Order F19-49

METRO VANCOUVER REGIONAL DISTRICT

Laylí Antinuk
Adjudicator

December 19, 2019

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Summary: The applicant requested that Metro Vancouver provide records and information related to communications between Metro Vancouver and its external lawyers. Metro Vancouver disclosed some information but withheld the majority of the responsive records in their entirety under s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act*. The applicant asserted that s. 25 (public interest disclosure) applied. The adjudicator determined that s. 14 applied to the withheld information and that s. 25 did not.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 14, s. 25(1), s. 25(1)(a), s. 25(1)(b).

INTRODUCTION

[1] The applicant requested all correspondence between Metro Vancouver Regional District (Metro Vancouver) and its lawyers respecting a previous OIPC inquiry, including a complete copy of the fees charged by its lawyers for work on that inquiry, and information about who requested the legal advice and authorized the payment of the legal fees. Metro Vancouver withheld all the correspondence and fee information under s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and released the balance of the information to the applicant.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review Metro Vancouver's decision. When requesting this review, the applicant stated that there is a public interest in the records at issue, so they should be released under s. 25. Mediation at the OIPC did not resolve the matter and the applicant requested an inquiry.

ISSUES

[3] This inquiry raises the following issues:

1. Does s. 25 require Metro Vancouver to disclose the information in dispute?

2. Does s. 14 authorize Metro Vancouver to withhold the information in dispute?

[4] Metro Vancouver bears the burden of proving that the applicant has no right to access the information withheld under s. 14.[1] When it comes to s. 25, however, Former Commissioner Loukidelis has said that both parties have an interest in providing evidence:

> ... where an applicant argues that s. 25(1) applies, it will be in the applicant's interest, as a practical matter, to provide whatever evidence the applicant can that s. 25(1) applies. While there is no statutory burden on the public body to establish that s. 25(1) does *not* apply, it is obliged to respond to the commissioner's inquiry into the issue and it also has a practical incentive to assist with the s. 25(1) determination to the extent it can.[2]

DISCUSSION

Background

[5] The applicant made the access request at issue during the course of a different inquiry (Inquiry A).[3] Inquiry A also involved Metro Vancouver and ultimately led to Order F18-07.[4] The records at issue in Inquiry A related to a steel galvanizing plant operated by EBCO Metal Finishing LP. The adjudicator found that s. 21 (harm to third party business interests) required Metro Vancouver to withhold some information in 16 pages of records.[5] Subsequently, the applicant argued that Metro Vancouver must disclose those 16 pages under s. 25 because disclosure was in the public interest. The OIPC held another inquiry and determined that s. 25 did not apply.[6]

[6] The applicant's current access request relates specifically to the communications that Metro Vancouver had with its external counsel respecting

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[1] Section 57(1) of FIPPA. Whenever I refer to section numbers throughout the remainder of this order, I am referring to a section of FIPPA.
[2] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 38. Emphasis in original.
[3] Vancouver's initial submission at para. 1. All information summarized in the rest of this paragraph came from Vancouver's initial submission at paras. 1-4.
[4] 2018 BCIPC 9 (CanLII).
[5] *Ibid* at paras. 47-48.
[6] Order F19-16, 2019 BCIPC 18 (CanLII).

Inquiry A. As noted above, the applicant also requested a complete copy of the legal fees charged to Metro Vancouver, including copies of invoices, statements and payment cheques as well as the identification of the individual(s) who requested the legal advice and authorized the payments.[7] Metro Vancouver provided the identity of the individual who requested the legal advice and authorized the payments, but it withheld all communications and legal fee information.

Records in dispute

[7] The records in dispute comprise the following:

- Emails (some with attachments) between Metro Vancouver and its external counsel related to Inquiry A; and
- Communications and information related to the legal fees charged for Inquiry A.

[8] Metro Vancouver did not provide a copy of the records in dispute for my review. Instead, it provided a detailed table of records and affidavit evidence from the lawyer who worked on Inquiry A. After carefully reviewing this evidence, I have decided that I have sufficient information to make my decisions respecting the application of ss. 25 and 14.

Public interest disclosure – section 25

[9] Section 25 requires a public body to disclose information in certain circumstances without delay despite any other provision of FIPPA. This section overrides all of FIPPA's discretionary and mandatory exceptions to disclosure.[8] The relevant parts of s. 25 state:

> **Information must be disclosed if in the public interest**
>
> 25(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.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[7] Applicant's access request to Vancouver dated November 29, 2017.
[8] *Tromp v. Privacy Commissioner*, 2000 BCSC 598 at paras. 16 and 19.

[10] Because s. 25 overrides all other provisions in FIPPA, previous orders have found that it applies in only the clearest and most serious situations.[9] Section 25 sets a high threshold, only intended to apply in serious circumstances.[10]

Risk of significant harm – section 25(1)(a)

[11] Disclosure under s. 25(1)(a) requires an imminent and substantial risk of harm based on an objective assessment.[11] To trigger a requirement for disclosure under s. 25(1)(a), there must be an element of temporal urgency to the risk of harm.[12] Former Commissioner Loukidelis clarified that information about a risk of significant harm includes information that:

- discloses the existence of the risk;
- describes the nature of the risk and the nature and extent of any harm anticipated if the risk comes to fruition and causes harm; or
- allows the public to take or understand actions to meet the risk or mitigate or avoid harm.[13]

According to the British Columbia Supreme Court, significant risks of disease, pestilence, and contamination would justify disclosure under s. 25(1)(a).[14]

Clearly in the public interest – section 25(1)(b)

[12] Disclosure under s. 25(1)(b) requires that the information at issue be "of clear gravity and present significance to the public interest."[15] Previous orders have determined that the duty to disclose under s. 25(1)(b) "only exists in the clearest and most serious of situations where the disclosure is *clearly* (i.e. unmistakably) in the public interest."[16] Former Commissioner Denham clarified that "clearly means something more than a 'possibility' or 'likelihood' that disclosure is in the public interest."[17]

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[9] For example, see Order 02-38, *supra* note 2 at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3.
[10] Order F15-27, 2015 BCIPC 29 (CanLII), at para. 29.
[11] *Clubb v. Saanich (Corporation of The District)*, 1996 CanLII 8417 (BC SC) at para. 30 [*Clubb*].
[12] Investigation Report F16-02, 2016 BCIPC No. 36 at p. 21 [IR F16-02]. Available on the OIPC website at https://www.oipc.bc.ca/investigation-reports/1972.
[13] Order 02-38, *supra* note 2 at para. 56
[14] *Clubb*, *supra* note 11 at para. 30
[15] Order 02-38, *supra* note 2 at para. 65.
[16] *Ibid* at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3. Emphasis in original. See also Order F18-26, 2018 BCIPC 29 (CanLII) at para. 14.
[17] Investigation Report F15-02 at p. 28 [IR F15-02]. Available on the OIPC website at https://www.oipc.bc.ca/investigation-reports/1814.

[13] Additionally, "public interest" does not mean merely that the public would find the information interesting, but rather that the disclosure of the information itself is in the public interest. The British Columbia Supreme Court put it this way:

> The term "public interest" in s. 25(1)(b) cannot be so broad as to encompass anything that the public may be interested in learning and the term is not defined by the various levels of public curiosity.[18]

[14] Furthermore, "public interest" under s. 25(1)(b) does not mean the public's interest in scrutinizing the work of public bodies. As stated by Former Commissioner Loukidelis, s. 25(1)(b) "is not an investigative tool for those who seek to look into the affairs of a public body. It is an imperative requirement for disclosure which is triggered by specific information the disclosure of which is clearly in the public interest."[19]

[15] To determine whether disclosure is clearly in the public interest, I must consider "whether a disinterested and reasonable observer would conclude that the disclosure is plainly and obviously in the public interest."[20] Some of the factors to consider when making this determination include whether disclosure would contribute to educating the public about the matter and whether disclosure would contribute in a substantive way to the body of information already available about the matter.[21] Former Commissioner Denham clarified that I may weigh the interests protected by any of the applicable exceptions to disclosure contained in FIPPA when considering whether disclosure is in the public interest.[22]

Parties' positions

[16] The applicant does not provide detailed submissions respecting s. 25, nor does he explicitly indicate which subsection he believes applies. However, based on what he says, I understand him to claim that both ss. 25(1)(a) and (b) apply. For instance, in his request for review to the OIPC, the applicant asks for disclosure of the information "in the public interest."[23] The applicant also asks that Metro Vancouver "review the situation, and in light of the public interest in the matter, that they make an administrative determination to waive privilege."[24] The applicant says that the public has a general right to know how public bodies utilize public funds.[25] The applicant also describes being part of a community group of residents that care about their environment and have concerns about

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[18] *Clubb*, *supra* note 11 at para. 33.
[19] Order 00-16, 2000 CanLII 7714 (BC IPC), at p. 14.
[20] IR F16-02, *supra* note 12.
[21] *Ibid* at p. 6 and 27.
[22] *Ibid* at p. 38.
[23] Applicant's February 8, 2018 letter to the OIPC at p. 2.
[24] Applicant's February 8, 2018 letter to the OIPC at p. 1.
[25] *Ibid* at p. 2.

the emissions from the EBCO galvanizing plant sitting atop the Brookswood aquifer in an environmentally sensitive area.

[17] Metro Vancouver submits that s. 25(1) does not require the disclosure of the information in dispute. According to Metro Vancouver, the information at issue "is not about a risk of significant harm to the environment or to the health or safety of the public, nor is the disclosure of the information in the records 'clearly in the public interest'".[26] Metro Vancouver argues that the applicant has not provided any information or submissions that "meet the high bar" for the application of s. 25.[27] In Metro Vancouver's view, the applicant has not shown any reason why the protection afforded by solicitor client privilege should be displaced in the circumstances.

[18] Metro Vancouver notes that the applicant has only made "generalized statements about enhanced transparency and accountability of public bodies in relation to how they use public funds."[28] Metro Vancouver contends that these generalized statements do not meet the high threshold for the application of s. 25(1). Metro Vancouver submits the applicant has not shown how the disclosure of the information at issue would contribute in a meaningful way to holding Metro Vancouver accountable for its actions or decisions respecting Inquiry A. While Metro Vancouver recognizes that the applicant does not bear the burden of proof, it argues that he has not met his obligation to explain how s. 25(1) applies in the circumstances.

Analysis and findings – section 25

[19] Applying the legal principles outlined above to the facts before me, I find that neither ss. 25(1)(a) nor (b) apply in the circumstances. My reasons follow.

Risk of significant harm – section 25(1)(a)

[20] The applicant says he has concerns about the environment and the emissions from the EBCO galvanizing plant built atop the Brookswood aquifer in an environmentally sensitive area. However, the applicant has not provided any evidence to support his belief that the records contain information about such matters or are about a risk of significant harm to the environment or the health or safety of anyone. Instead, the evidence before me indicates that the information at issue is about Metro Vancouver's interactions with its lawyers in defence of its access to information decision related to Inquiry A.

[21] As described above, s. 25(1)(a) requires that the information at issue be about an imminent and substantial risk of harm. In my view, communications

[26] Vancouver's initial submission at para. 30.
[27] *Ibid* at para. 36.
[28] *Ibid* at para. 39.

between Vancouver and its lawyers respecting Inquiry A and information about legal fees is not information about a risk of harm, let alone a significant risk. Therefore, I find that s. 25(1)(a) does not apply.

Clearly in public interest – section 25(1)(b)

[22] As previously noted, the information at issue here comprises legal fee information and communications between Metro Vancouver and its lawyers. I do not understand how or why this information passes the high threshold for disclosure under s. 25(1)(b) and the applicant has not explained.

[23] The applicant argues that it is in the public interest to disclose this information so the public will know how Metro Vancouver has utilized taxpayer funds. However, the applicant's statement that the public has a general right to know how public funds are being spent does not establish that the information at issue is "of clear gravity and present significance to the public interest."[29]

[24] In my view, the disinterested and reasonable observer would not conclude that disclosure is plainly and obviously in the public interest. While I accept that the applicant is motivated by a desire to know what the information might reveal, public interest is not defined by one individual's curiosity and s. 25(1)(b) is not an investigative tool for scrutinizing the affairs of a public body. In my view, the disclosure of the communications between Metro Vancouver and its lawyers and fee information respecting Inquiry A would not contribute to educating the public about Metro Vancouver's use of public funds.

[25] Because s. 25(1) overrides all the FIPPA exceptions to access, it is important to weigh the public interest in disclosure under s. 25(1) against the interests protected by the FIPPA exceptions to disclosure. The applicable exception here is s. 14 which allows public bodies to withhold information protected by solicitor client privilege. Canadian courts views solicitor client privilege as a substantive legal right with constitutional value,[30] and a principle of fundamental justice.[31] I am not satisfied that in this case the "public's general right to know how public funds are being utilized"[32] outweighs the vital interests protected by s. 14.

[26] For all these reasons, I find that s. 25(1)(b) does not apply. I will now consider the application of s. 14.

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[29] Order 02-38, *supra* note 2 at para. 65.
[30] *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 (CanLII) at para. 88 [*Central Coast*].
[31] *Canada (National Revenue) v. Thompson*, 2016 SCC 21 (CanLII) at para. 17.
[32] Applicant's February 8, 2018 letter to the OIPC at p. 2.

Solicitor client privilege – section 14

[27] As mentioned above, s. 14 allows public bodies to refuse to disclose information protected by solicitor client privilege. Section 14 encompasses two kinds of privilege recognized at common law: legal advice privilege and litigation privilege.[33] Metro Vancouver claims legal advice privilege over the information in dispute.

[28] Legal advice privilege arises out of the unique relationship between client and lawyer.[34] The Supreme Court of Canada describes its purpose in the following terms:

> Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent… The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought… Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients.[35]

[29] To this end, legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking, formulating and giving legal advice. In order for legal advice privilege to apply to a communication (and records related to it),[36] the communication must:

1) be between a solicitor and client;

2) entail the seeking or giving of legal advice; and

3) the parties must have intended it to be confidential.[37]

[30] The scope of legal advice privilege extends beyond the explicit seeking and giving of legal advice to include communications that make up "part of the continuum of information exchanged [between solicitor and client], provided the object is the seeking or giving of legal advice."[38]

[31] Legal advice privilege also extends to a lawyer's fee accounts and billing information. A rebuttable presumption of privilege applies to this type of

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[33] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at para. 26.
[34] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 839 [*Solosky*].
[35] *Smith v. Jones*, 1999 CanLII 674 (SCC) at para. 46.
[36] *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22.
[37] *Solosky*, *supra* note 34 at p. 837. Another formulation of this test appears in *R. v. B.*, *supra* note 36 at para. 22.
[38] *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 (CanLII) at para. 83.

information because the courts have found it intrinsically connected to the solicitor client relationship and the communications inherent in it.[39]

[32] A party that wants access to a lawyer's fee information can rebut the presumption by establishing that there is no reasonable possibility that production will permit the deduction or acquisition of communications protected by solicitor client privilege.[40] For present purposes, this means that the applicant must rebut the presumption of privilege by way of evidence or argument.[41] The question in such an inquiry becomes: could an assiduous inquirer, aware of background information,[42] deduce, infer or otherwise acquire communications protected by solicitor client privilege?[43]

Parties' positions

[33] Metro Vancouver submits that the records at issue are confidential communications between Metro Vancouver and its lawyers that directly relate to the seeking, formulating and giving of legal advice in relation to Inquiry A.[44]

[34] In discussing the rebuttable presumption respecting legal fees, Metro Vancouver notes that this is the third inquiry initiated by the applicant arising out of the request for records dealt with in Order F18-07. According to Metro Vancouver, disclosure of the legal fee information would reveal to the applicant the amounts Metro Vancouver paid at various stages of Inquiry A and, more generally, the costs Metro Vancouver has incurred and may incur in the future in defending its access decisions under FIPPA.

[35] The applicant concedes that Metro Vancouver has the legal authority to withhold documents subject to solicitor client privilege but notes that s. 14 is a discretionary exception under FIPPA. Accordingly, the applicant asks Metro Vancouver to waive privilege in light of the public interest in the matter.[45] When discussing legal fees, the applicant contends that "the attachment of privilege to legal fees and costs is arguably not a completely settled area of law."[46] Therefore, the applicant says that this information should be released, particularly because of the public interest in its disclosure. Alternatively, the

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[39] *Maranda v. Richer,* 2003 SCC 67 (CanLII) at para. 33 [*Maranda*]; *Donell v. GJB Enterprises Inc.,* 2012 BCCA 135 (CanLII) at para. 49 [*Donell*].
[40] *Donell*, *ibid* at para. 59.
[41] *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner),* 2019 BCSC 1132 (CanLII) at para. 55.
[42] *Central Coast*, *supra* note 30 at para. 112.
[43] *Donell*, *supra* note 39 at para. 58; see also *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 (CanLII) at para. 37.
[44] Vancouver's initial submission at para. 15. The remainder of the information summarized in this section comes from this submission at paras. 25-26 and 29.
[45] Applicant's February 8, 2018 letter to the OIPC at p. 2.
[46] *Ibid*.

applicant requests that Metro Vancouver provide an "agglomerate accounting for all legal fees associated with this file."[47]

Analysis and findings – section 14

[36] I have categorized the information in dispute and will discuss it as follows:

- Communications and information related to the legal fees;
- Communications related to the retainer; and
- Communications related to the legal work itself.

For the reasons set out below, I find that legal advice privilege protects each of these three categories of information.

[37] I begin with the communications and information related to legal fees. As described above such information is presumptively privileged. The applicant contends that this is "arguably not a completely settled area of law."[48] I disagree. The Supreme Court of Canada established the rebuttable presumption related to legal fees and declared that the party seeking access to legal fees bears the burden of rebutting the presumption.[49] Metro Vancouver's evidence establishes that this information relates to legal fees; therefore, I find it presumptively privileged. The applicant has not provided evidence or argument capable of rebutting this presumption. Therefore, legal advice privilege applies and Metro Vancouver can withhold the information related to legal fees under s. 14.

[38] I also find that legal advice privilege protects the communications related to the retainer and the legal work itself; therefore, s. 14 applies. These communications only involved Metro Vancouver employees and employees of the law firm retained by Metro Vancouver for Inquiry A. Therefore, I find that these were solicitor client communications. Additionally, the affidavit evidence from the lawyer directly involved in the communications indicates that they were confidential and the table of records shows that no third parties were involved in the communications.[50] Given this, I find that the parties involved in these two categories of communication intended them to be confidential. Additionally, as I explain below, I also find that these two categories of communication entail the seeking and giving of legal advice.

[39] The courts and previous OIPC orders have found that the terms of the solicitor client relationship contained in a retainer agreement and associated documents relate directly to communications involved in the seeking, formulating

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[47] *Ibid*.
[48] *Supra* note 45.
[49] *Maranda*, *supra* note 39 at paras. 33 and 34.
[50] Lawyer EV Affidavit at para. 5.

or giving of legal advice.[51] I make the same finding here. Based on Metro Vancouver's submissions and evidence, I am satisfied that all the communications between Metro Vancouver and its lawyers that relate to the retainer are about matters that pertain to the seeking and giving of legal advice. Therefore, Metro Vancouver can withhold these communications under s. 14.

[40] Lastly, the uncontested affidavit evidence establishes that the communications related to the legal work comprise:

- communications related to the preparation for Inquiry A, including identifying and obtaining relevant information and documents;
- communications involving legal advice on Inquiry A;
- communications in which counsel obtains instructions; and
- communications reporting on the status of Inquiry A.[52]

In my view, all these communications entail the seeking and giving of legal advice. Therefore, legal advice privilege protects them and s. 14 applies.

CONCLUSION

[41] For the reasons given above, under s. 58 of FIPPA, I confirm Metro Vancouver's decision that s. 25 does not apply to the information and its decision to refuse to disclose the information under s. 14.

December 19, 2019

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

OIPC File No.: F18-73650

[51] *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 1996 CanLII 1780 (BC SC) at para. 16; Order F15-15, 2015 BCIPC 16 (CanLII) supra note 4 at para. 17; Order F13-15, 2013 BCIPC 18 (CanLII) at para. 16; Order F05-10, 2005 CanLII 11961 (BC IPC) at para. 13; and Order F19-01, 2019 BCIPC 1 (CanLII) at para. 20.
[52] Lawyer EV affidavit at para. 7(f).