



Order F21-25

## CITY OF POWELL RIVER

Elizabeth Barker  
Director of Adjudication

June 16, 2021

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**Summary:** The applicant requested access to records the City obtained from its lawyer regarding the sale of land. The adjudicator determined the records were legal opinions and confirmed the City's decision that solicitor client privilege applied and the City was authorized to refuse access under s. 14 of the *Freedom of Information and Protection of Privacy Act*. The adjudicator also found that the applicant failed to establish that solicitor client privilege had been waived.

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

### INTRODUCTION

[1] The applicant requested access to two records the City of Powell River (City) received from its lawyer about a land sale. The City withheld the records in their entirety under s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the public body's decision to refuse him access to the records. Mediation failed to resolve this matter and it proceeded to inquiry.

### ISSUE

[2] The issue to be decided in this inquiry is whether the City is authorized to refuse to disclose the two records under s. 14 of FIPPA. Section 57 of FIPPA says that it is up to the City to prove s. 14 applies.

## DISCUSSION

### ***Background***

[3] The City incorporated the Powell River Waterfront Development Corp. (PRWDC) in 2003 and entered into a partnering agreement with it to acquire and develop lands on behalf of the City. The City was PRWDC's sole shareholder and appointed its board members.

[4] In 2018, PRWDC agreed to sell 10 acres of land to Sino Bright Investment Ltd. I will refer to this as the "sale". PRWDC announced the sale at a City Council meeting on February 5, 2019. That same day, the applicant provided Council and City staff a list of questions and accompanying materials challenging the legality of the sale.

[5] The applicant wrote again to Council on February 11, 2019 about his concerns with the sale. He was invited to make a presentation at the upcoming February 19, 2019 meeting of the Committee of the Whole.

[6] On February 15, 2019, the City received a memorandum from its lawyer about the sale.

[7] After the applicant's presentation at the February 19, 2019 Council meeting, there was a discussion and question period. The Mayor revealed that the City had received the February 15, 2019 memorandum, which everyone at the meeting referred to as a "legal opinion". During the meeting, the City agreed to forward more questions and information to its lawyer for further input.

[8] The City's lawyer provided the City a revised memorandum dated February 21, 2019.

[9] The applicant's FIPPA access request was for "a copy of a Feb. 15 legal opinion, (updated on Feb. 21, 2019)".<sup>1</sup>

[10] In March 2019, the sale was cancelled. The City subsequently purchased all the lands previously owned by PRWDC and PRWDC was dissolved.

### ***Records at issue***

[11] The two records in dispute are the February 15, 2019 memorandum and the February 21, 2019 revised memorandum. The City's lawyer authored both and addressed them to the City's Director of Economic Development and Communications. The City has completely withheld the memoranda under s. 14.

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<sup>1</sup> Applicant's July 24, 2019 request for review to the OIPC.

**Solicitor client privilege, s. 14**

[12] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The law is well established that s. 14 encompasses both legal advice privilege and litigation privilege.<sup>2</sup> Based on the City's submissions, it is clear that the City is claiming only legal advice privilege applies to the two memoranda.

[13] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.<sup>3</sup> In order for legal advice privilege to apply, the information at issue must be:

- (i) a communication between solicitor and client;
- (ii) which entails the seeking or giving of legal advice; and
- (iii) which is intended to be confidential by the parties.<sup>4</sup>

[14] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions above are satisfied, then legal advice privilege applies to the communications.<sup>5</sup>

[15] The City's Corporate Officer provided the City's submission. The City did not submit any affidavit evidence. The City refers to the memoranda as "legal opinions". It says that it has a solicitor client relationship with the law firm that provided the legal opinions, and the opinions "contain confidential information directly relating to the seeking, formulating and giving of legal advice."<sup>6</sup>

[16] The applicant says he accepts that the disputed records are legal opinions, given that he has no information establishing otherwise.

[17] I am satisfied that the memoranda meet the criteria for legal advice privilege. They are communications between the City and its lawyer and they contain legal opinion and advice. I note that there are no express statements of confidentiality in the memoranda and they are not marked as being privileged and confidential, as is usually the case with lawyers' legal opinions. Nonetheless, based on the content of the memoranda, and the fact that there is no indication that anyone else was privy to them, I accept that they are intended to be confidential communications between solicitor and client.

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<sup>2</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [College] 2002 BCCA 665 (CanLII) at para. 26.

<sup>3</sup> *College*, *ibid* at para. 31.

<sup>4</sup> *Solosky v. The Queen*, [1980] 1 SCR 821 [Solosky] at p. 837.

<sup>5</sup> *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22. See also *Solosky*, *ibid*, at p. 829.

<sup>6</sup> City's initial submission at para. 10.

### ***Waiver of privilege***

[18] The applicant submits that the City is not authorized to refuse him access to the memoranda under s. 14 because privilege was waived.

[19] Solicitor client privilege belongs to, and can only be waived by, the client.<sup>7</sup> Once privilege is established, the party seeking to displace it has the onus of showing it has been waived.<sup>8</sup> Given the importance of solicitor client privilege to the functioning of the legal system, evidence justifying a finding of waiver must be clear and unambiguous.<sup>9</sup>

[20] A waiver of solicitor client privilege may be express or it may be by implication where required by fairness and consistency. The following statement from *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd.* is most often cited for the common law test for waiver:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost...<sup>10</sup>

### ***Comments about the privileged communications***

[21] In order to fully appreciate the parties' submissions about waiver, it is necessary to first set out the events that are germane to the applicant's waiver argument.

[22] The parties' submissions referred me to the City's webcasts for its February 19 and March 5, 2019 Committee of the Whole meetings as well as items in the local newspaper. I have listened to the portions of the webcasts that deal with the sale and read the news articles. Based on that information, I find the following facts to be relevant here.

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<sup>7</sup> *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 39; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 at para. 39.

<sup>8</sup> *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420 at para. 22; *Maximum Ventures Inc. v. de Graaf*, 2007 BCSC 1215 [*Maximum*] at para. 40.

<sup>9</sup> *Maximum*, *ibid*, at para. 40.

<sup>10</sup> *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd.* 1983 CanLII 407 (BC SC) at para. 6. Also *Graham v. Canada (Minister of Justice)*, 2021 BCCA 118 at paras. 47-48.

[23] At the February 19 Council meeting, the applicant made a presentation about his concern with the legality of the sale. He emphasized that he believed the sale had to be approved by the City and that the land should have been offered through an open bid process. He also advised Council to get its lawyers to answer the questions he raised.<sup>11</sup> He said, “You have to ask the right questions to get the right answer.”<sup>12</sup>

[24] In the discussion that followed, the Mayor referred to the applicant’s earlier list of questions. It was at that point that the Mayor made the remarks that the applicant submits waived privilege over the memoranda. The Mayor said:

Those questions, I believe in detail, ah, went to our lawyers, and we do have a response to those questions. And, ah, whether that, Council has to meet *in camera* to decide whether they want to release those, ah, opinions from the lawyers, but, ah, from the questions so far [applicant’s name], ah, the legal opinion had come back that says that the City is on solid ground, ah, based on, you’ll remember the list last time, and I went woah, like there’s a lot here, and we need to ask our lawyers what, ah, what their positions are because that’s who we work with when we make these moves with staff. You don’t do this stuff unilaterally and they’re in discussion with, ah, Lidstone and Company. So, your first set, as I say, I think there is some duplication in today’s versus what we had last time and correct me if I’m wrong if it’s not, um, and where there is not duplication we will get those off to our lawyers as well to, ah, advise Council. But we do have a legal opinion ... So it’s on our agenda, I guess, okay. So, ah, yeah, so, um, which does state, as of the questions so far, that, ah, the City’s on solid ground. So I’ll just leave that, ah, to that.”<sup>13</sup>

[Emphasis added]

[25] There is then some discussion about how the City would provide the public answers to the questions, and the Mayor says again that Council will discuss the legal opinion *in camera* and decide whether to make it public.

[26] Later, during question period a journalist asked the Mayor if his comment about being on solid ground “let the cat out of the bag” regarding the legal opinion. A councillor responded by saying:

I think we need to agree to release the legal opinion before we talk about it. I feel uncomfortable with this question because we haven’t passed a motion to say let’s release it and we’re kind of releasing it, so... [shrugging motion].<sup>14</sup>

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<sup>11</sup> Applicant’s submission at para. 11. He says his presentation consisted primarily of the contents of his February 11 and 19, 2019 letters.

<sup>12</sup> Starting at 54:25 of the February 19, 2019 webcast.

<sup>13</sup> At 55:22- 56:39 of the February 19, 2019 webcast.

<sup>14</sup> Starting at 1:42 of the February 19, 2019 webcast.

[27] The journalist asked if it is possible that the legal opinion would be made public. The Mayor and several councillors said it is possible, but first they needed to discuss it *in camera*.

[28] The journalist also asked if the City was required to approve any sale of land by PWRDC and the Chief Administrative Officer (CAO) replied, “No, unless [the land was] City owned and provided to Waterfront Dev Corp or transferred to Waterfront Dev Corp and then they were to dispose of it.”<sup>15</sup>

[29] Several days later, a February 22, 2019 local newspaper article stated: “[PRWDC’s president] added that PRWDC is 100 percent in compliance with the partnership agreement and the contract with Sino Bright is legal.”<sup>16</sup>

[30] At a subsequent March 5, 2019 meeting of the Council of the Whole, PRWDC’s president said:

PRWDC directors, unpaid volunteers, are described as being rogue, as acting without authority, yet in reality the city’s solicitor, Lidstone and Company has confirmed that we acted legally in agreeing to sell 10 acres of land to Sino Bright. We did not require council’s prior consent.<sup>17</sup>

[31] In an April 13, 2019 letter to the local newspaper, PRWDC’s president wrote, “...on February 19, 2019, council informed [the applicant] that the city’s lawyers had confirmed PRWDC in fact did have the legal authority.”<sup>18</sup>

*Applicant’s submission on waiver*

[32] The applicant submits that “any privilege attached to the records in dispute has been waived”<sup>19</sup> because of the following events:

1. The Mayor disclosed that the legal opinion said the City was on solid ground.
2. What the Mayor and the CAO said about whether the sale was required to be publicly offered and whether the City’s prior approval was required was “most assuredly addressed in the legal opinions.” Thus, he submits, what they said revealed the “very heart of the legal opinion”, not just the “gist”.<sup>20</sup>

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<sup>15</sup> At 1:40 of the February 19, 2019 webcast.

<sup>16</sup> Applicant’s submission at paras. 18-19 and applicant’s exhibit 6.

<sup>17</sup> At 42:45 of the City’s March 5, 2019 webcast.

<sup>18</sup> Applicant’s exhibit 6.

<sup>19</sup> Applicant’s submission at para. 23.

<sup>20</sup> All quotes in this paragraph are from the applicant’s submission at paras. 21-22.

3. The February 22, 2019 news article reported that PRWDC’s president said the sale was legal. The applicant believes this statement shows that the City must have shared its legal opinion with PRWDC. He does not think that sharing was a waiver of privilege (he says common interest privilege applies).<sup>21</sup> Rather, he submits that what PRWDC’s president said at the March 5, 2019 meeting, and to the media, waived privilege.
4. The City misled the public when it said inconsistent things about which of the applicant’s letters and questions were forwarded to the City’s lawyer to consider when formulating the February 15, 2019 legal opinion.<sup>22</sup>

[33] The applicant asserts that the statements made by the Mayor, the CAO and PRWDC’s president “relating to the documents in dispute, were misleading, unfair and sufficient to waive any privilege attached to those records, namely; a February 15, 2019 legal opinion and its February 21, 2019 updated version.”<sup>23</sup>

*City’s submission on waiver*

[34] The City disputes that there was a waiver of privilege. It says:

The Mayor and CAO comments were provided as answers to questions posed at public meetings. Attempts at transparency and conveying assurance to the public in relation to proper process, should not result in a waiver of solicitor client privilege...<sup>24</sup>

[35] The City submits the Mayor only revealed the “gist” of the legal opinion. It cites BC Orders 00-07 and 07-05, where it was found that disclosing the gist of, or part of, a legal opinion did not amount to a waiver over the entire opinion.<sup>25</sup>

[36] The City also says that the comments that were made about the legal opinion “do not mislead, misrepresent or contradict the records in dispute”.<sup>26</sup>

[37] In addition, the City says:

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<sup>21</sup> Applicant’s submission at para. 22. He says he agrees the City and PRWDC had a common interest in the legal opinions.

<sup>22</sup> Applicant’s submission at paras. 2 and 20. Specifically, he says that the City’s inquiry submission says the City forwarded the applicant’s February 11, 2019 materials; however, at the February 19, 2019 Council meeting the Mayor said the City forwarded the applicant’s February 5, 2019 materials.

<sup>23</sup> Applicant’s submission at para. 3.

<sup>24</sup> City’s reply at para. 10.

<sup>25</sup> City’s initial submission at para. 23; Order 00-07, 200 CanLII 7711 (BC IPC); Order F07-05, 2007 CanLII 9596 (BC IPC).

<sup>26</sup> City’s reply at para. 11.

Solicitor client privilege belongs to the client, in this case the City, and may only be waived by a resolution or bylaw passed by a majority of City Council.

...

The City submits that solicitor client privilege over these two legal opinions belongs to Council of the City of Powell River. Council has not waived privilege over the legal opinions by resolution or bylaw.<sup>27</sup>

[38] The City cites ss. 114(3) and 122 the *Community Charter* in support of its argument that the City can only waive privilege by a resolution or bylaw passed by the majority of council.<sup>28</sup> Those provisions state:

Council as governing body

114 (1) The members of a municipal council are the mayor and the councillors.

...

(3) The powers, duties and functions of a municipality are to be exercised and performed by its council, except as otherwise provided under this or another Act, and a council, in exercising or performing its powers, duties and functions, is acting as the governing body of the municipality.

Exercise of powers by bylaw or resolution

122 (1) A council may only exercise its authority by resolution or bylaw.

(2) If an enactment provides that a council is required or empowered to exercise a power by bylaw, that power may only be exercised by bylaw.

(3) If a council may exercise a power by resolution, that power may also be exercised by bylaw.

(4) An act or proceeding of a council is not valid unless it is authorized or adopted by bylaw or resolution at a council meeting.

[39] The City says:

In relation to whether the client, Council of the City of Powell River, waived privilege, it is noted that no specific content of the legal opinion was discussed, and it appears that members of Council and staff, although pressed during the open meeting, were not ready to publicly discuss legal advice contained in the records.

Further, several councillors repeated, on several occasions during the meeting, that the legal opinions and associated discussions on the content

<sup>27</sup> City's reply at paras. 5-6.

<sup>28</sup> *Community Charter*, SBC 2003, c. 26. The City also cites *Guelph (City) v. Super Blue Box Recycling Corp.*, 2004 CanLII 34954 (ON SC) at para. 84, and *Order F13-10 North Saanich (District) (Re)*, 2013 BCIPC 11 (CanLII).



and possible release must occur during an in-camera Council meeting, and that Council has yet to consider the matter.

It is clear that the Council had no intention of waiving privilege over the records at the Committee of the Whole meeting, did not do so, and that such deliberations would need to occur in an in-camera meeting.

...What is relevant to note, is that the motion to go in-camera for the purpose of discussing matters of solicitor client privilege is evidence that members of Council are aware and have resolved to hold such deliberations without the public in attendance. Such discussions include releasing or not releasing legal advice.<sup>29</sup>

[40] As for what the CAO said at the meeting, the City says:

In relation to the CAO's comments, the applicant assumes the CAO disclosed legal advice. It is submitted that, from time to time, staff are expected to provide advice and offer clarity during meetings. When doing so, they draw upon their own knowledge and experience which may or may not relate to advice obtained from legal counsel at some point in time. The CAO did not state that his advice was obtained through legal counsel.<sup>30</sup>

### *Findings*

[41] For the reasons that follow, I find that the applicant has not met his burden of establishing that the City waived privilege over the memoranda.

[42] I find that what the Mayor said at the February 19, 2019 meeting about the legal opinion was a statement meant to assure the public that the City's approach to the sale was given serious consideration and was based on legal advice. The context provided by the webcast persuades me that this was the case. In addition, I have reviewed both memoranda and find that what the Mayor said at the meeting did not reveal the "gist" or the substance of the privileged communication. Rather, he reveals in only a rough sense his understanding of the implications of the legal advice. Even less information was disclosed in the present case than in Orders 00-07 and 07-05, which the City cited, where the adjudicators found that disclosing the gist or part of a privileged communication was not a waiver.<sup>31</sup>

[43] I am not persuaded that the Mayor's remarks show an intention to waive privilege over the memoranda. Instead, the evidence demonstrates that he was clearly aware that solicitor client privilege applied and that he could not make the decision on his own to waive privilege for the City. He said more than once during the February 19, 2019 meeting that Council needed to meet *in camera* to

<sup>29</sup> City's initial submission at para. 27.

<sup>30</sup> City's initial submission at para. 29.

<sup>31</sup> Orders 00-07 and F07-05, *supra* at note 25.

decide whether to disclose the legal opinion. Another councillor echoed this. I also accept the City's evidence that a waiver of the City's privilege can only occur by a resolution or bylaw passed by a majority of City Council. There was no evidence to the contrary.

[44] I am also not persuaded by the applicant's argument that the answers the CAO provided to questions at the February 19, 2019 meeting waived privilege. The CAO did not even mention the legal opinion. The applicant is speculating that the CAO was not expressing his own opinion but, instead, was parroting the legal opinion. Such speculation is insufficient to establish that the City waived privilege. Furthermore, there is nothing to suggest the CAO was authorized to waive privilege on behalf of the City.

[45] In addition, I find that the applicant has not established that what PRWDC's president said waived privilege over the memoranda. Privilege can only be waived by the client, and the City was the client in the context of the privileged communications at issue here. What PRWDC's president said does not establish an intention on the City's part to waive privilege over the legal advice the City received from its lawyer. The applicant did not explain how PRWDC would have had the authority to waive privilege over legal advice the City received from its lawyer.

[46] I have also considered whether the comments made about the privileged communications in the memoranda amount to an implied waiver. Fairness and consistency are the touchstones in that analysis.

[47] I find that the applicant's assertion that the statements relating to the memoranda were misleading and unfair are not, without more, sufficient to establish privilege was waived. He did not explain how the statements could mislead or unfairly disadvantage someone unless they are given full access to the privileged communication. For instance, there is no information suggesting that what was said was material to any issue in litigation or other legal proceeding. Further, based on my review of the memoranda, I can see nothing misleading in what was said about the privileged communications.

[48] Therefore, I am not persuaded that fairness and consistency require finding that there was an implied waiver over the privileged communication in the memoranda.

[49] Finally, I do not see the relevance of the applicant's claim that the City made inconsistent statements about which of his letters and questions were forwarded to the City's lawyers. The applicant did not explain how this relates to the issue of waiver.

[50] In summary, I find the applicant has not established that there was a waiver of privilege in this case.

**CONCLUSION**

[51] For the reasons given above, under s. 58 of FIPPA, I confirm the City's decision to refuse to disclose the records in dispute to the applicant under s. 14 of FIPPA.

June 16, 2021

**ORIGINAL SIGNED BY**

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Elizabeth Barker, Director of Adjudication

OIPC File No.: F19-80253