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Order F16-35

CITY OF BURNABY

Elizabeth Barker
Senior Adjudicator

July 14, 2016

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Summary: The applicant asked the City of Burnaby for a list of all legal fees and costs it incurred regarding the Trans Mountain pipeline since January 1, 2013. Burnaby refused to disclose the requested information on the grounds that it was subject to solicitor client privilege, so s. 14 of FIPPA applied. The adjudicator confirmed Burnaby's decision.

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

Authorities Considered: B.C.: Order 02-38, 2002 CanLII 42472 (BC IPC); Order F15-16, 2015 BCIPC 17 (CanLII); Order F15-64, 2015 BCIPC 70 (CanLII). **Ont:** *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner*), 2005 CanLII 6045 (ON CA); *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2007 CanLII 65615 (ON SCDC); *Corporation of the City of Waterloo v. Cropley and Higgins*, 2010 ONSC 6522 (CanLII).

Cases Considered: *Maranda v. Richer*, 2003 SCC 67; *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427 (CanLII).

INTRODUCTION

[1] This inquiry is about an applicant's request to the City of Burnaby ("Burnaby") for "a list of all legal fees/costs incurred by Burnaby regarding the TransMountain pipeline, since January 1, 2013." Burnaby refused to disclose any information in the requested record on the basis it is protected by solicitor client privilege under s. 14 of 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 Burnaby's decision. Mediation did not resolve the matter and the applicant requested that it proceed to inquiry under Part 5 of FIPPA. Both parties provided submissions for this inquiry.

ISSUE

[3] The issue in this inquiry is whether Burnaby is authorized to refuse access to information under s. 14 of FIPPA. Under s. 57(1) of FIPPA, Burnaby has the burden of proving that the applicant has no right to access the information in the record.

DISCUSSION

[4] **Background –** This case concerns a request for the legal costs incurred by Burnaby for the Trans Mountain Expansion Project ("TMEP"). The TMEP relates to the proposed expansion of the existing Trans Mountain pipeline between Edmonton and Burnaby. Burnaby has been involved in litigation regarding the proposed expansion since 2013. Burnaby retained a law firm to represent it in the litigation and in proceedings before the National Energy Board ("NEB").

[5] Burnaby explains that the BC litigation is not yet concluded. Its appeal of *Burnaby (City) v. Trans Mountain Pipeline ULC,* 2015 BCSC 2140, which deals with whether Burnaby's bylaws should apply to Trans Mountain, is still pending. Burnaby was also granted intervenor status in the NEB proceedings, which were ongoing at the time its submissions were provided in this inquiry.[1]

[6] **Record in dispute -** The record in dispute is a two page list, which appears to be a printout of an Excel spreadsheet. Burnaby is withholding all of the information on the list. Each invoice is detailed on a separate line, containing the date and amount of the invoice, whether the invoice was paid, the name of the law firm and a brief description of the legal services provided. Each line also contains general accounting details (*i.e.*, document and account numbers and the date each invoice was posted and entered). The bottom line of the list contains the aggregate total amount of all the invoices. The list covers invoices received from the law firm for the 21 month time frame specified in the applicant's access request: January 1, 2013 - September 10, 2014.

[7] **Solicitor client privilege –** Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[1] Burnaby's submissions are dated February 9 and March 30, 2016.

[8] As stated by the Supreme Court of Canada in *Maranda v. Richer* [*Maranda*],[2] there is a presumption that lawyers' billing information is privileged. LeBel, J. said:

> …The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements.
>
> …Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved.

[9] The presumption that such information is privileged may be rebutted. In *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)* [*Central Coast*][3] the BC Supreme Court said that the correct approach to determining whether the presumption has been rebutted is to consider the following two questions:

1. Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege?
2. Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

[10] I will follow the approach set out in *Maranda* and *Central Coast*.

Parties' submissions

[11] Burnaby submits that the information in dispute is presumptively privileged because it relates to legal fees and expenses.[4] It cites *Maranda* and *Central Coast* in support of its position.

[12] Burnaby also submits that the applicant is an assiduous seeker of information who is aware of the litigation and NEB proceedings, and he could use the information to deduce privileged communications between Burnaby and its legal counsel. Burnaby believes that the applicant is a particularly well-informed inquirer because he worked as a political aide to a prime minister and as

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[2] *Maranda v. Richer*, 2003 SCC 67, at paras. 32-33.
[3] *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427 (CanLII), at para. 104.
[4] Burnaby's initial submissions at para.38.

a journalist. Burnaby submits that, as a result, he has special training and knowledge in gathering information. Burnaby provides the following reasons why it believes that disclosing the information in dispute to the applicant will directly or indirectly reveal communications which are protected by solicitor client privilege:

- The information relates to interim legal fees and disbursements for outstanding court litigation and NEB legal proceedings. In addition, both matters are still at an early stage and are highly contentious.[5]

- The record covers invoices from only one law firm and relates to legal work regarding only the TMEP (*i.e.*, this is not a situation where the record covers invoices from various law firms for various matters). The record also covers a relatively short time frame.

- There is a significant amount of information in the public domain concerning Burnaby's ongoing legal challenges regarding the TMEP. For instance, the information is available in court decisions, court registry files, the NEB website and NEB rulings. In addition, the TMEP matters have been extensively covered by the media.[6] The applicant could combine the information in dispute with the publicly available information and deduce Burnaby's state of preparation for various proceedings and the level of legal resources it is willing to expend on these matters. The listing of invoices and their dates would also indirectly disclose the frequency of Burnaby's communications with its lawyers and the degree to which it instructed legal counsel at various times in the proceedings.

- Disclosure of the legal fees and costs paid over the period during which there were several court hearings and applications and submissions to the NEB may reveal information about Burnaby's strategy for the litigation and the NEB hearing.

[13] The applicant says: "There is no reason to believe that releasing legal costs will in anyways [sic] infringe on solicitor-client privilege. The fact that other institutions have disclosed such information, with no impact, shows that it can be easily done."[7] He provides several examples where public bodies and government institutions in BC and elsewhere in Canada have chosen to disclose information that is protected by solicitor client privilege.[8] He also cites the Office of the Information Commissioner of Canada's 2011-12 annual report where the Commissioner said "…when it can be shown that privileged communications

[5] Burnaby's initial submissions at para. 47.
[6] Burnaby's initial submissions at paras. 39-43.
[7] Applicant's submissions at p. 3.
[8] Applicant's submissions at p. 1. The examples he provides are the CBC, Hydro One in Ontario, the BC Liberal Party, and the City of Nanaimo.

cannot be deduced from the disclosure of the fees, the fees are considered "neutral information" and are no longer protected by the privilege."[9]

[14] In response to Burnaby's submission that he is an informed and assiduous inquirer, the applicant says that this is an irrelevant factor. He submits that allowing this consideration to be a reason for denying him access to the requested record "would create a dangerous precedent that could be exploited by other institutions and undermine the Act in unforeseen ways."[10]

Analysis

[15] The information in dispute in this case reveals how much Burnaby was billed by the law firm for legal services and whether those bills were paid. The presumption that this information is protected by solicitor client privilege clearly applies in this case. In considering whether the presumption is rebutted, I have examined the facts and context of this case in light of the two questions posed in *Central Coast*. For the reasons that follow, I find that the presumption has not been rebutted.

[16] The applicant already knows that the withheld information relates to legal services for Burnaby's involvement in TMEP litigation and NEB proceedings. He also knows that it pertains to the 21 month time frame specified in his access request. What he does not yet know - and what would be revealed by the information in dispute - are the dates and dollar amounts of the invoices, whether the invoices have been paid, and the aggregate total of the invoices.

[17] In my view, access to the information in dispute would give anyone with rudimentary research skills and an interest in the TMEP issue[11] the ability to glean details about the approach Burnaby instructed its lawyers to take, and how much effort and money it was willing to expend, on certain aspects of the proceedings. The information also reveals details about the timing and frequency of the invoices, and how much legal services would have been provided to Burnaby at various times throughout the TMEP-related court and NEB proceedings. This could easily be compared to information about the progress and results of those proceedings, which is publicly available in news coverage and court and NEB records. Further, the evidence provided by Burnaby, which the applicant did not refute, is that those proceedings are not concluded.

[18] I also find that the presumption has not been rebutted for the aggregate total of the individual invoices. I recognize that there have been BC and Ontario

[9] Office of the Information Commissioner of Canada's 2011-12 annual report at p. 23.
[10] Applicant's submissions at p. 2.
[11] The applicant has a background in political research and journalistic investigation, so arguably possesses more than rudimentary research skills.

orders that have held that the presumption was rebutted regarding total amounts of legal fees.[12] However, on the facts of this case, I am satisfied that there is a reasonable possibility that access to the aggregate total amount will permit the applicant to deduce details about Burnaby's privileged communications with its lawyers because of the interim nature of the fees and the fact that they relate to ongoing matters. Also significant is the fact that the invoices come from one law firm and pertain to only two legal matters, for which there are publicly available records and media coverage. For instance, the total amount of legal fees covers a relatively short time frame and it would be possible to deduce what portion relates to identifiable steps in the court litigation and the NEB proceedings and what legal strategies were employed (and legal work done) in exchange for those fees.

[19] In summary, I am satisfied that there is a reasonable possibility that disclosure of the information in dispute will reveal to the applicant, or allow him to deduce, communication protected by solicitor client privilege. Therefore, I find that the presumption that the information is protected by solicitor client privilege has not been rebutted. I conclude that Burnaby is authorized under s. 14 of FIPPA to refuse to disclose the information in dispute to the applicant.

Discretion

[20] The applicant argues that other public bodies have chosen to disclose similarly privileged information about legal fees with "no impact", so Burnaby should do the same.

[21] Section 14 is a discretionary exception to disclosure (it uses the word "may"). Therefore, Burnaby has the discretion to decide whether to disclose records that are protected by solicitor client privilege. In examining the issue of discretion, my role is not to substitute the decision I might have reached for that of the public body.[13] My role is to ensure that the public body has exercised its discretion, and if not, to require it to do so. Further, I can require it to reconsider if I believe that it exercised discretion in bad faith or took into account irrelevant or extraneous grounds.

[22] I have considered Burnaby's submissions and affidavit evidence about why it considered the information in dispute to be privileged and why it was concerned about the consequences of disclosure. Based on that information, I am amply satisfied that Burnaby exercised its discretion by turning its mind to

[12] Order F15-64, 2015 BCIPC 70; Order F15-16, 2015 BCIPC 17; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner*), 2005 CanLII 6045 (ON CA); *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2007 CanLII 65615 (ON SCDC); *Corporation of the City of Waterloo v. Cropley and Higgins*, 2010 ONSC 6522 (CanLII).

[13] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 147.

whether to disclose the information in dispute, and that it considered appropriate factors when making that decision.

[23] On a general note, given the importance of solicitor client privilege to the legal system, it is difficult to conceive of a situation where a public body – having established that records are protected by solicitor client privilege – could then be found to have improperly exercised its discretion to withhold information under s. 14. Solicitor client privilege is a class privilege that does not involve a balancing of interests on a case-by-case basis or a weighing of the harm that might result from disclosure.[14]

CONCLUSION

[24] For the reasons above, under s. 58(2) of FIPPA, I confirm Burnaby's decision to refuse to give the applicant access to the information it withheld under s. 14 of FIPPA.

July 14, 2016

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F14-59610

[14] R. v. McClure, 2001 SCC 14 at para. 35; R. v. Gruenke, [1991] 3 SCR 263 at para. 26; R. v. Goodis, 2006 SCC 31 at paras. 15-17; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 at para. 75.