



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F14-54

CITY OF VICTORIA

Caitlin Lemiski
Adjudicator

December 22, 2014

CanLII Cite: 2014 BCIPC 58
Quicklaw Cite: [2014] B.C.I.P.C.D. No. 58

Summary: The City had applied to the Commissioner for authority under s. 43 of the *Freedom of Information and Protection of Privacy Act*. The applicant, one of the parties against whom s. 43 had been sought, requested access to City records relating to that application. The City disclosed some records but withheld others. Section 14 authorizes the City to withhold information that it withheld on the basis of privilege.

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

Authorities Considered: B.C.: Order 00-06, 2000 CanLII 6550 (BC IPC).

INTRODUCTION

[1] This order originates, ultimately, in an application that was made by the public body, the City of Victoria (“City”), for authorization under s. 43 of the *Freedom of Information and Protection of Privacy Act* (“Act”) to disregard requests for access to records from individuals including the applicant in this case. The City ultimately withdrew that application. On October 12, 2012, the applicant made a request under the Act for access to records relating to the s. 43 application and the background to it.¹

¹ The access request, which contained 13 numbered paragraphs, was both specific and detailed. There is no dispute that the City has failed to produce all responsive records. The only issue here is whether s. 14 of the Act applies. Accordingly, it is not necessary to reproduce the access request in full.

[2] The City responded more than three months later, with an initial disclosure of 40 pages of records on January 25, 2013. The City disclosed a further 18 pages of records on February 8, 2013. Portions of the first set of documents were withheld under ss. 14 and 22 of the Act, while the entirety of the second set was withheld under s. 14.

[3] The applicant appealed the City's decision and, mediation having failed to entirely resolve the dispute, this inquiry was held. As a result of mediation, only nine records are now in dispute. Of these, portions have been withheld from records one through three, while records four through nine have been withheld in their entirety. The mediation process also narrowed the issue in the appeal to whether s. 14 authorizes the City to refuse to disclose information in those nine records.

ISSUE

[4] The only issue for me to decide is whether s. 14 of the Act authorizes the City to refuse to disclose the information it has withheld under that section.

DISCUSSION

Test for solicitor-client privilege

[5] Section 14 provides that a public body “may refuse to disclose information that is subject to solicitor-client privilege”. The test to be applied in determining whether information is privileged and thus may be withheld is well-established. In this case, the City relies on the kind of privilege recognized under s. 14 that is often referred to as legal professional privilege.

[6] I must first deal with the City's contention that it is well-established that “there is a *prima facie* right of privilege for communications between solicitor and client”,² citing Order 00-06.³ It follows, the City argues, that once it proves the existence of all four elements of the privilege, the onus shifts to the applicant to disprove the privilege's existence.

[7] In my view, speaking of a *prima facie* privilege having been made out is not helpful here. Rather, once all of the elements of the privilege have been made out in evidence, the privilege is established. If an applicant from the outset has provided evidence that persuades the decision-maker that one or more of the necessary elements has not been established, then, on a balance of probabilities, the decision-maker may find that the privilege claim has not been proved. This is the way to approach the issue, not through the lens of a *prima facie* case and a shifting onus to disprove.

² City's initial submission, para. 5.

³Order 00-06, 2000 CanLII 6550 (BC IPC).

[8] The question, in other words, is whether the public body has established on a balance of probabilities that the privilege exists. This is clear from what was stated in Order 00-06, where the public body had argued that s. 14 contemplates a *prima facie* claim of privilege, as the City argues here. Order 00-06 rejected that argument, holding that the public body must establish each element of the test for privilege.

[9] The test for this privilege is well-established. I will apply the principles adopted in Order 00-06:

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.⁴

[10] I will now assess, record by record, whether s. 14 authorizes the City to withhold information from the applicant.

Assessment of each record

Record one (pages 5-8)⁵

[11] This record consists of a string of emails exchanged among various City staff and members of City council. The severed information consists of a communication from a councillor to, and a response from, the City solicitor, Tom Zworski (“City Solicitor”), and a follow-up question from a member of council (p. 5), and the City Solicitor’s response to that question.⁶ Sixteen lines of text have been withheld under s. 14.

[12] These communications relate to the conduct of the then ongoing s. 43 application by the City. The context in which they took place, and the affidavit evidence in this inquiry, readily establish that the communications were confidential. It is also plain from my review of the communications, and in light of the affidavit evidence, that the communications relate to the seeking and giving of legal advice. The responses to councillors from the City Solicitor in fact clearly

⁴ Order 00-06, 2000 CanLII 6550 (BC IPC) p. 8.

⁵ This order uses the City’s numbering for records and page numbering for individual pages within these records. The City helpfully provided the applicant with its list of documents, which uses this numbering. City’s initial submission, paras 6-8.

⁶ City’s initial submission, para 14; affidavit of Valda Stefani, para 8.

contain legal advice. Section 14 clearly authorizes the City to refuse to disclose the information that it has withheld under that section.

Record two (pages 12-13)

[13] This record is an August 8, 2012 memorandum from the City Solicitor to the City's mayor and council. The entire memorandum, apart from its header, has been withheld under s. 14. The header states that it is "privileged and confidential", and that the memorandum "contains information that is subject to solicitor-client privilege and is protected from disclosure". The affidavit evidence also supports this confidentiality.

[14] The contents of the memorandum relate to the then ongoing s. 43 proceeding. The contents set out legal advice from the City Solicitor to the mayor and council about that proceeding.

[15] The required elements of the test for solicitor-client privilege are met. Section 14 authorizes the City to refuse to disclose the withheld portions of the memorandum.

Record three (pages 36-40)

[16] This also consists of an email exchange among the City Solicitor and members of council. The City only withheld a portion from p. 37. This consists of the text of an email from the City Solicitor, in which he provides advice about the ongoing s. 43 proceeding.

[17] As with the above records, the evidence establishes that this was a confidential communication between lawyer and client and the communication contains legal advice. It is undoubtedly privileged.

Record four (page 41)

[18] This August 14, 2012 email from Phong Phan, a lawyer employed by the City, and the City Solicitor also relates to the s. 43 proceeding. All of the necessary elements of the test for solicitor-client privilege are plainly met, on the evidence, for the entirety of this record. Section 14 authorizes the City to withhold it.

Record five (pages 42-44)

[19] This record consists of an email from a legal assistant with the City to mayor and council, enclosing a copy of the August 8, 2012 memorandum from the City Solicitor, discussed above. The City is authorized to withhold the entirety of this record under s. 14.

Record six (pages 45-47)

[20] This record consists of a letter from the City to this Office in relation to the s. 43 proceeding. The City withheld it under s. 3(1)(c) of the Act, which excludes records relating to the exercise of the functions of an officer of the Legislature. As noted earlier, only s. 14 is in issue in this inquiry, but it is clear, in light of several previous decisions of this Office, that s. 3(1)(c) does apply. This record is excluded from the right of access to records under the Act and thus the City properly withheld it.

Record seven (pages 48-52)

[21] This record comprises an email exchange between the City Solicitor and Rob Woodland, the City's Director of Legislative and Regulatory Services ("Director"), along with a draft letter (which the evidence discloses was drafted by the City Solicitor).

[22] The evidence makes it clear that this record consists of confidential communications related to the seeking or giving of legal advice, in this instance, again, in relation to the s. 43 proceeding. It is clearly subject to solicitor-client privilege under s. 14.

Record eight (pages 53-54)

[23] This record also consists of an email exchange between the City Solicitor and the Director. As with record seven, included in the emails is a draft memorandum, which the Director prepared and on which the City Solicitor provided advice. It does not matter that the final memorandum from the Director may have been disclosed, or that it would not be privileged. The evidence shows that the draft forms part of a confidential communication related to the seeking and giving of legal advice. It is clearly protected under s. 14, even if the final memorandum is not.

Record nine (pages 55-58)

[24] This record consists of emails between Phong Phan, one of the City's lawyers, and various City staff. It is, as with the other records in dispute, clearly confidential and related to the seeking or giving of legal advice. It is protected under s. 14.

CONCLUSION

[25] All of the applicant's arguments have been carefully considered, as have the City's. There is absolutely no doubt that the information and records that the City has withheld under s. 14 have been properly withheld.

[26] Accordingly, under s. 58(2)(b) of the Act, I confirm the decision of the City to withhold the records or information it has withheld under s. 14.

December 22, 2014

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

OIPC File No.: F13-53336