



Protecting privacy. Promoting transparency.

Order F18-46

**ASSOCIATION OF PROFESSIONAL ENGINEERS AND GEOSCIENTISTS OF
THE PROVINCE OF BRITISH COLUMBIA**

Erika Syrotuck
Adjudicator

November 7, 2018

CanLII Cite: 2018 BCIPC 49
Quicklaw Cite: [2018] B.C.I.P.C.D. No. 49

Summary: The applicant requested all records related to a complaint he made against a member of the Association of Professional Engineers and Geoscientists of the Province of British Columbia (APEG). APEG refused access on the basis of ss. 14 and 22 of FIPPA and s. 46 of the *Engineers and Geoscientists Act*, but only s. 14 was at issue in the inquiry. The adjudicator found that APEG was authorized to refuse access to the information in dispute under s. 14.

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

INTRODUCTION

[1] The applicant requested access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to all records related to a complaint he made against a member of the Association of Professional Engineers and Geoscientists of the Province of British Columbia (APEG). APEG responded to the applicant's request but refused to disclose some information on the basis of ss. 14 (solicitor client privilege) and 22 (unreasonable invasion of third party personal privacy) of FIPPA and s. 46 of the *Engineers and Geoscientists Act*.

[2] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review APEG's decision to withhold information. The applicant then confirmed by email that he was only seeking a specific letter that APEG was refusing to disclose under s. 22 and all of the information APEG was

refusing to disclose under s. 14.¹ Mediation did not resolve these issues and the matter proceeded to inquiry.

[3] At the inquiry, the third party consented to disclosure of the letter. APEG then provided the applicant with a copy of this letter. As a result, s. 22 is no longer an issue in this inquiry.

ISSUE

[4] The issue in this inquiry is whether APEG is authorized to refuse to disclose the information in dispute under s. 14 of FIPPA. Under s. 57(1), APEG has the burden of proving that the information in dispute is subject to solicitor client privilege.

DISCUSSION

Records in Dispute

[5] APEG did not provide the records in dispute for my review. Instead the APEG's Director, Legislation, Ethics and Compliance (Director) provided affidavit evidence describing the records as:

- Four pages of email correspondence between APEG's Compliance Officer (Compliance Officer), APEG's staff lawyer (Lawyer) and the Director dated August 8, 2016 (August Emails).²
- A three page email from the Compliance Officer to the Lawyer and the Director dated October 24, 2016 (October Email).³
- A copy of the October Email on which the Director made handwritten notes in the margins. Attached to this is a separate piece of paper on which the Director made further handwritten notes. (I will refer to these records collectively as the Notes).⁴

Section 14

[6] Section 14 permits a public body to refuse to disclose information that is subject to solicitor client privilege. It is well established that s. 14 includes litigation privilege and legal advice privilege⁵. APEG submits that the records in

¹ Since the applicant narrowed the records in dispute, s. 46 of the Engineers and Geoscientists Act was no longer in issue.

² Affidavit of the Director, Legislation, Ethics and Compliance for APEG, para 3.

³ Affidavit of the Director, Legislation, Ethics and Compliance for APEG, para 4.

⁴ Affidavit of the Director, Legislation, Ethics and Compliance for APEG, para 5.

⁵ See for example, Decision F05-04, 2005 CanLII 18155 (BC IPC) at para. 13; *College of Physicians of B.C. v British Columbia (Information and Privacy Commissioner)* 2002 BCCA 665 [College] at para. 26.

this case are protected by legal advice privilege. Previous OIPC orders⁶ have applied the following test for legal advice privilege:

[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.⁷

[7] I will apply the same test here.

APEG's submissions

[8] The Director says that he is the senior in-house legal counsel for APEG and that his roles include providing legal advice to APEG, supervising the Lawyer and supervising the investigation process.⁸

[9] The Compliance Officer says that on August 8, 2016 she wrote to the Lawyer and the Director to ask for legal advice about APEG's confidentiality and disclosure obligations.⁹ The Compliance Officer states that the Lawyer responded by giving his advice on the same day.¹⁰ The Director says that he has reviewed the content of the August Emails and says that he confirms that the emails contain a request for legal advice from the Compliance Officer and legal advice from the Lawyer.¹¹

[10] The Compliance Officer says that on October 24, 2016 she wrote to the Lawyer and the Director for legal advice about APEG's confidentiality and

⁶ Order F17-43, 2017 BCIPC 47 at para. 38; Order F15-52, 2015 BCIPC 55 at para. 10.

⁷ *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22.

⁸ Affidavit of the Director, Legislation, Ethics and Compliance at para. 6.

⁹ Affidavit of the Compliance Officer, at paras. 26-27.

¹⁰ Affidavit of the Compliance Officer, at para. 27.

¹¹ Affidavit of the Director, Legislation, Ethics and Compliance at para. 3.

disclosure obligations. The Director says that he reviewed the email and confirms that it contains a request for legal advice from the Compliance Officer.¹²

[11] The Compliance Officer says that she sent the emails on August 8, 2016 and October 24, 2016 to the Lawyer and the Director in their roles as in house counsel.¹³ The Director says that both he and the Lawyer were involved in the August and October Emails in their roles as legal advisors to APEG.¹⁴

[12] The Compliance Officer says she did not include any other parties on either of the August or October Emails and that she always intended them to be confidential and privileged. She also says she has never waived privilege and has not shared the emails with anyone, except on a need to know basis within APEG and to its external legal counsel in connection with the applicant's request for information.¹⁵ The Director says that he understands that APEG has not waived privilege on the August or October Emails and that these records have been maintained in confidence.¹⁶

[13] The Director says that for the purpose of preparing his response to the Compliance Officer's questions, he printed the October Email and made some handwritten notes in the margins and on a separate piece of lined paper.¹⁷ He states that he made the Notes in his role as legal advisor to APEG.¹⁸ The Director states that he has always intended the Notes to be confidential and privileged and has kept them as such.¹⁹ The Director says that he understands that APEG has not waived privilege on the Notes and has maintained them in confidence.²⁰

Applicant's submissions

[14] The applicant's submissions address s. 22, which is no longer an issue in this inquiry. The applicant does not directly address APEG's claim of solicitor client privilege over the records in dispute.

Analysis

[15] While APEG has not provided the records in dispute in this inquiry, it has provided the kind of detailed evidence that has allowed me to independently assess whether each of the four parts of the test for legal advice privilege apply.

¹² Affidavit of the Director, Legislation, Ethics and Compliance at para. 4.

¹³ Affidavit of the Compliance Officer, at paras. 26-27.

¹⁴ Affidavit of the Director, Legislation, Ethics and Compliance at para. 6.

¹⁵ Affidavit of the Compliance Officer, at para. 29.

¹⁶ Affidavit of the Director, Legislation, Ethics and Compliance at para. 7.

¹⁷ Affidavit of the Director, Legislation, Ethics and Compliance at paras. 4-5.

¹⁸ Affidavit of the Director, Legislation, Ethics and Compliance at para. 6.

¹⁹ Affidavit of the Director, Legislation, Ethics and Compliance at para. 7.

²⁰ Affidavit of the Director, Legislation, Ethics and Compliance at para. 7.

[16] For the reasons that follow, I find that the August and October Emails are privileged.

[17] I am satisfied, based on the evidence of the Compliance Officer and the Director that the August and October Emails consist of communications between a lawyer and a client and that they were related to giving, seeking or formulating legal advice. I accept that the Compliance Officer sent requests for legal advice to the Director and the Lawyer on both occasions and that the August Emails include advice from the Lawyer. I am satisfied that the Lawyer and the Director were acting in their capacity as legal advisors.

[18] Based on the evidence of the Director and the Compliance Officer, I am also satisfied that the August and October Emails were of a confidential character. Specifically, I accept that no one else was party to the emails. I note that the Compliance Officer states that she shared the emails on a need to know basis within APEG. The BC Supreme Court has affirmed that “privilege extends to include communications between employees advising of communications from lawyer to client.”²¹ In other words, legal advice remains privileged when it is discussed and shared internally by the client.²² Therefore, the fact that the Compliance Officer shared the information within APEG does not erode the confidential character of the August and October Emails.

[19] In summary, I am satisfied that the August and October Emails meet all four elements of the test for legal advice privilege.

[20] I am also satisfied that the Notes are privileged.

[21] The Director says he prepared the Notes for the purpose of giving legal advice to the Compliance Officer. He does not say if he actually gave legal advice on the matter to which the Notes relate. All he says is that he was “involved” in the August and October Emails.

[22] Regardless of whether the Director actually gave advice to the Compliance Officer, I am satisfied that the Notes relate to formulating legal advice in response to the request for the advice. In this way, the Notes came into existence because of the request for legal advice. The test for legal advice privilege includes “papers relating to the communications”. In *Susan Hosiery Ltd. v. Minister of National Revenue*, Jackett P said:

What is important to note ... is that [the rules of privilege] do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the

²¹ *Bank of Montreal v. Tortora*, 2010 BCSC 1430, at para. 12, citing *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)*, [1988] O.J. No. 1090 (Ont. S.C.J.).

²² Order F17-39, 2017 BCIPC 43 at para. 54.

communications or working papers that came into existence by reason of the desire to obtain a legal opinion....²³

[23] I am satisfied that the Notes are “working papers” related to the request for legal advice. I find that the Notes are also privileged.

CONCLUSION

[24] Under s. 58 of FIPPA, I confirm APEG’s decision to refuse to disclose the information in dispute under s. 14.

November 7, 2018

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F17-71001

²³*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 at p. 33, [1969] C.T.C. 353.