Order F21-37

MINISTRY OF FINANCE
(Partial reconsideration of Order F19-38)

Lisa Siew
Adjudicator

20 August, 2021

CanLII Cite: 2021 BCIPC 45
Quicklaw Cite: [2021] B.C.I.P.C.D. No. 45

Summary: In a court-ordered partial reconsideration of Order F19-38, the adjudicator considered further evidence provided by the Ministry of Finance to support its decision to withhold three categories of records under s. 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator determined the information at issue was protected by solicitor-client privilege and the Ministry of Finance was authorized to withhold that information under s. 14.

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

INTRODUCTION

[1] This is a court-ordered partial reconsideration of Order F19-38. I was the adjudicator delegated to decide the inquiry that led to Order F19-38 and determined, among other things, that the Ministry of Finance (Ministry) was not authorized under s. 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to refuse access to certain records sought by an access applicant.

[2] I concluded in Order F19-38 that the Ministry did not provide sufficient evidence to establish solicitor-client privilege applied to certain records, despite being given several opportunities to do so during the inquiry. The Ministry filed a judicial review application on a number of grounds, including that it had provided sufficient evidence that s. 14 applied to those records.

[3] On February 19, 2021, the Supreme Court of British Columbia issued *British Columbia (Minister of Finance) v. British Columbia (Information and*

Privacy Commissioner), its judicial review of Order F19-38.[1] The Honourable Mr. Justice Steeves considered four categories of records that I determined the Ministry was not authorized to withhold under s. 14. Justice Steeves upheld my decision for three of those four categories of records on the basis the Ministry did not provide sufficient evidence to support its claim of solicitor-client privilege over those records.

[4] Given the importance of solicitor-client privilege, Justice Steeves sent the matter back to the Office of the Information and Privacy Commissioner (OIPC) for a reconsideration and allowed the Ministry to provide a further submission, including affidavit evidence, to justify its claim of privilege for those three categories of records.

[5] In light of Justice Steeves' reasons, the OIPC offered the parties an opportunity to provide further submissions regarding the application of s. 14 to the disputed records. The Ministry and the access applicant provided further submissions.[2]

ISSUE

[6] The issue I must decide in this inquiry is whether s. 14 applies to the information withheld in the records described by Justice Steeves as "the documents in categories one, two and four."[3]

[7] Section 57(1) places the burden on the Ministry, as the public body, to prove the applicant has no right to access the information withheld under s. 14.

DISCUSSION

Background

[8] This matter arises from an access applicant's three separate requests under FIPPA to the Ministry for records related to the Sunshine Coast Tourism Society (the Society).[4] The applicant requested records involving the Society's application to have the municipal and regional district tax (MRDT) apply to two particular regional districts.

---

[1] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 [*Finance*].

[2] I have carefully considered the applicant's submission which includes other matters not set out in the notice of inquiry. I will only refer to the applicant's submission where it is relevant to the issues in this inquiry.

[3] *Finance*, *supra* note 1 at para. 167.

[4] The first access request is referred to by the Ministry as FIN-2016-62160, the second access request is referred to as FIN-2016-63904 and the third access request is referred to as FIN-2016-63848. The records at issue in this court-ordered reconsideration all arise out of the second access request FIN-2016-63904. I will use this reference, where necessary, in citing the records.

[9] The MRDT is a tax charged on taxable accommodation, commonly referred to as the hotel room tax. The MRDT is used primarily to raise revenue for local tourism marketing, programs and projects. For the time period of the applicant's three access requests, the program was jointly administered by the Ministry, Destination British Columbia, and the Ministry of Jobs, Tourism, and Skills Training.

Records at issue

[10] As I described above, Justice Steeves found that the Ministry did not provide sufficient evidence to support its application of s. 14 to three categories of records. These are the records at issue in this inquiry.

[11] As outlined in Justice Steeves decision,[5] the three categories of records are:

- Category 1 record: an email attachment.[6]
- Category 2 records: emails involving employees of ministries other than the Ministry and the Ministry of Attorney General (formerly the Ministry of Justice).[7]
- Category 4 records: emails involving a lawyer with the Legal Services Branch (LSB) of the Ministry of Attorney General.[8]

[12] For consistency and clarity, I will adopt Justice Steeves' designation of these records as category 1, 2 and 4 throughout this order.

Section 14 evidence

[13] For the inquiry that led to Order F19-38, the Ministry did not provide the records for my review. Instead, the Ministry provided the following evidence to prove s. 14 applied to the records:

- A table briefly describing the records withheld for each of the applicant's three separate access requests.
- Affidavits from two LSB lawyers (DP and KC).
- An affidavit from a former Ministry employee, identified in the records as a tax policy analyst (Policy Analyst or RF).

[5] *Finance*, *supra* note 1 at paras. 163-167.
[6] This document is located at pages 242-246 of FIN-2016-63904.
[7] These emails are located at pages 58-60, 72-74 and 239-241 of FIN-2016-63904.
[8] These emails are located at pages 219-220 of FIN-2016-63904.

[14] For this reconsideration, the Ministry provided two additional affidavits from LSB lawyers, LL and DP, to justify its position that s. 14 applies to the records at issue. I have considered both the original evidence and the additional evidence in coming to my decision in this reconsideration.

Section 14

[15] Section 14 states that a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.[9] The Ministry claims legal advice privilege over the information withheld under s. 14. Legal advice privilege applies to confidential communications between a solicitor and client for the purposes of obtaining and giving legal advice.[10]

[16] For this reconsideration, the Ministry has relied on the following three-part test to determine whether s. 14 applies to the information at issue:

1. the communication must 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.[11]

[17] I do not have any objections or concerns in using and applying the three-part test proposed by the Ministry as the analytical framework for determining whether legal advice privilege applies to the information in dispute.[12]

[18] I also note that solicitor-client privilege applies more broadly than the criteria outlined in the three-part test discussed above. Courts have found that solicitor-client privilege extends to communications that are "part of the continuum of information exchanged" between the client and the lawyer in order to obtain or provide the legal advice.[13] A "continuum of communications" involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as "history and background

---

[9] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26.
[10] *College* at paras. 26-31.
[11] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 838, [1980] 1 SCR 821 at p. 13.
[12] I note that the Ministry adopted and used a different four-part test in the inquiry that led to Order F19-38, but argued on judicial review that this four-part test was not appropriate. For a full discussion about the analytical framework for determining whether legal advice privilege applies, see *Finance* at paras. 70-75.
[13] *Huang v. Silvercorp Metals Inc*., 2017 BCSC 795 at para. 83; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp Development*] at paras. 40-46.

from a client" or communications to clarify or refine the issues or facts.[14] The continuum also covers communications at the other end of the continuum, after the client receives the legal advice, such as internal client communications about the legal advice and its implications.[15]

[19] However, solicitor-client privilege does not apply to all communications or documents that pass between a lawyer and their client. For instance, an attachment to an email does not become privileged simply because it was exchanged between a solicitor or client, even if it is attached to a privileged communication.[16] Instead, solicitor-client privilege may apply if the attachment reveals communications that are protected by privilege or would allow one to infer the content and substance of privileged advice.[17]

[20] Bearing these principles in mind, I will now consider the evidence and records at issue.

Category 1 record: an email attachment

[21] One of the records at issue is an email attachment described by the Ministry in its table of records as "draft correspondence" that it sought and received legal advice on from a government lawyer. The specific description reads:

> Email chain ending with email from [RF] (of MoF [Ministry of Finance]) to [GM] of the Ministry of Justice[18] dated July 25 2016 regarding MOJ [Ministry of Justice]'s proposed draft reply to [the applicant] and discussing legal advice from [DP], LSB legal counsel attaching draft correspondence the Ministry sought and received legal advice from LSB legal counsel, including [KC].[19]

[22] I concluded in Order F19-38 that s. 14 applied to the email, but found the Ministry did not provide sufficient evidence that solicitor-client privilege applied to the email attachment for the following reasons:[20]

> [34] In this case, the Ministry did not provide sufficient evidence to establish that the draft correspondence is a privileged communication between the Ministry and a lawyer or that it would reveal such information. The LSB lawyers and the Policy Analyst do not discuss this draft

[14] *Camp Development* at para. 40.
[15] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.
[16] *Finance*, *supra* note 1 at para. 110. Order F18-19, 2018 BCIPC 22 (CanLII) at para. 36.
[17] *Finance*, *supra* note 1 at para. 111. Order F18-18, 2018 BCIPC 21 at paras. 36 and 39.
[18] At the time of the applicant's access requests.
[19] Description quoted by Justice Steeves in *Finance* at para. 104 with names anonymized and citations omitted.
[20] Order F19-38, 2019 BCIPC 43 at paras. 33-35.

> correspondence in their affidavits. The Ministry also does not explain how someone looking at the draft correspondence can infer what an LSB lawyer advised about the proposed correspondence and its contents.
>
> [35] Instead, based on information disclosed in the correspondence coordinator's email and the surrounding emails, I can clearly determine that the attachment is correspondence prepared by the Ministry of Justice in response to an email directly from the applicant. In other words, it is the Ministry of Justice's response to the applicant on behalf of its own ministry. The attachment is not draft correspondence that was prepared for the Ministry of Finance by its lawyers. Instead, it is apparent that the Ministry of Justice is showing it to the Policy Analyst because she asked for an opportunity to review it. Therefore, I am not satisfied that the attachment would reveal the Ministry's privileged communication with its lawyers. As a result, I find that Ministry has not proven that s. 14 applies to the attachment.

[23] On judicial review, Justice Steeves upheld my decision and agreed that there was "no evidence about the specific email attachment that is at issue here."[21] He found none of the lawyers, including KC who is referred to in the description of this document, discuss the issue of privilege for this specific email attachment.[22]

[24] Justice Steeves also addressed my finding that the attachment is correspondence prepared by the Ministry of Justice (now the Ministry of Attorney General) in response to an email directly from the applicant and not draft correspondence prepared for the Ministry of Finance by its lawyers. After receiving further submissions on this matter, including the email attachment at issue, Justice Steeves concluded that he was able to "ascertain how the adjudicator was able to 'clearly determine' the nature of the attachment as well as her reasons for finding, correctly, that the email attachment was not subject to solicitor-client privilege."[23]

Does legal advice privilege apply to the category 1 information?

[25] For this reconsideration, the Ministry submits that the email attachment is privileged because it "was exchanged between client and legal counsel for the purpose of obtaining and providing legal advice."[24] During the reconsideration, I asked the Ministry to clarify a description of the email attachment.[25] The Ministry explained that the email attachment is a four-page memo where "the body text of

---

[21] *Finance*, *supra* note 1 at para. 117.
[22] *Ibid* at paras. 114-118.
[23] *Ibid* at para. 123.
[24] Ministry's submission dated April 21, 2021 at para. 25.
[25] Letter dated July 29, 2021 to Ministry's legal counsel.

the memo includes, among other things, draft correspondence in the form of a letter."[26]

[26] The Ministry provided an affidavit from DP, an LSB lawyer, to support its position. DP's evidence confirms that the email attachment is a memo from GM, an LSB employee, to RF who is a Ministry employee. DP attests that he and a number of LSB lawyers, whom he identifies by name, reviewed and approved GM's draft memo to RF and "provided legal advice with respect to its wording."[27] DP says the memo "indicates that a number of LSB lawyers reviewed and approved [GM]'s draft correspondence" that is included in the body of the memo.[28]

[27] With regards to the draft correspondence included in the memo, DP's evidence confirms the draft correspondence was prepared by the Ministry of Justice. DP says GM drafted the correspondence and "sent it to various legal counsel in LSB for their advice on his draft and approval of the final draft."[29] DP confirms there were legal discussions and communications between LSB lawyers regarding the wording of the draft correspondence.[30]

[28] Based on the Ministry's further evidence, I conclude s. 14 applies to the email attachment. The evidence establishes that GM, an LSB employee, sought and obtained confidential legal advice from a number of LSB lawyers about the memo and the draft correspondence revealed in the memo. There is no evidence that these communications involved individuals other than the LSB lawyers or the LSB employee. Therefore, I am satisfied some of these documents formed part of the necessary exchange of information between solicitor and client for the purpose of obtaining and providing confidential legal advice. I also accept that disclosing information about the draft correspondence would reveal the precise subject matter of the confidential legal advice that GM sought and obtained from the LSB lawyers.

[29] I have considered the fact that there is no evidence that disclosing the entire memo would "allow an outside party to accurately infer the legal advice given."[31] The Federal Court of Appeal has said that "documents and actions shaped by legal advice are not necessarily themselves legal advice and do not necessarily form part of the protected continuum of communication."[32] In this case, although the memo was shaped by legal advice, it is clear that the memo is one of the "end products" of that process since GM sent the memo to RF, the

---

[26] Letter dated August 3, 2021 from Ministry's legal counsel.
[27] DP's affidavit no. 2 at para. 11.
[28] *Ibid* at para. 11.
[29] *Ibid* at para. 10.
[30] *Ibid* at para. 10.
[31] *Finance*, *supra* note 1 at para. 143.
[32] *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 (CanLII) at para. 33.

intended recipient of the memo.[33] However, the courts have emphasized that severance of some of the communications in the continuum can only occur when there is no risk of revealing legal advice provided by the lawyer to the client.[34] In the present case, I am unable to conclude there is no risk of revealing such privileged information. As a result, I conclude legal advice privilege applies to the entire email attachment.

Was there a waiver of privilege?

[30] Having found legal advice privilege applies, I note that GM shared the draft correspondence with a Ministry employee. Generally, the disclosure of privileged information to individuals outside of the solicitor-client relationship may amount to a waiver of privilege.[35] However, common interest privilege is an exception to the general rules of waiver, and it allows parties with interests in common to share privileged information or communications without waiving their privilege.[36] Since part of the information that I have found to be privileged was later shared, I need to consider whether waiver applies.

[31] For the following reasons, I find that GM did not waive privilege when he shared the draft correspondence included in the memo with RF, a Ministry employee. DP explains the memo was provided to RF "because she was the instructing client on the legal file being referenced in the draft correspondence and had requested an opportunity to review and comment on the draft correspondence before it was sent out by LSB."[37] DP attests that all the individuals included in the communications were involved in some manner in the Society's MRDT application and "therefore had a need to know about the legal advice sought and received from legal counsel" and intended their communications to be confidential.[38]

[32] Based on this evidence, I find RF of the Ministry of Finance had a common interest with employees of the Ministry of Justice regarding the content of the draft correspondence and these employees intended their communications to be confidential. Therefore, I conclude there was no waiver of privilege in these circumstances and that s. 14 applies to the category 1 record.

---

[33] *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 (CanLII) at para. 30.
[34] *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 51, quoted in *Finance* at para. 67.
[35] *S&K Processors Ltd. v Campbell Ave. Herring Producers Ltd.,* 1983 CanLII 407 (BCSC) at para. 6.
[36] *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510 (CanLII) at para. 14; Order F17-23, 2017 BCIPC 24 (CanLII) at para. 56.
[37] DP's affidavit no. 2 at para. 12.
[38] *Ibid* at paras. 22-23.

Category 2 records: email chains

[33] The records at issue include three email chains described by the Ministry in its table of records as ending with or including an email between DP and Ministry employee(s) where legal advice is sought from DP.[39] During the inquiry that resulted in Order F19-38, the Ministry said these communications also include employees from other government ministries, but it declined to identify these other government employees or explain their role in these communications.

[34] I concluded in Order F19-38 that there was insufficient explanation and evidence to support the Ministry's claim that these emails are confidential communications between a solicitor and client since there was "no evidence about the identity of these unidentified government employees, what role they played in the solicitor client relationship or what interest they had in the matters being discussed in these emails."[40] There was also no affidavit evidence that adequately described these records and the description of these emails in the records table did not identify any government employees from another ministry.

[35] I also found that the case authorities cited by the Ministry were not applicable or persuasive since they dealt with the waiver of solicitor-client communications when "the initial issue for these communications that include non-Ministry employees is not waiver, but whether they are privileged in the first place."[41]

[36] On judicial review, Justice Steeves found my decision was correct and concluded the Ministry's evidence did not address these specific records or establish that solicitor-client privilege applied to these emails. Justice Steeves agreed that the description of these emails in the table of records did not "reference other ministries or other employees".[42] He found that the affidavit evidence relied on by the Ministry "is in the most general terms and does not identify the specific documents at issue."[43]

[37] Justice Steeves also confirmed that the case authorities relied on by the Ministry regarding the waiver of privilege "was not responsive to the issues before the adjudicator" since the issue for these emails was not waiver, but whether the emails were privileged in the first place.[44] As part of his reasons, Justice Steeves concluded that "a global assertion of privilege that applies to

---

[39] The specific descriptions are quoted by Justice Steeves in *Finance* at para. 124 with names anonymized and citations omitted.
[40] Order F19-38, 2019 BCIPC 43 at para. 38.
[41] *Ibid* at para. 39.
[42] *Finance*, *supra* note 1 at para. 132.
[43] *Ibid* at para. 132.
[44] *Ibid* at para. 131.

legal counsel across government does not support a claim of solicitor-client privilege for individual documents."[45]

Does legal advice privilege apply to the category 2 information?

[38] For this reconsideration, the Ministry describes the category 2 records as an email chain between Ministry employees and LSB lawyers, which includes earlier emails "with external third parties related to the legal advice sought and received by the Ministry employees."[46] It says the Ministry employees sent "the external emails to LSB lawyers for the purpose of providing information necessary for the lawyers to formulate their advice" and that "the Ministry employees specifically asked the LSB lawyers for advice regarding such matters raised in the emails with third parties and such advise [*sic*] was provided."[47]

[39] The Ministry also relies on DP's affidavit to support its position regarding the category 2 records. DP provided a detailed description of these emails and the individuals involved in these communications. Based on this description, I have summarized the Ministry's evidence about these email communications as follows (names anonymized by me):

Page # of record	**Date**	**Document**
58-60	July 25, 2016	Email chain that contains the following emails: (1) Email sent to RF (Ministry employee). (2) RF forwards the email she received to DP (LSB lawyer) and copies PF (Ministry employee), asking DP to "provide legal advice to her and the Ministry generally respecting the contents of the email she received and forwarded."[48] (3) PF forwards RF's email to HW (Ministry employee) and JE, an employee with Government Communications and Public Engagement. (4) HW replies to PF's email and "reiterates that the Ministry should ask [DP] for legal advice."[49]

[45] *Finance*, *supra* note 1 at para. 132.
[46] Ministry's submission dated April 21, 2021 at para. 26.
[47] *Ibid* at para. 27.
[48] DP's affidavit no. 2 at para. 13.
[49] *Ibid* at para. 17.

		(5) PF email to RF and CS (Ministry employee) where PF "relays the legal advice that [DP] provided respecting the first email in the chain and the topics discussed in the subsequent emails in the chain."[50]
72-74	July 25, 2016	Email chain (contains some of the same emails as pages 58-60) that consists of the following emails: (1) Email sent to RF (Ministry employee). (2) RF forwards the email she received to DP (LSB lawyer) and copies PF (Ministry employee), asking DP to "provide legal advice to her and the Ministry generally respecting the contents of the email she received and forwarded."[51] (3) Email from DP to RF, copied to PF confirming DP will provide legal advice requested by RF.
239-241	July 25, 2016	Email chain (contains some of the same emails as pages 58-60 and 72-74) that contains the following emails: (1) Email sent to RF (Ministry employee). (2) RF forwards the email she received to DP (LSB lawyer) and copies PF (Ministry employee), asking DP to "provide legal advice to her and the Ministry generally respecting the contents of the email she received and forwarded."[52]

[40] Based on DP's additional evidence, I conclude RF (a Ministry employee) sought legal advice for herself and for the Ministry. DP confirms that he "provided legal advice respecting the first email in the chain and the topics discussed in the subsequent emails in the chain" and that the final email in the chain on pages 58-60 of the records at issue contain his legal advice.[53]

[41] In terms of confidentiality, DP identifies all the individuals in these communications and the content of the emails. DP says "in every instance where information withheld in the records reveals communications between LSB employees, Ministry employees and government employees, I intended them to

[50] DP's affidavit no. 2 at para. 18.
[51] *Ibid* at para. 13.
[52] *Ibid* at para. 13.
[53] *Ibid* at paras. 17 and 19.

be confidential and I understand the parties to the communications intended them to be confidential as well."[54] I accept DP's evidence about the confidentiality of these emails since he was directly involved in some of those communications or reviewed the emails to provide his affidavit for this reconsideration.[55] As a result, I find that legal advice privilege applies to the emails between DP and Ministry employees.

[42] I also accept that legal advice privilege applies to the email where RF's request for legal advice is forwarded to another Ministry employee since the disclosure of this communication would reveal that the Ministry sought legal advice on a particular matter. Past jurisprudence has found that it would not be appropriate "to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication."[56]

Was there a waiver of privilege?

[43] Based on DP's description, the only employee in these communications who is not a Ministry employee or an LSB lawyer is JE, an employee with Government Communications and Public Engagement (GCPE). The evidence indicates that PF (a Ministry employee) forwarded a privileged communication to JE, specifically RF's email to DP about seeking legal advice for herself and the Ministry. Therefore, I need to consider whether waiver applies since the Ministry shared a privileged communication with JE, an individual outside the solicitor-client relationship.

[44] The disclosure of privileged information to individuals outside of the solicitor-client relationship may amount to a waiver of privilege.[57] DP says he does not consider sharing information with GCPE to be a waiver of solicitor-client privilege and that "it is not uncommon for multiple ministries to be working on the same file."[58]

[45] As previously noted, common interest privilege is an exception to the general rules of waiver, and it allows parties with interests in common to share privileged communications without waiving their privilege.[59] Based on the Ministry's evidence, I am satisfied that the GCPE employee shared a common interest with the Ministry regarding the matters for which legal advice was sought.

---

[54] DP's affidavit no. 2 at para. 22.
[55] *Ibid* at paras. 13-21.
[56] *Canada (Justice) v. Blank*, 2007 FCA 87 at para. 13, quoted in Ministry's initial submission at para. 75.
[57] *S&K Processors Ltd. v Campbell Ave. Herring Producers Ltd.,* 1983 CanLII 407 (BCSC) at para. 6.
[58] DP's affidavit no. 2 at para. 16.
[59] *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510 (CanLII) at para. 14; Order F17-23, 2017 BCIPC 24 (CanLII) at para. 56.

[46] DP explains that GCPE provides communication services to all provincial government ministries.[60] DP submits that "because Ministry of Finance employees cc'd GCPE on this email, in this instance, GCPE was providing communication services to the Ministry on the Sunshine Coast Tourism's Municipal and Regional District Tax Application file."[61] DP also attests that all of the individuals included in the communications were involved in the Society's MRDT application and "therefore had a need to know about the legal advice sought and received from legal counsel."[62] As a result, I conclude there was no waiver of privilege in these circumstances since the government employees in these communications shared a common interest. Therefore, I am satisfied that s. 14 applies to the category 2 records.

Category 4 records: email chain

[47] The last record at issue is an email chain described in the table of records as follows:[63]

> Email chain including email dated July 14, 2016 between [GM] of the Ministry of Justice, [CG] of [Ministry of Finance] and [LL], LSB legal counsel, seeking and discussing legal advice regarding appropriate response for Ministry.

[48] In Order F19-38, I concluded the Ministry did not establish that s. 14 applied to this email chain because "there was no evidence from any of the individuals who participated in this email chain as to the nature or confidentiality of these particular records."[64] I found the Ministry's affidavit evidence from DP too general as it did not specifically address this email chain or explain what factors led DP to form the opinion that what he was reviewing in these emails was legal advice or that the communications were intended to be confidential.[65]

[49] On judicial review, Justice Steeves found my decision was correct and concluded the Ministry "provided no evidence from any of the individuals involved about the nature or the confidentiality of the records at issue. And there was no explanation about what factors supported the claim of solicitor-client privilege or confidentiality."[66] Justice Steeves reviewed DP's affidavit in detail and determined "there is no evidence about the documents at issue here."[67] He was not persuaded by the Ministry's arguments that DP's affidavit was the "best

---

[60] DP's affidavit no. 2 at para. 15.
[61] *Ibid* at para. 15.
[62] *Ibid* at para. 23.
[63] Description quoted by Justice Steeves in *Finance* at para. 149 with names anonymized.
[64] Order F19-38, 2019 BCIPC 43 (CanLII) at para. 59.
[65] *Ibid* at para. 60.
[66] *Finance*, *supra* note 1 at para. 152.
[67] *Ibid* at para. 155.

evidence" partly because "DP may have read the documents at issue but he does not say so specifically."[68] Justice Steeves also concluded the description of the email chain in the table of records did not meet the civil litigation standard for information required to establish a claim of solicitor-client privilege.[69]

Does legal advice privilege apply to the category 4 information?

[50] For this reconsideration, the Ministry provided further information about the category 4 records. The Ministry says the category 4 records are an email chain between government employees that copies an LSB lawyer, but does not include emails directly from that LSB lawyer.[70] It describes the content of the emails as "employees discuss[ing] legal advice they require and intend to seek from the cc'd lawyer."[71] The Ministry submits that s. 14 applies because "privilege applies to communications about the need to seek legal advice if the evidence establishes that disclosure of the communication would reveal actual confidential communication between legal counsel and a client."[72]

[51] The Ministry also provided an affidavit from LL, the LSB lawyer that was copied on one of the emails, to establish "that where the employees discuss needing advice from LSB lawyers, they did in fact receive such advice from an LSB lawyer."[73] LL provided a detailed description of these emails and the individuals involved in these communications. Based on this more detailed description, I have summarized these email communications as follows (names anonymized by me):

Page # of record	**Date**	**Document**
219-220	unknown	Email chain that contains the following emails: (1) Email sent by KK (Ministry of Attorney General employee) to GM (LSB Correspondence Coordinator and Writer), where KK forwards GM some correspondence and asks whether the Ministry of Attorney General or another ministry should respond to the correspondence. (2) GM responds to KK "confirming he will seek legal advice from an LSB lawyer in order to answer [KK]'s question."[74]

[68] *Finance*, *supra* note 1 at para. 156.
[69] *Ibid* at para. 157.
[70] Ministry's submission dated April 21, 2021 at para. 28.
[71] *Ibid* at para. 28.
[72] *Ibid* at para. 28, citing Order F17-23, 2017 BCIPC 24 at para. 49.
[73] Ministry's submission dated April 21, 2021 at para. 29.
[74] LL's affidavit at para. 9.

		(3)-(6) GM and KK exchange "three additional brief emails regarding importing attachments to the correspondence into the Ministry of Attorney General's communication tracking system."[75] (4) GM forwards entire email chain to the Ministry of Finance's correspondence unit and copies LL on the email describing LL's role in the file.

[52] LL says that "by being cc'd, I was provided with copies of information I needed to inform my subsequent legal advice to [GM] on this file generally and with respect to [KK]'s request for legal advice, specifically."[76] In terms of confidentiality, LL says "in every instance where information withheld in the records reveals communications between LSB employees, Ministry employees and government employees, I intended them to be confidential and I understand the parties to the communications intended them to be confidential as well."[77]

[53] I also note that LL says she was advised by the LSB legal counsel representing the Ministry on this reconsideration that the adjudicator in Order F19-38, "accepted that the attachment to this chain of emails was subject to solicitor-client privilege but did not accept that the emails were subject to solicitor-client privilege."[78] However, that is not an accurate statement of my findings in Order F19-38 because, as noted above, the original description of this email chain in the Ministry's table of records did not identify any email attachments. Therefore, in Order F19-38, I did not consider whether s. 14 applied to any email attachment for this specific record.

[54] To be clear, I do not have any evidence that the category 4 records include an email attachment. During the inquiry and the judicial review, the Ministry did not identify or discuss an email attachment for this specific record. Furthermore, for this reconsideration, LL's detailed description of this record does not identify any attachments to the email chain. Therefore, without more, I am not satisfied that the category 4 records include an email attachment. As a result, I have only considered whether s. 14 applies to the email chain.

[55] For the reasons to follow, I find that the email chain is subject to legal advice privilege. Based on the Ministry's further evidence, I understand that some of the information in this email chain is actually two Ministry of Attorney

[75] LL's affidavit at para. 10.
[76] *Ibid* at para. 12.
[77] *Ibid* at para. 13.
[78] *Ibid* at para. 8.

General employees talking about obtaining legal advice on a matter. Typically, the fact that communications discuss the intent or need to seek legal advice at some point in the future does not suffice on its own to establish that privilege applies.[79] There must be evidence that disclosure of those communications would reveal actual confidential communications between legal counsel and the client.[80]

[56] To establish such a claim, previous OIPC orders accept evidence that the public body eventually did seek and receive legal advice on the particular matters discussed between the government employees.[81] I agree with that approach as the disclosure of the earlier employee discussions would then reveal confidential communications between a lawyer and client. In this case, I am satisfied the two Ministry of Attorney General employees actually sought and received the confidential legal advice that they discussed obtaining in these emails. LL confirms that she provided the "subsequent legal advice" sought by the two employees.[82] As a result, I am satisfied that legal advice privilege applies to the email chain at issue.

Was there a waiver of privilege?

[57] I note that the email chain was forwarded to the Ministry of Finance's correspondence unit so I must decide if this constitutes a waiver of privilege over these communications. In my view, it does not. As previously noted, common interest privilege is an exception to the general rules of waiver, and it allows parties with interests in common to share privileged communications without waiving their privilege.[83]

[58] LL says all the individuals included in the communications were involved in the Society's MRDT application either by working directly on the application or "assisting the Minister of Finance and the Attorney General in corresponding with [the applicant] about the application and his concerns with the application." LL attests that these individuals "therefore had a need to know about the legal advice sought and received from legal counsel, including myself, regarding the application and correspondence."[84]

[59] As a result, I find employees of the Ministry of Finance had a common interest with employees of the Ministry of Attorney General (formerly the Ministry of Justice) in responding to and addressing the matters discussed in these

---

[79] Order F17-23, 2017 BCIPC 24 at para. 49.
[80] Order F17-23, 2017 BCIPC 24 at para. 49.
[81] Order F18-38, 2018 BCIPC 41 at para. 37 and Order F17-23, 2017 BCIPC 24 at para. 50.
[82] LL's affidavit at para. 12.
[83] *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510 (CanLII) at para. 14; Order F17-23, 2017 BCIPC 24 (CanLII) at para. 56.
[84] LL's affidavit at para. 14.

emails. Therefore, I conclude there was no waiver of privilege in these circumstances and that s. 14 applies to the category 4 records.

CONCLUSION

[60] For the reasons given, under s. 58 of FIPPA, I confirm the Ministry's decision to refuse access to the information withheld under s. 14 of FIPPA.

August 20, 2021

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.s: F16-67664, F17-70478, F17-70479