



Order F20-30

## CITY OF KELOWNA

Laylí Antinuk  
Adjudicator

June 25, 2020

CanLII Cite: 2020 BCIPC 36  
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**Summary:** The applicant requested legal invoices paid by the City of Kelowna in respect of a specific file. Kelowna refused to provide the requested information citing s. 14 (solicitor client privilege) of FIPPA. The adjudicator found that s. 14 applied and confirmed Kelowna's decision to withhold the requested information.

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

### INTRODUCTION

[1] The applicant requested that the City of Kelowna (Kelowna) provide a copy of all invoices for legal fees charged in relation to a previous inquiry with the Office of the Information and Privacy Commissioner (OIPC). Kelowna withheld the requested invoices under s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the OIPC to review Kelowna's decision to withhold information under FIPPA. Mediation did not resolve the issues in dispute and the applicant requested an inquiry. Both parties provided submissions for the inquiry.

### ISSUE

[3] In this inquiry, I will decide whether s. 14 authorizes Kelowna to withhold the information in dispute. Kelowna bears the burden of proving that the applicant has no right to access the information.<sup>1</sup>

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<sup>1</sup> Section 57(1) of FIPPA.

## DISCUSSION

### ***Background***

[4] As noted, the applicant requested legal invoices generated in relation to Kelowna's legal representation for a previous OIPC inquiry. That inquiry (the 2018 inquiry) also involved the applicant and ultimately resulted in Order F18-11.<sup>2</sup> The 2018 inquiry arose as a result of Kelowna's decision to impose a fee for processing an access request it received from the applicant.<sup>3</sup> Kelowna retained external counsel to assist with its participation in the 2018 inquiry.<sup>4</sup> The applicant then made the current access request so that he could determine how much Kelowna spent on external counsel's legal services for the 2018 inquiry.<sup>5</sup> Kelowna refused to release the requested invoices.

### ***Records in dispute***

[5] The responsive records comprise three invoices (totalling 6 pages) sent to Kelowna by its external legal counsel. Kelowna withheld all three invoices in their entirety under s. 14. Kelowna provided the invoices on an *in camera* basis for my review in this inquiry.

### ***Solicitor client privilege – section 14***

[6] Section 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.<sup>6</sup> While it does not explicitly say so, I understand that Kelowna claims legal advice privilege over the information in dispute.

[7] Legal advice privilege applies to confidential communications between solicitor and client made for the purpose of seeking and giving legal advice.<sup>7</sup> This form of privilege is a substantive civil and legal right that arises out of the unique relationship between client and lawyer.<sup>8</sup> Canadian courts view legal advice privilege as a principle of fundamental justice with constitutional dimensions and value.<sup>9</sup> Given its fundamental importance, the Supreme Court of Canada has

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<sup>2</sup> 2018 BCIPC 14.

<sup>3</sup> Applicant's submission at para. 7; Kelowna's reply submission at para. 7.

<sup>4</sup> City Clerk's Affidavit at para. 5.

<sup>5</sup> Applicant's submission at para. 5.

<sup>6</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 839; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 at para. 49.

<sup>9</sup> *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 17; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 20; *School District No. 49*

said that legal advice privilege “must be as close to absolute as possible to ensure public confidence and retain relevance.”<sup>10</sup>

[8] To properly protect this vital aspect of our justice system, the Supreme Court of Canada decided that a rebuttable presumption of privilege applies to a lawyer’s billing information, explaining:

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. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum.<sup>11</sup>

[9] A party who wants access to a lawyer’s fee information can rebut the presumption by proving that there is no reasonable possibility that production will permit the deduction or acquisition of communications protected by legal advice privilege.<sup>12</sup> For present purposes, this means that the applicant must rebut the presumption of privilege by way of evidence or argument.<sup>13</sup> The questions in such an inquiry are:<sup>14</sup>

- 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?

#### *Parties’ positions*

[10] Kelowna submits that the records consist of confidential communications it had with its lawyers that directly relate to the seeking, formulating or giving of

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(*Central Coast*) v. *British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 at para. 88 [*Central Coast*].

<sup>10</sup> *R. v. McClure*, 2001 SCC 14 at para. 35.

<sup>11</sup> *Maranda v. Richer*, 2003 SCC 67 at para. 33.

<sup>12</sup> *Donell v. GJB Enterprises Inc.*, 2012 BCCA 135 at para. 59 [*Donell*].

<sup>13</sup> *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at para. 55.

<sup>14</sup> *Central Coast*, *supra* note 9 at para. 122; *Donell*, *supra* note 12 at para. 58; see also *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 at para. 37.

legal advice.<sup>15</sup> Kelowna argues that legal advice privilege presumptively applies because the records consist of lawyers' invoices and asserts that the applicant has not discharged his onus to rebut the presumption. Kelowna further contends that the applicant is an assiduous inquirer with background information that he could use to deduce privileged communications from the information in dispute. Kelowna argues that the applicant's participation in the 2018 inquiry increases the possibility that disclosure of the invoices will reveal privileged communications because the applicant has so much background information (e.g. he received a copy of Kelowna's 2018 inquiry submissions).

[11] Kelowna also notes that the applicant is actively pursuing a number of other FIPPA disputes with Kelowna. As such, Kelowna argues that disclosure of the disputed information would allow the applicant to understand and deduce: (a) privileged communications respecting the 2018 inquiry; and (b) Kelowna's "greater strategy" and its relationship to external counsel for current ongoing FIPPA disputes with the applicant.<sup>16</sup>

[12] Kelowna's City Clerk says he is concerned that even if the invoices were severed to disclose only the total fees, it would still allow a person to deduce detailed information regarding communications between Kelowna and its lawyers, such as the amount of time spent and the level of preparation required for the 2018 inquiry. The City Clerk also states, "even though the 2018 inquiry is completed, disclosure of the Records would allow inferences to be made about the City's litigation strategy as it relates to OIPC inquiries specifically, and other administrative and legal proceedings generally."<sup>17</sup>

[13] The applicant submits this inquiry is not about solicitor client privilege, instead it is "about how a public body uses taxpayer monies."<sup>18</sup> The applicant says that he does not want to know the legal advice or legal strategy Kelowna's lawyers may have provided. Rather, he only wants to be able to determine the gross amount of taxpayer dollars Kelowna spent on legal services for the 2018 inquiry. The applicant points out that as a party in the 2018 inquiry, he already received the submissions Kelowna made in that inquiry. He says Kelowna's lawyers prepared those submissions presumably as a culmination of legal advice or strategies. From this, I take the applicant to argue that knowing the total amount Kelowna spent on legal fees will not reveal anything about legal advice or strategies that he does not already know.

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<sup>15</sup> Kelowna's initial submission at para. 6. The information in the remainder of this paragraph and the one that follows comes from Kelowna's initial submission at paras. 8-10; its reply submission at paras. 6-7 and 10-11; and the City Clerk's Affidavit at paras. 9-10.

<sup>16</sup> Kelowna's reply submission at para. 10.

<sup>17</sup> The information in this paragraph comes from the City Clerk's Affidavit at paras. 9-10.

<sup>18</sup> Applicant's submission at para. 2. The information in the remainder of this paragraph and paragraphs 14-15 comes from the Applicant's submission at paras. 3-5 and 7-9.

[14] The applicant also contends that if Kelowna releases the invoices with only the bottom line amount shown, this “could in no manner or form” disclose any confidential communications between Kelowna and its lawyers.<sup>19</sup> To support this argument, the applicant highlights the fact that he has not requested a breakdown of hours spent, billing rates, or disbursements that might make up the total amount captured in the invoices. The applicant also raises s. 6(2) of FIPPA, which obliges public bodies to create records for applicants in certain circumstances. The applicant says Kelowna could use its accounting records to create a record showing the total amount of the legal fees for the 2018 inquiry.

[15] In addition, the applicant expresses his frustration with the process and says he finds it bewildering that Kelowna is expending large sums of money for staff time and legal representation in order to prevent him from having access to this information. He also draws my attention to the “gross inequality” that exists between his own resources – as a self-represented, private citizen with limited FIPPA experience – and the resources of Kelowna with its experienced staff, substantial financial resources, and its ability to engage the services of a leading law firm for legal representation.<sup>20</sup> He asks that I consider this inequality in the inquiry.

*Applicant’s submissions respecting inequality*

[16] Prior to delving into my privilege analysis, I will address the applicant’s request that I consider the inequality between his resources and Kelowna’s. I have reflected upon the applicant’s frustrations and his experience of inequality. It is undeniable that public bodies generally have far greater resources than the vast majority of private citizens. In my view, this disparity is one of the reasons Offices of the Legislature, such as the OIPC, exist: to level the playing field between citizens and public bodies by impartially and independently investigating and adjudicating their disputes. In this case, I have applied the relevant case law to the facts impartially and to the best of my abilities.

*Analysis and findings – legal advice privilege*

[17] The information in dispute consists of three invoices sent to Kelowna by external counsel for legal work. Kelowna says it received these invoices in confidence and its evidence indicates that the invoices include descriptions of work completed, billing rates of lawyers involved, and the total costs and disbursements Kelowna’s lawyers charged for legal representation in connection with the 2018 inquiry.<sup>21</sup> With the applicable case law in mind, I find it clear that legal advice privilege presumptively applies to the invoices.

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<sup>19</sup> *Ibid* at para. 9.

<sup>20</sup> *Ibid* at para. 3.

<sup>21</sup> City Clerk’s Affidavit at para. 8. Kelowna did not provide this evidence on an *in camera* basis.

[18] As explained above, in order to rebut this presumption, the applicant must show that the answer to the following two questions is “no”.

- 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?

[19] In this case, the applicant has requested lawyers’ billing information related to a specific legal dispute that he was intimately involved in. While the applicant has clarified that he seeks only the total amount spent on legal fees, that total relates to a single, specific matter. This distinguishes the present case from previous OIPC orders that have found the presumption rebutted in respect of access requests for total legal fee amounts. For example, OIPC adjudicators have found the presumption rebutted when the information at issue consisted of:

- The aggregate totals of legal fees paid to different law firms in specified years (i.e. it was impossible to determine whether the total amounts related to any specific matter).<sup>22</sup>
- The combined total of legal fees and settlement amounts for specific legal matters (i.e. it was impossible to determine the total amount of legal fees because legal fees were combined with settlement amounts).<sup>23</sup>
- The total amount of legal fees paid in relation to a specific investigation involving multiple employees and contractors such that the legal fees could pertain to any one or more legal matters (i.e. it was impossible to determine whether the total amount related to any specific legal matter).<sup>24</sup>
- The total fee amounts on legal invoices when it was impossible to deduce what specific matters those invoices related to.<sup>25</sup>

[20] Unlike those previous cases, the information in dispute in this case all relates to a single matter: the 2018 inquiry. As noted, the applicant participated in the 2018 inquiry as a party and therefore has extensive background information related to it. For instance, the applicant received Kelowna’s submissions, which Kelowna’s lawyers prepared.

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<sup>22</sup> Order F15-16, 2015 BCIPC 17 at paras. 23, 30-32 and 35-38.

<sup>23</sup> Order F17-21, 2017 BCIPC 22 at paras. 23 and 29-30.

<sup>24</sup> Order F15-64, 2015 BCIPC 70 at para. 25.

<sup>25</sup> Order F17-55, 2017 BCIPC 60 at para. 36.

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[21] With this in mind, I find that there is a reasonable possibility that disclosure of the information in dispute, including the total amount of legal fees spent for the 2018 inquiry, will directly or indirectly reveal privileged communications. The disputed information could be used by an assiduous inquirer – with precisely the type of background information the applicant has – to deduce privileged communications. For example, having seen Kelowna’s submissions for the 2018 inquiry, if the applicant knew how much Kelowna’s lawyers charged, he could determine how much time and effort Kelowna instructed its lawyers to put into the drafting of those submissions. Knowing the total amount of legal fees could also allow the applicant to determine Kelowna’s position regarding the merits and importance of the issues addressed in the 2018 inquiry and how many times Kelowna communicated with its lawyers respecting the 2018 inquiry. For these reasons, I find that the presumption of privilege stands.

[22] In short, Kelowna has established that legal advice privilege protects the invoices, so s. 14 authorizes Kelowna to withhold them.

## **CONCLUSION**

[23] For the reasons given above, under s. 58(2) of FIPPA, I confirm Kelowna’s decision to withhold the information in dispute under s. 14.

June 25, 2020

## **ORIGINAL SIGNED BY**

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Laylí Antinuk, Adjudicator

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