Order F19-14

MINISTRY OF ENVIRONMENT AND CLIMATE CHANGE STRATEGY

Elizabeth Barker
Senior Adjudicator

March 26, 2019

CanLII Cite: 2019 BCIPC 16
Quicklaw Cite: [2019] B.C.I.P.C.D. No. 16

Summary: An applicant sought access to a two page email chain between a Ministry employee and a Deputy Regional Crown Counsel. The Ministry refused access under s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that the email chain was not protected by solicitor client privilege and ordered the Ministry to disclose it to the applicant.

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

INTRODUCTION

[1] This case relates to the applicant's unsuccessful attempts to secure a permit for two prohibited animals under the *Controlled Alien Species Regulation*.[1] He requested the Ministry of Environment and Climate Change Strategy (Ministry) provide him with records related to his permit application and the prosecution of his alleged offences under the *Controlled Alien Species Regulation*.

[2] The Ministry disclosed records to the applicant but it withheld some information from them under ss. 14 (solicitor client privilege), 15 (harm to law enforcement), 16 (harm to intergovernmental relations), 17 (harm to financial or economic interests of a public body) and 22 (harm to third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[1] BC Reg 94/2009, enacted under the *Wildlife Act,* RSBC 1996, c. 488.

[3] The applicant requested a review of the Ministry's decision by the Office of the Information and Privacy Commissioner (OIPC). Mediation did not resolve the matters in dispute and the applicant requested that they proceed to written inquiry. A notice of inquiry was issued and written submissions were provided by both parties. As will be discussed below, ultimately, the only issue in dispute was the Ministry's decision to refuse access to two pages under s. 14.

Preliminary matters

Information in dispute

[4] Shortly before the OIPC's notice of inquiry was issued and during a separate proceeding being heard by the Environmental Appeal Board, the Ministry provided the applicant with an unsevered copy of all but 11 pages of the records in dispute.

[5] The Ministry requested an adjournment of the OIPC inquiry in order to reconsider its severing of the remaining 11 pages. Ultimately, it decided to provide the applicant with nine more unsevered pages. The Ministry continues, however, to refuse access to pages 286-287, which it submits are protected by solicitor client privilege.

[6] The applicant initially refused to agree to the scope of this inquiry being narrowed to only pages 286-287. He disputed that the records he received through the Environmental Appeal Board process were unsevered. He said there was "ample opportunity to filter" them before he received them during the Environmental Appeal Board proceedings.

[7] The Ministry provided the OIPC with a copy of the records that the applicant was given during the Environmental Appeal Board process. I compared those records with the records that the Ministry provided with its submissions in this inquiry. There are 298 pages in each set of records and the only pages I cannot see are pages 286-287. Based on my comparison, I was satisfied that the two sets of records were identical and that the applicant was given an unredacted version of the records in dispute in this inquiry, with the sole exception of pages 286-287.

[8] I wrote to the parties about what the comparison revealed and the applicant agreed to narrow the scope of this inquiry to pages 286-287. Therefore, the only information in dispute is on pages 286-287, and I will only consider the Ministry's decision to refuse the applicant access to those two pages.

Records not provided

[9] The Ministry did not produce a copy of pages 286-287 for my review in this inquiry because it asserts that these records are protected by solicitor client privilege. It provided affidavit evidence instead.

[10] Given the importance of solicitor client privilege, and in order to minimally infringe on that privilege, the OIPC will only order production of records being withheld under s. 14 when it is absolutely necessary to adjudicate the issues in dispute.[2] Following the close of submissions, I extended the Ministry two opportunities to clarify and provide more evidence regarding its claim of solicitor client privilege. The Ministry provided further information in response.[3] Based on that additional information, I was able to make a decision about whether s. 14 applied to pages 286-287 and it was unnecessary to order production of the records for my review.

ISSUE

[11] The issue to be decided in this inquiry is whether the Ministry is authorized to refuse to disclose pages 286-287 under s. 14 of FIPPA. Section 57 of FIPPA says that the burden of proving that an applicant has no right of access under s. 14 rests with the public body.

DISCUSSION

Background

[12] This case relates to the applicant's history of unsuccessful applications to the Ministry's Director of Wildlife for a controlled alien species permit. In 2016, while waiting for a decision on his application, the applicant was charged with possessing a controlled prohibited species in BC without a permit. A few days after the charges were laid the Director of Wildlife declined his permit application.[4] The criminal charges were eventually stayed.

[13] The applicant's access request was for copies of any communication between the British Columbia Crown Prosecution Service (BCPS) and the British Columbia Conservation Service about his permit application and the criminal charges. He also asked for those two bodies' expense reports related to the same matters as well as the expense reports of several named individuals.

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[2] Production orders are made pursuant to s. 44(1) of FIPPA.
[3] My letters are dated December 20, 2018 and January 3, 2019. The Ministry's letters in response are dated January 3 and January 31, 2019.
[4] The applicant's appeal of the Director's decision was recently heard by the Environmental Appeal Board and its decision is pending.

Solicitor client privilege - s. 14

[14] 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. The law is well established that s.14 of FIPPA encompasses both legal advice privilege and litigation privilege. The Ministry is asserting that legal advice privilege applies.[5]

[15] When deciding if legal advice privilege applies, BC Orders have consistently applied the following criteria:

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.

[16] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions set out above are satisfied, then legal advice privilege applies to the communications and the records relating to it.[6]

[17] I will apply the above test in my analysis of whether pages 286-287 are protected by legal advice privilege.

Ministry's initial submissions

[18] The Ministry submits that pages 286-287 are an email chain that reveals a request for legal advice.[7]

[19] The pages are described in the Ministry's table of records as: "Email chain ending with email from [JB] to [CM] and [JC] dated February 8, 2017." The Ministry also provides an affidavit from a crown counsel (LM) who is also the Information Access and Privacy Coordinator for the BCPS.[8] She says that the first time she saw the two pages was when they were provided to her during this inquiry. She says:

> I have reviewed the Records marked page 286 and 287. I would

[5] On December 20, 2018, I wrote to the Ministry to say that while it had not expressly said so, I understood it was claiming legal advice privilege, not litigation privilege. In its reply, the Ministry did not say that I was incorrect in so concluding.
[6] *R. v. B.,* 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v. Solosky*, 1979 CanLII 9 (SCC) at p. 13.
[7] Ministry's initial submission at para. 32.
[8] BCPS was formerly called the Criminal Justice Branch of the Ministry of Attorney General.

characterize these pages as follows:

> a. A Ministry employee emails a BCPS legal assistant. In this email the Ministry employee provides factual information and requests advice.
>
> b. The BCPS legal assistant forwards the Ministry employee's email to Deputy Regional Crown Counsel for review and response.
>
> c. Deputy Regional Crown Counsel responds to the Ministry employee via email and provides legal advice in response to the Ministry employee's request.
>
> d. The Ministry employee forwards the legal advice to two additional Ministry employees.
>
> I believe the emails between the Ministry employees, BCPS legal assistant and Deputy Regional Crown Counsel were intended to be confidential in nature. [9]

[20] The Ministry says the following about the circumstances surrounding the email chain:

> As indicated by the wording of the Applicant's access request, the Records relate to the investigation of the Applicant, the prosecution of the Applicant, and the Director of Wildlife's decision to deny the Applicant a Controlled Alien Species permit (the issue which was recently adjudicated before the Environmental Appeal Board).[10]

Applicant's submissions

[21] The applicant disputes that s. 14 applies. He also says that the information in dispute cannot be protected by solicitor client privilege because he suspects it is about illegal activity. I understand him to be arguing that the future crimes and fraud exception to privilege applies in this case. That exception states that if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged.[11]

Ministry's reply

[22] The Ministry denies that the communication was for an improper or illegal purpose, and it says that applicant's allegations are "untrue, entirely unsupported in fact, and insufficient to repudiate the application of solicitor client privilege."[12]

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[9] Crown Counsel affidavit at paras. 5-6.
[10] Ministry's initial submissions at p. 4.
[11] *Solosky v. The Queen*, 1 SCR 821 at p. 835.
[12] Ministry's reply submission at p. 1.

Further submissions

[23] As previously mentioned, I wrote twice to the Ministry to offer it the opportunity to submit further information. The first time I asked for information about the relationship between the Ministry employee and the Deputy Regional Crown Counsel because it was not clear how a Deputy Regional Crown Counsel would be acting as the employee's legal advisor.

[24] In response, the Ministry provided information about the role of crown counsel generally. It says that it is a crown counsel's role under ss. 2(a) and (d) of the *Crown Counsel Act*[13] to approve and conduct, on behalf of the Crown, all prosecutions of offences in BC and to advise the government on all criminal law matters. The Ministry says "the *Crown Counsel Act* clearly contemplates that crown counsel may provide such advice to Ministry clients and therefore that Ministries can be in, and in this case the Ministry is in, a solicitor-client relationship with crown counsel."[14]

[25] Crown counsel have multiple functions and responsibilities, which are listed in s. 2 of the *Crown Counsel Act* as follows:

> Functions and responsibilities of the Criminal Justice Branch[15]
>
> 2 The Branch has the following functions and responsibilities:
>
> (a) to approve and conduct, on behalf of the Crown, all prosecutions of offences in British Columbia;
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> (b) to initiate and conduct, on behalf of the Crown, all appeals and other proceedings in respect of any prosecution of an offence in British Columbia;
>
> (c) to conduct, on behalf of the Crown, any appeal or other proceeding in respect of a prosecution of an offence, in which the Crown is named as a respondent;
>
> (d) to advise the government on all criminal law matters;
>
> (e) to develop policies and procedures in respect of the administration of criminal justice in British Columbia;
>
> (f) to provide liaison with the media and affected members of the public on all matters respecting approval and conduct of prosecutions of offences or related appeals;
>
> (g) any other function or responsibility assigned to the Branch by the Attorney General.

[13] RSBC 1996, c. 86.
[14] Ministry's January 3, 2019 submission at p. 1.
[15] The BCPS was formerly called the Criminal Justice Branch.

[26] While the Ministry cites ss. 2(a) and (d) of the *Crown Counsel Act*, it does not speak about the facts of this case and how they relate to those provisions. I offered the Ministry a second opportunity to provide further information about this and about the Deputy Regional Crown Counsel's role and relationship with the Ministry employee in this instance. In reply, the Ministry says:

> The necessary implication of the Ministry's reliance on section 2(d) of the *Crown Counsel Act* is that the Records deal with legal advice provided by Crown Counsel to Ministry employees on a criminal law matter.[16]

[27] I also provided the Ministry an opportunity to provide more information about the confidentiality of the records. In response, the Ministry says the following about its evidence that the email chain contains confidential communication about legal advice:

> Therefore, the Ministry submits that the Commissioner is obliged to take [LM's] sworn evidence at face value: it is inappropriate for the Commissioner to assume that a more expansive description which would not breach solicitor-client privilege was available to [LM]. The Ministry submits that as an officer of the court, [LM] must be presumed to have provided the most extensive and explicit description possible short of disclosing information which is subject to solicitor-client privilege.
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> … absent any evidence to the contrary, [LM's] sworn evidence of confidentiality of the Records is a sufficient basis to establish that the confidentiality that attaches to all communications within the framework of the solicitor-client relationship attaches to the communications in these Records.[17]

[28] The Ministry also cites Order F15-26,[18] in support of its position that a solicitor client relationship can exist between crown counsel and the Ministry. In Order F15-26, the Ministry provided the records for my review along with fulsome evidence and submissions that established that the specific communications at issue between crown counsel and the Ministry staff were protected by legal advice privilege. Each case must be decided on its individual facts and I am not bound to make the same decision as I did in Order F15-26. I will decide the present case based on the evidence and submissions provided by the parties.

[16] Ministry's January 31, 2019 submission at p. 4.
[17] Ministry's January 31, 2019 submission at pp. 5-6.
[18] Order F15-26, 2015 BCIPC 28 (CanLII).

Analysis and findings

Communication between client and legal advisor about legal advice

[29] For the reasons that follow, I find that the Ministry has not established that disclosing the email chain would reveal a communication between a client and legal advisor about legal advice.

[30] Legal advice privilege applies to communication between an individual and a lawyer when the lawyer is acting in his or her capacity as the individual's legal advisor. Where government lawyers are concerned it is not always the case that their communications are made within the solicitor client framework. In *R. v. Campbell* the Supreme Court of Canada stated:

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations.
> …
> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered […].[19]

[31] In addition, the courts have recognized the unique role of crown counsel within the legal system. They have spoken of the fundamental duty of crown counsel to remain independent from those who may have an interest in the prosecution and how important this is to the proper operation of the rule of law.[20]

[32] Keeping in mind what the courts have said about the role of lawyers employed by the government or Crown, I have considered the evidence that the Ministry provides to support its assertion that the email participants were client and solicitor communicating about legal advice.

[33] I can tell from the already disclosed records that the three Ministry employees all worked for the Ministry's Conservation Officer Service. JB, the

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[19] *R. v. Campbell*, [1999] 1 SCR 565 at para. 50. See also *Pritchard v. Ontario (Human Rights Commission)*, 1 SCR 809 at paras. 19-20 for the same principle.
[20] *Krieger v. Law Society of Alberta,* 2002 SCC 65 at paras. 29-30. See also, *R. v. Regan*, 2002 SCC 12 at paras. 156-157; *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337.

employee who communicated directly with the Deputy Regional Crown Counsel, was a conservation officer. The other two, CM and JC, were a sergeant and an inspector.

[34] The Ministry's submissions do not provide an explanation or evidence about the nature of the relationship between the Deputy Regional Crown Counsel and JB. For instance, the Ministry did not explain JB's role and whether he was a client of the Deputy Regional Crown Counsel or responsible for seeking advice on behalf of someone else. This is not obvious from the records that have already been disclosed.

[35] As for the role of the Deputy Regional Crown Counsel, the Ministry provides information about what ss. 2(a) and (d) of the *Crown Counsel Act* say generally about the responsibilities of crown counsel. However, the Ministry provides no evidence about the specific lawyer in this case, whose job title is not crown counsel but Deputy Regional Crown Counsel, and his/her role with respect to communicating with JB. The already disclosed records also do not shed light on this relationship.

[36] There is also insufficient evidence or explanation about the nature of the communication between the Deputy Regional Crown Counsel (whose name was not provided) and JB. The Ministry says that the "necessary implication of the Ministry's reliance on section 2(d) of the *Crown Counsel Act* is that the Records deal with legal advice provided by Crown Counsel to Ministry employees on a criminal law matter."[21] The Ministry says it relies on s. 2(d), but that is not the same as telling me why they rely on that provision and what the evidentiary basis is for doing so. Reliance on a law does not necessarily "imply" that the law applies. Only evidence would allow me to reach that conclusion and that is what is lacking in this inquiry.

[37] I have considered what evidence the Ministry provides to support its assertion that the emails on pages 286-287 contain legal advice. In addition to the records, the Ministry's evidence is found in LM's affidavit. She explains the sequence of the emails and says that she "would characterize" the communication in the emails as "legal advice."

[38] An affiant's assertion that a communication is "legal advice" is not sufficient on its own to establish that fact. I recognize that LM has training as a lawyer and crown prosecutor and that she has reviewed the records. However, LM was not involved in the emails and she did not explain, even in the broadest terms what she means by the term "legal advice" and what factors led her to form the opinion that what she was reviewing was legal advice. The Courts have said that it is open to a decision maker to refuse to accept a lawyer's opinion, when it

[21] Ministry's January 31, 2019 submission at p. 4.

is unsupported by evidence, on a matter in controversy in the inquiry.[22] In this case, I do not agree with LM's opinion because she does not provide evidence to explain what factors led her to form that opinion.

[39] In summary, I am not persuaded by the Ministry's assertions and evidence that the communication between JB and the Deputy Regional Crown Counsel was between a client and legal advisor about legal advice.

Confidentiality

[40] As for the element of confidentiality, LM says she believes the emails were "intended to be" confidential in nature. She does not explain the basis for her belief or how she knows what was intended by the individuals involved in the communications. The Ministry did not provide any evidence from the individuals who participated in the emails.

[41] In response to the opportunity to provide more information about confidentiality, the Ministry says that the basis of LM's belief is that she reviewed the emails.[23] The Ministry also says that, absent any evidence to the contrary, LM's sworn evidence about the confidentiality of the records is a sufficient basis to establish that they are confidential.[24] I disagree. The onus of establishing that the emails are a confidential communication rests with the Ministry. I am not persuaded by LM's bare opinion, unsupported by more evidence, that the people participating in the emails intended their communications to be confidential.

Summary of findings on s. 14

[42] In summary, I find that the Ministry has not established that pages 286-287 meet the test for legal advice privilege. Given that finding, there is no need to consider the applicant's argument that the information cannot be privileged because it is about facilitating a crime.

CONCLUSION

[43] For the reasons provided above, I make the following order under s. 58(2)(a) of FIPPA:

1. The Ministry is not authorized by s. 14 of FIPPA to refuse the applicant access to pages 286-287.

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[22] *Nanaimo Shipyard Ltd. v. Keith et al*, 2007 BCSC 9 (CanLII) at para. 29.
[23] Ministry's January 31, 2019 submission at p. 6.
[24] The Ministry declined to provide more evidence regarding the issue of confidentiality.

2. The Ministry is required to give the applicant access to pages 286-287 by May 9, 2019. The Ministry must concurrently send the OIPC's registrar of inquiries a copy of its cover letter to the applicant, together with a copy of the records.

March 26, 2019

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File: F17-71893