Order F20-42

MINISTRY OF ATTORNEY GENERAL

Elizabeth Barker
Director of Adjudication

October 1, 2020

CanLII Cite: 2020 BCIPC 51
Quicklaw Cite: [2020] B.C.I.P.C.D. No. 51

Summary: An applicant requested access to all records related to the province's policies and procedures regarding solicitor client privilege. The Ministry of Attorney General (Ministry) refused to disclose the information under s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act*. The applicant claimed that the records should be disclosed under s. 25 (public interest override). The adjudicator found that s. 25 did not apply and confirmed the Ministry's decision to refuse access under s. 14.

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

INTRODUCTION

[1] An applicant requested the Ministry of Attorney General (Ministry) provide her a copy of all records related to the Province of British Columbia's policies and procedures regarding solicitor client privilege. The Ministry disclosed some records but withheld other records under s. 14 (solicitor client privilege) 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 the Ministry's decision. The applicant also claimed that disclosure of the records was in the public interest under s. 25 of FIPPA. Mediation failed to resolve either issue and the applicant requested that these matters proceed to an inquiry.

ISSUES

[3] The issues to be decided in this inquiry are as follows:

1. Is the Ministry required to disclose the information in dispute under s. 25?
2. Is the Ministry authorized by s. 14 of FIPPA to refuse the applicant access to the information in dispute?

[4] Section 57(1) of FIPPA places the burden on the Ministry to prove that the applicant has no right of access to the information being withheld under s. 14. FIPPA does not say who has the burden of proving that s. 25 applies. However, previous BC orders have said that it is in the interests of both parties to provide the adjudicator with whatever evidence and argument they have regarding s. 25.[1]

DISCUSSION

Background

[5] The applicant is a resident of a community in the interior of the province. In 2017 she decided to become involved in providing public input into a proposed forest stewardship plan, and she says that she set about educating herself by conducting online searches and taking a government-sponsored course. She found a document on the Ministry of Forests, Lands and Natural Resource Operations (FLNRO) website that contained an excerpt from a 2010 legal opinion that the Ministry (at that time called the Ministry of Justice) provided to FLNRO.[2] She concluded that the legal opinion, which was about forest stewardship plan matters, was not being followed by FLNRO and the forest industry.

[6] The applicant and two other individuals in her community formed a working group and decided to write to the Attorney General to ask him to ensure forest stewardship plans were made in accordance with the law. They emailed the Deputy Attorney General and referenced the excerpt from the legal opinion that the applicant had found online.

[7] The Deputy Attorney General replied:

> Please be advised that all legal advice provided by the Ministry of Justice is subject to solicitor-client privilege. Any excerpts of legal advice that you may have received or discovered are and remain privileged and confidential, and the Minister does not waive privilege over any portion of this advice. Please ensure that you delete, return or destroy any copies of this legal advice that remain in your possession, and do not share or copy such advice to any other person.[3]

[8] What followed was a protracted exchange of correspondence between the working group's lawyer and the Deputy Attorney General. The working group wanted to be able to freely use the excerpt from the legal opinion during forestry-

[1] For example, see: Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 39.
[2] This legal opinion is not a record at issue in this inquiry.
[3] Applicant's affidavit exhibit B.

related public participation processes. The working group asserted that FLNRO had waived privilege when it posted the legal advice on its public website. The Deputy Attorney General's position was that the Ministry of Justice gave the legal opinion to FLNRO, the opinion had been posted in error on FLNRO's website, it had since been removed, solicitor client privilege over government information can only be waived with the approval of the Deputy Attorney General, and there had been no waiver of privilege.

[9] The working group's lawyer challenged the Deputy Attorney General to provide the authority behind the statement that privilege can only be waived with the approval of the Deputy Attorney General. The applicant was not satisfied with the Deputy Attorney General's responses, so she made the FIPPA access request that is the subject of this inquiry.

[10] The working group ultimately made their submission in the forestry-related public participation process without being able to use the legal opinion excerpt that the Ministry claimed was protected by privilege.[4]

Records in Dispute

[11] There are three records at issue in this inquiry. The legal opinion excerpt about the forestry matter, which the applicant found on the FLNRO website, is not one of the records in dispute.

[12] The Ministry did not provide the disputed records for my review. Instead, they are described in an affidavit from a senior legal counsel with the Ministry's Office of the Assistant Deputy Attorney General, Legal Services Branch (Senior Legal Counsel). Exhibit A to her affidavit describes the records as follows:

> Record 1: Criminal Search Warrants, Policy No. 09CSW.00, dated January 2009;
>
> Record 2: Waiver of Solicitor Client Privilege and the Offices of the Ombudsman and Information and Privacy Commissioner, Policy No. 95WSCPOIPC.00, dated December 1995; and
>
> Record 3: "Professional Standards Committee – Audrey Lieberman Memo, dated August 2008.

[13] These records comprise 22 pages, all of which have been completely withheld under s. 14.

[14] Although the Ministry did not provide the records for my review, I determined that the evidence in the Senior Legal Counsel's affidavit was

[4] Applicant's affidavit at exhibit I.

sufficient to decide whether s. 14 properly applied. The commissioner has the power pursuant to s. 44(1) of FIPPA to order production of records over which solicitor client privilege is claimed. However, given the importance of solicitor client privilege to the legal system, and in order to minimally infringe on that privilege, the commissioner will only order production when absolutely necessary to adjudicate the issues in an inquiry. In this case, I found it was not necessary, based on the evidence that was given, to see the records in order adjudicate the s. 14 issue.

Solicitor client privilege, s. 14

[15] 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.[5] Although the Ministry does not say which type of privilege it is claiming, I understand it is claiming legal advice privilege because it submits that the test is the one previous OIPC orders have used for legal advice privilege. The test says that for legal advice privilege to apply the following conditions must be satisfied:

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.[6]

[16] Not every communication between solicitor and client is privileged, but if the above four conditions are satisfied, then privilege applies to the communications and the records relating to it.[7]

Ministry's submission

[17] The Ministry submits that the records withheld under s. 14 are legal opinions provided to the Ministry's Legal Services Branch (LSB) by LSB lawyers.[8]

[18] The Senior Legal Counsel provides background about the Ministry and LSB. She explains that in addition to being a member of Executive Council, the Attorney General is the chief law officer of the Crown. In that role, the Attorney

---

[5] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26.
[6] *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22; *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 [*Pritchard*] at paras. 15-16; *Canada v. Solosky*, 1979 CanLII 9 (SCC) [Solosky] at pp. 829 and 837.
[7] Solosky, *ibid* at p. 829.
[8] Ministry's initial submission at para. 25.

General is the legal advisor to the Lieutenant Governor, cabinet and government ministries. The Attorney General also represents government and ministries in legal proceedings, is responsible for criminal prosecutions in the province, represents the public interest in civil litigation, is responsible for drafting legislation and ensures the administration of public affairs is in accordance with the law. The Senior Legal Counsel says that LSB supports the Attorney General's mandate by providing or overseeing all legal services to government with respect to civil matters on behalf of the Attorney General.[9]

[19] The Senior Legal Counsel says that the Acting Assistant Deputy Attorney General has delegated to her the responsibility for reviewing and signing-off on freedom of information access requests. She says that she has reviewed the records in dispute and they are accurately described in Exhibit A to her affidavit (at paragraph 12 above).

[20] She says that based on her review of the records and her knowledge of LSB operations, she believes the records are legal opinions provided by legal counsel to LSB, and they were intended to be confidential in nature.[10] She says the records "provide legal advice to LSB lawyers and serve to inform the legal basis for lawyers' practice on various issues addressed in the opinions. As such some are described as policies intended to provide guidance on legal issues, though they are also confidential legal opinions."[11] She says that in this context the LSB lawyer providing the opinions is advising LSB as the client.

[21] The Senior Legal Counsel says that Record 1 (titled "Criminal Search Warrants") sets out the legal basis for lawyers to protect solicitor client privilege in the event of a search warrant. She says, "This legal basis includes substantive legal analysis."[12] She adds that Record 1 also directs legal counsel on what action to take to preserve privilege and provides the legal grounds for such action.

[22] She says that Record 2 (titled "Waiver of Solicitor Client Privilege and the Offices of the Ombudsman and Information and Privacy Commissioner") is a 25-year old memorandum from a practicing lawyer who was also the Assistant Deputy Attorney General at the time. She says this record "includes substantive legal analysis on the subject of waiver of solicitor client privilege in particular circumstances."[13]

[23] The Senior Legal Counsel describes Record 3 (titled "Professional Standards Committee – Audrey Lieberman Memo") as a legal memorandum

[9] Senior Legal Counsel's affidavit at para. 6.
[10] Senior Legal Counsel's affidavit at para. 10.
[11] Senior Legal Counsel's affidavit at para. 12.
[12] Senior Legal Counsel's affidavit at para. 13.
[13] Senior Legal Counsel's affidavit at para. 14.

about solicitor client privilege that was provided to LSB's Professional Standards Committee. She says that she requested this legal opinion on behalf of the Office of the Assistant Deputy Attorney General in 2008.

Applicant's submission

[24] The applicant submits that the Ministry has not met its burden of proving that it is authorized to refuse to disclose the records under s. 14. She says that in order to prove the Ministry is authorized to refuse to disclose the records under s. 14, it must do more than establish that the records are protected by solicitor client privilege. She argues that the Ministry must also prove that the interests protected by the privilege are not outweighed by the public's interest in disclosure. The applicant submits that in this case it is in the public interest to disclose the records in dispute and there "are no countervailing interests at stake and none in evidence."[14] The applicant says that it is in the public interest that other lawyers and the public be able to see the policies to ensure they are "based upon sound and up to date legal analysis."[15]

[25] Linked to the applicant's argument about competing interests, the applicant contends that the Ministry has not proven s. 14 applies because the Ministry has not established that there will be any harm from disclosure. She says:

> There is no apparent evidence of any pressing need to withhold. All the Affidavit of [the Senior Legal Counsel] asserts is that disclosure of the policies "would have the effect of disclosing the substance of confidential legal advice". There is no evidence that this would result in any adverse consequences that could in any way meet the burden the Public Body must meet.[16]

[26] The applicant also submits that solicitor client privilege applies in the context of "private law" but it does not apply to the records at issue because there are no private interests at stake.[17] She characterizes the issue in this case as being about "public law" and disclosure of public information because it involves government policy. She asserts that s. 14 only applies when disclosure may violate "private solicitor-client privilege rights of particular individuals".[18]

Ministry's reply

[27] The Ministry says that the applicant's submission about private and public law rests on the proposition that the common law of solicitor client privilege does

[14] Applicant's submission at para. 54.
[15] Applicant's submission at para. 40.
[16] Applicant's submission at para. 39.
[17] Applicant's submissions at paras. 44-50.
[18] Applicant's submission at para. 49.

not apply to public bodies. It says that this is inconsistent with well-established jurisprudence, including orders of the OIPC. The Ministry cites several cases which state that solicitor client privilege applies to government in the same way as it applies to private parties and that there is no distinction between the application of the privilege under the common law and its application under s. 14.[19]

Analysis and findings

[28] I accept the Senior Legal Counsel's evidence regarding the records. Her evidence satisfies me that the records are communications between LSB as client and its solicitors, specifically LSB legal counsel. I am also persuaded by her evidence that all three records contain solicitors' legal analysis and direction to LSB about legal matters and are, thus, directly related to the provision of legal advice.

[29] The Senior Legal Counsel also says that the records are "confidential legal opinions". She does not say what information she considered that led her to conclude that these communications were "confidential". However, her evidence about who provided the records and who was the recipient satisfies me that these records were intended to be confidential communications. There is nothing before me that suggests that the disputed records were intended to be communications between anyone other than solicitor and client.

[30] I have considered the applicant's arguments about why government and/or public bodies cannot claim solicitor client privilege, but I am not persuaded by what she says. The applicant does not cite any authority to support her assertions, and the caselaw is very clear that solicitor client privilege and s. 14 can apply to government and to a public body's communications with its lawyers.[20]

[31] I am also not swayed by the applicant's argument that s. 14 and solicitor client privilege apply only in a private law context and they cannot apply to policy records that relate to how government operates. The applicant does not provide any caselaw that supports her claim on that point. I am not persuaded that there is any distinction between the application of solicitor client privilege at common law and under s. 14 of FIPPA in the way the applicant suggests. The courts have

---

[19] *Alberta (Information and Privacy Commissioner) v. University of Calgary,* 2016 SCC 53; ***British Columbia (Attorney General) v. Lee***, 2017 BCCA 219 (CanLII); *Edmonton Police Services v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10; Order F20-08, 2020 BCIPC 9 (CanLII).

[20] *R. v. Campbell,* 1999 CanLII 676 (SCC) at para. 50; *Pritchard, supra* note 6 at paras. 19-21; *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 (CanLII) at paras. 19-37; *Stevens v. Canada (Prime Minister)*, 1998 CanLII 9075 (FCA) at para. 22. See also numerous OIPC orders, for instance Order F20-08, 2020 BCIPC 9 (CanLII), Order F19-33, 2019 BCIPC 36 and Order F18-18 BCIPC 21.

clearly said that the purpose of s. 14 is to ensure that what would at common law be the subject of solicitor client privilege remains protected.[21]

[32] The applicant also argues that the Ministry has failed to meet its burden because it has not shown that there would be any adverse consequences from disclosing the substance of any confidential legal advice in the records. In my view, the applicant's argument is premised on an incorrect assumption that solicitor client privilege is a harms-based exception to disclosure. Solicitor client privilege is a class-based privilege and whether it applies to a record depends on whether the test for privilege is met. There is no requirement to weigh competing interests or harm from disclosure in the way that the applicant suggests.[22] The applicant did not provide any caselaw, and I am not aware of any, that supports her assertion that this is the way solicitor client privilege operates in the common law or in the context of s. 14 of FIPPA.

[33] In conclusion, I find that the Ministry has proven that it is authorized to refuse to disclose the records under s. 14 because they are protected by solicitor client privilege.

Public Interest - s. 25

[34] The applicant submits that the information in dispute should be disclosed pursuant to s. 25. Section 25 of FIPPA requires public bodies to proactively disclose information about a risk of significant harm or when disclosure is clearly in the public interest. Section 25 reads as follows:

> 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.
>
> (3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify
>
> (a) any third party to whom the information relates, and
>
> (b) the commissioner.

[35] Section 25 imposes an obligation to disclose information even if there has been no request for the information. This obligation overrides every other section in FIPPA, including the mandatory exceptions to disclosure found in Part 2 and the privacy protections contained in Part 3. Given this broad override of privacy

---

[21] *College*, *supra* note 5 at para. 26; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* 1996 CanLII 1780 (BCSC) at para 35.

[22] *R. v McClure*, 2001 SCC 14 at para 31; *R. v. Gruenke*, 1991 CanLII 40 (SCC) at para. 26.

interests, the threshold for proactive disclosure under s. 25 is very high, and s. 25 only applies in the clearest and most serious situations.[23]

[36] The parties agree that the issue here is whether s. 25(1)(b) applies.

Section 25(1)(b) - Clearly in the public interest

[37] What constitutes "clearly in the public interest" is contextual and determined on a case-by-case basis. A public body must consider whether a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that the disclosure is plainly and obviously in the public interest. [24]

[38] The first question to answer is whether the information concerns a matter that engages the public interest. A public body should consider the following factors when deciding if the matter is one that invokes s. 25(1)(b):

- is the matter the subject of widespread debate or discussion by the media, the Legislature, Officers of the Legislature or oversight bodies?
- does the matter relate to a systemic problem rather than to an isolated situation?

[39] This is not to say that the matter must be the subject of widespread public debate. There may well be situations where the matter is not currently of public concern or known to the public, yet it clearly engages the public interest.

[40] Once it is determined that the information is about a matter that engages the public interest, the public body should go on to consider the nature of the information to determine if it meets the high threshold for disclosure. The factors to consider include whether the disclosure would:

- contribute to educating the public about the matter;
- contribute in a substantive way to the body of information that is already available;
- facilitate the expression of public opinion or allow the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions?

---

[23] See, for example, Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3.

[24] For the principles discussed here, see also OIPC Investigation Report F16-02 at pp. 26-27 (https://www.oipc.bc.ca/reports/investigation-reports/) and the OIPC guidance document titled "Section 25: The Duty to Warn and Disclose", December 2018 (https://www.oipc.bc.ca/resources/guidance-documents/).

[41] Proactive disclosure under s. 25 must be of such import and significance that it justifies the override of the exceptions to access and the privacy protective provisions of FIPPA that would otherwise apply. In any given set of circumstances there may be competing public interests, weighing for and against disclosure. The threshold is not fixed and it will vary according to those interests.

Applicant's submissions

[42] The applicant asserts that the Ministry must proactively disclose the policies and rules that govern how the Ministry exercises its power to restrict a provincial ministry's disclosure of information pursuant to solicitor client privilege.

[43] The applicant believes that the Ministry "has sought to avoid accountability for the apparent 7 year failure to uphold the law as described in the [redacted] excerpt from the 2010 legal opinion choosing instead to attempt to simply selectively silence three members of the public."[25]

[44] The applicant says:

> As a member of the public, I believe that I am entitled to know the "rules" followed by the Attorney General's Office in relation to claims of solicitor-client privilege, particularly when they have been used to selectively silence me and impede my ability to participate in important public processes. These "rules" that are said to apply to the rights of members of the public, that have been applied to me and that guide operations of the Attorney General's Office should, in my view, be disclosed on the public website of the Attorney General's Office so that all members of the public are aware of the rules being applied to them and so that members of the public can assess whether these publicly disclosed "rules" are legal. This is particularly important in a situation in which the Attorney General's Office has sought to selectively silence a few members of the public and where accountability of the Attorney General's Office itself is at issue.[26]

[45] The applicant submits that "the public interest clearly requires disclosure of the policies by which access to public information is governed… Access to government information is the matter of public interest and it is an ongoing issue of concern in the media and otherwise."[27]

[46] The applicant also says:

> The public interest issue arises in this particular case because the information in question relates to undisclosed policies used to silence a member of the public on an important matter of public interest relating to

[25] Applicant's submission at para. 31.
[26] Applicant's submission at para. 25.
[27] Applicant's submission at paras. 73-74.

> forestry law and to silence that member of the public, the Applicant in relation to whether or not the Public Body is upholding the law. This is at the core of public accountability. [28]

[47] The applicant submits "that the public interest is the key consideration in this instance and that solicitor-client privilege is not a significant consideration as there are no private interests at stake and there is no involvement of the Attorney General in his capacity as representative of the public in litigation."[29]

Ministry's submissions

[48] The Ministry submits that the circumstances of this case do not meet the threshold of "clearly in the public interest" as contemplated by s. 25, and no public interest would be served by overriding s. 14 and requiring disclosure. The Ministry says that there is no doubt as to the significant public interest served by solicitor client privilege, and it cites *Alberta (Information and Privacy Commissioner) v. University of Calgary*[30] where the Supreme Court of Canada said that solicitor client privilege is fundamental to the proper functioning of the legal system.

[49] The Ministry says, "The applicant's stated frustrations relating to her involvement with legal matters and her belief that the Ministry legal opinions are relevant to her frustrations do not establish a factual foundation or grounds for disclosure of the records at issue in this inquiry under s. 25 of FIPPA."[31]

Analysis and findings

[50] The information in dispute is about the legal principles of solicitor client privilege and how they are applied within government. It is clear that this is a matter of particular interest to the applicant, given the specific events that she was involved with. I understand the applicant wants to uncover and apply a critical lens to the legal advice in the records because she does not agree with what the Ministry has previously told her about its practices regarding waiver of privilege within government. She asserts that the public should be able to say if they agree that the rules set out in the disputed records are "legal."[32]

[51] In my view, however, the applicant's evidence does not show how the matter discussed in the records relates to a systemic problem rather than an isolated incident involving herself and the other two in her working group. She also did not submit evidence that the information is about a matter of widespread

---

[28] Applicant's submission at para 77.
[29] Applicant's submission at para. 72.
[30] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2 SCR 555.
[31] Ministry's reply submission at p. 4.
[32] Applicant's submission at para. 25.

public debate or discussion by the media, the Legislature, Officers of the Legislature or oversight bodies. Although she asserts that access to government information is a matter of public interest and is an ongoing issue of concern in the media and elsewhere, she provides nothing to show that information about the matter of how the government applies solicitor client privilege garners such attention.

[52] In conclusion, I am not persuaded that the matter the records relate to engages the public interest in the way required for s. 25(1)(b) to apply. It is not necessary, therefore, to go on to consider the specific nature of the information in dispute to decide if it meets the high threshold for disclosure. I find that the Ministry is not required to disclose the information in dispute pursuant to s. 25(1)(b).

CONCLUSION

[53] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. I confirm the Ministry's decision to refuse to disclose the disputed information under s. 14 of FIPPA.

2. I confirm the Ministry's decision that it is not required to disclose the disputed information under s. 25(1)(b) of FIPPA.

October 1, 2020

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC File No.: F18-77674