the Ministry submits that legal advice privilege applies in this case. The test for legal advice privilege is as follows:

[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 communications (and papers relating to it) are privileged.¹²

[27] A number of the emails in the email chains are between a Ministry employee and the Ministry's lawyer. Based on my review of the records, I find that solicitor client privilege applies to these emails. They are of a confidential character between a client and a legal advisor. They are also directly related to the seeking, formulating or giving of legal advice. I therefore find that legal advice privilege applies to this information.

¹² *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC).

[28] There are also other emails earlier in the email chains that are not written by or addressed to a lawyer. However, previous orders such as Order F14-17 have confirmed that communications enclosed with other privileged communications may also be protected from disclosure under s. 14.¹³ In this case, the communications at issue are not between a lawyer and client, but they form part of the communication between lawyer and client because they form part of the background facts and context to the legal advice. I therefore find that legal advice privilege applies to these emails because of their context as communications that are part of privileged email communications between Ministry staff and its legal counsel, and since they would reveal legal advice.¹⁴

[29] In summary, I find that s. 14 applies to all of the information withheld under s. 14 because it is subject to legal advice privilege.

CONCLUSION

[30] For the reasons given above, under s. 58 of FIPPA, I order that the Ministry is authorized to withhold the information at issue under s. 14 of FIPPA.

September 8, 2014

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

OIPC File No.: F12-50674

¹³ Order F14-17, 2014 BCIPC 20 (CanLII) at para. 29. Also see Order F07-13, 2007 CanLII 30398 (BC IPC).

¹⁴ Most of two emails at the start of one of the email chains have already been disclosed to the applicant. These emails may very well be subject to solicitor client privilege given the precise context and content of those emails, which would give rise to the issue of waiver of privilege. However, this issue was not raised by the parties. Further, assuming these records are privileged, considering and applying the principles for waiver in the context of FIPPA stated in Order F14-15, 2014 BCIPC No. 18, I find that the Ministry did not waive privilege to the remainder of the email chain because the Ministry did not intend to waive privilege and it is neither unfair nor misleading to now withhold the remainder of the email chain.