



Order F21-61

CITY OF SURREY

Ian C. Davis
Adjudicator

November 30, 2021

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Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the City of Surrey (City) for access to a forensic audit report. The City responded by withholding the responsive records in their entirety under several exceptions to disclosure under FIPPA, including ss. 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of a third party's personal privacy). The adjudicator determined that the City is authorized under s. 14 to withhold the disputed records on the basis that litigation privilege applies, but not on the basis that solicitor-client/legal advice privilege applies. Given this finding, and since the City did not provide the records to the OIPC, the adjudicator did not find it necessary to consider s. 22(1).

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

INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the City of Surrey (City) for access to a forensic audit report.

[2] The City responded by withholding the responsive records in their entirety under several FIPPA exceptions to disclosure, including ss. 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of a third party's personal privacy).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision. Mediation did not resolve the matter and it proceeded to inquiry. The City advised that it is only withholding the records under ss. 14 and 22(1), so those are the only sections at issue in this inquiry.¹

¹ City's initial submissions at paras. 4-5.

ISSUES AND BURDEN OF PROOF

[4] The issues I will decide in this inquiry are:

1. Is the City authorized to withhold the records under s. 14?
2. Is the City required to withhold the records under s. 22(1)?

[5] The burden is on the City to establish that s. 14 applies.² However, the applicant has the burden to show that disclosure would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).³

BACKGROUND

[6] When a property is developed in the City, the City may require the developer to pay a number of development fees. The City's Planning and Development Department deals with this process.

[7] In late January of 2010, the City became aware of an allegation against an employee (Employee) of the Planning and Development Department.⁴ The Employee had allegedly approached a property developer and asked for a personal payment in exchange for not requiring the developer to pay the City the required development fees. The City immediately reported the allegation to the police.

[8] On February 11, 2010, the City retained KPMG Forensic Inc. (KPMG) to investigate. Specifically, the City retained KPMG to investigate whether there was any evidence that the Employee, and possibly other employees in the Planning and Development Department, had failed to collect development fees in exchange for personal payments.

[9] KPMG prepared and delivered to the City three forensic investigation reports (KPMG Reports) dated April 23, May 19 and July 8, 2010.

[10] KPMG's investigation identified that there were a number of development projects where not all of the required development fees had been paid to the City. All of these projects were linked solely to the Employee.

[11] Subsequently, the Employee was convicted of criminal fraud.

² FIPPA, s. 57(1).

³ FIPPA, s. 57(2). However, the Ministry has the initial burden to show that the information it is withholding under s. 22(1) is personal information: Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9-11.

⁴ The information in this background section is based on the evidence, which the applicant does not contest and I accept, in the affidavit of KR, one of the City's Assistant Solicitors, at paras. 3-12, 14, 17, 20 and 24-25 [Affidavit of KR].

[12] On September 14, 2018, the applicant made the access request at issue in this inquiry, which is for the KPMG Reports.

RECORDS IN DISPUTE

[13] The records in dispute are the KPMG Reports. The City is withholding them in their entirety.

[14] The City did not provide the KPMG Reports to the OIPC. As a result, I do not know the exact information in the reports. The City provided affidavit evidence from KR, one of its Assistant City Solicitors, about the general content and structure of the reports.⁵ However, most of that evidence is *in camera*, so I cannot provide further detail. The most I can say is that the KPMG Reports relate to KPMG's investigation of whether City employees failed to collect development fees.

[15] I am satisfied that the City's affidavit evidence regarding the KPMG Reports is sufficiently detailed for me to determine whether s. 14 applies. As for s. 22(1), I do not need to see the records because, as I set out below, I do not consider it necessary to decide whether s. 22(1) applies in this case.

OVERVIEW OF THE PARTIES' POSITIONS

[16] The parties provided submissions that address the legal details of the issues in dispute. I discuss those submissions below. At this stage, the parties' overall positions can be summarized as follows.

[17] The applicant seeks transparency. He submits that the records should be released because it is "time for the public to know what went on inside Surrey city hall, so that it never happens again."⁶ He says the records are now more than 11 years old and no harm would result from disclosing them. The applicant is concerned that, without transparency, "there exists the likelihood that more corruption will occur in the same department or elsewhere in city hall."⁷ The applicant argues that the public has a right to know what happened.

[18] The City submits that it is authorized under s. 14 to withhold the KPMG Reports in their entirety. The City also submits that it is required to withhold the records under s. 22(1).

⁵ Affidavit of KR at paras. 15, 18 and 21.

⁶ Applicant's submissions at para. 4.

⁷ Applicant's submissions at para. 14.

SECTION 14 – SOLICITOR-CLIENT PRIVILEGE

[19] Section 14 states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. This section encompasses litigation privilege and solicitor-client privilege (also known as “legal advice privilege”).⁸ In this case, the City submits that both litigation privilege and legal advice privilege apply to the KPMG Reports. I consider both privileges below, starting with legal advice privilege.

Are the KPMG Reports protected by legal advice privilege?

[20] The test for legal advice privilege has been expressed in various ways, but the essential elements are that there must be:

1. a communication between solicitor and client;
2. that entails the seeking or giving of legal advice; and
3. that is intended by the solicitor and client to be confidential.⁹

[21] The privilege is so important to the legal system that it applies broadly and must be as close to absolute as possible.¹⁰ The confidentiality ensured by legal advice privilege allows clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better assist their clients.¹¹

[22] The City submits that legal advice privilege applies to the KPMG Reports.¹² The City says that its lawyers used the reports to assist them in providing it with legal advice. The City also submits that:

... all the Withheld Records meet the test for legal advice privilege since they were an indirect communication between the City and KPMG that assisted the City and its counsel in communicating with each other for the purposes of giving and receiving legal advice. In this sense it falls within the continuum of communications between solicitor and client. The parties also intended the Withheld Records to be confidential. In fact, they are marked “PRIVILEGED AND CONFIDENTIAL”.¹³

⁸ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26 [College].

⁹ *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837.

¹⁰ *R. v. McClure*, 2001 SCC 14 at para. 35; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 10 and 13 [Camp].

¹¹ *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34.

¹² City’s initial submissions at paras. 43-46.

¹³ City’s initial submissions at para. 43.

[23] The applicant questions whether legal advice privilege applies.¹⁴ He says that KPMG is not a law firm. In support of his position, the applicant relies on Orders F10-18 and F20-22.¹⁵ In those cases, the adjudicators found that the disputed communications were not protected by legal advice privilege because the lawyers involved were not acting in their capacities as lawyers providing legal advice.

[24] Based on KR's evidence, I am satisfied that, at all relevant times, a solicitor-client relationship existed between the City (i.e., the client) and its internal and external lawyers (i.e., the solicitors). In relation to this solicitor-client relationship, KPMG is a third party (i.e., neither the client nor the client's lawyer). Since the KPMG Reports were produced by KPMG and not the City or its lawyers, they are third-party communications, not solicitor-client communications. As a result, the KPMG Reports do not meet the first part of the test for legal advice privilege.

[25] Despite this, the law recognizes that, in some circumstances, solicitor-client privilege extends to communications between clients or their lawyers and third parties.¹⁶ Solicitor-client privilege applies to such communications where the third party is:

- acting as a channel of communication (or messenger, translator, amanuensis or conduit) simply carrying information between the lawyer and the client; or
- performing a function, on the client's behalf, which is integral to the relationship between solicitor and client.¹⁷

[26] The above principles are well-established and, in my view, provide the proper legal framework for determining whether the KPMG Reports are subject to legal advice privilege, even though the City cited different authorities.¹⁸

[27] Having reviewed the City's authorities, I find they are not applicable here. The City cited two authorities for the proposition that legal advice privilege applies to documents "prepared for the dominant purpose of obtaining legal

¹⁴ Applicant's submissions at paras. 5-9.

¹⁵ Applicant's submissions at paras. 7-9, citing Order F10-18, 2010 BCIPC 29 and Order F20-22, 2020 BCIPC 26.

¹⁶ *College*, *supra* note 8 at paras. 43-51; *General Accident Assurance Co. v. Chrusz*, 1999 CanLII 7320 (ON CA) (cited to CanLII).

¹⁷ *College*, *ibid* at para. 50; *Chrusz*, *ibid* at p. 46; *Bank of Montreal v. Tortora*, 2010 BCSC 1430 at para. 15.

¹⁸ I am not bound to apply the authorities relied on by the parties: *R. v. Badhesa*, 2019 BCCA 70 at para. 18. *College* and *Chrusz*, *ibid*, do not change the issue or raise a new issue, which remains whether legal advice privilege applies to the KPMG Reports.

advice”, even where litigation may not be present.¹⁹ However, in my view, these cases relate to the test for litigation privilege rather than legal advice privilege.²⁰ As I set out below, the test for litigation privilege as formulated by the BC Court of Appeal explicitly captures documents prepared for the dominant purpose of obtaining legal advice.

Was KPMG acting as a channel of communication between the City and its lawyers?

[28] The first question is whether KPMG was acting as a channel of communication between the City and its lawyers.

[29] I find that KPMG’s role was to provide expert forensic investigation analysis to the City as a consulting expert or a potential expert witness. I make this finding based on the evidence the City provided, much of which is *in camera*, regarding the contents of the KPMG Reports and the circumstances in which they were commissioned and prepared.

[30] Given KPMG’s role, I am not persuaded that it was acting as a channel of communication between the City and its lawyers. In my view, providing expert forensic investigation analysis is not the same as simply carrying or translating information between the City and its lawyers. I find that KPMG was a source of expert information, not a mere conduit of information. I accept that KPMG’s analysis assisted the City’s lawyers in providing legal advice to the City, but I am not persuaded that the City and its lawyers could not communicate without KPMG.²¹

Was KPMG performing a function integral to the solicitor-client relationship between the City and its lawyers?

[31] The next question is whether KPMG was performing a function integral to the solicitor-client relationship between the City and its lawyers.

[32] Several cases indicate that a third party is performing a function integral to the solicitor-client relationship if the third party is authorized by the client to direct the lawyer to act or to seek legal advice from the lawyer on behalf of the client.²² Courts have found a third party’s role integral to the solicitor-client relationship

¹⁹ City’s initial submissions at para. 23, citing *Poirier v. Wal-Mart Canada Corp.*, 2004 BCSC 1592 at para. 9 and *Berghuis v. Future Shop Ltd.*, 2000 BCSC 1398 at paras. 18-20.

²⁰ The City’s authorities also do not refer to the test for, or the leading cases specifically on, legal advice privilege. Further, they predate *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, which clarified the law regarding the distinctions between legal advice privilege and litigation privilege.

²¹ For similar reasoning, see *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 532 at para. 31 [*Bilfinger*].

²² *College*, *supra* note 8 at para. 51; *Camp*, *supra* note 10 at paras. 54-67; *Bilfinger*, *ibid* at paras. 25-40; *Tortora*, *supra* note 17 at paras. 17-19; *Chrusz*, *supra* note 16 at p. 53.

where the third party is so intimately involved in the factual circumstances and the client's affairs that they effectively stand in the place of the client and their authority "reach[es] inside the solicitor-client relationship".²³

[33] However, in other cases, courts have found that communications and reports from experts providing expert analysis and assistance were not protected by legal advice privilege because the experts were incidental and not integral to the solicitor-client relationship.²⁴

[34] An example is *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*]. The College was investigating a complaint against a physician. The complainant provided various kinds of information to support her allegation that the physician hypnotized her. The College's lawyer retained experts to interpret, assess and opine on the information and the allegation. The lawyer then used the expert opinions to advise the College of the legal implications of the complaint. The Court of Appeal found that the experts' services were incidental, and not integral, to the seeking and obtaining of legal advice because the experts never stood in the place of the College as client.

[35] The inquiry here involves analyzing the function the third party played in relation to the solicitor-client relationship. I found above that KPMG's function was to provide expert forensic investigation analysis to the City.

[36] In my view, KPMG was not performing a function integral to the solicitor-client relationship between the City and its lawyers. I do not see how KPMG's function was materially different from the function of the experts in other similar cases such as *College*. I am not satisfied on the evidence before me that KPMG had any authority to request or receive legal advice from the City's lawyers on the City's behalf or to instruct the City's lawyers. I accept that the information in the KPMG Reports was relevant, and perhaps even essential, to the legal problem the City was facing regarding the development fees. However, the authorities make clear that this is not sufficient to make KPMG's role integral to the solicitor-client relationship.²⁵

[37] I am also not persuaded by the City's argument that the KPMG Reports fall within the "continuum of communications" between solicitor and client. The

²³ See, for example, *Camp*, *supra* note 10 at paras. 54-65 and *Tortora*, *supra* note 17 at para. 19. The quote is from *Chrusz*, *ibid*.

²⁴ See, for example, *College*, *supra* note 8 at paras. 43-51; *Bilfinger*, *supra* note 21 at paras. 23-40; *Potash Corporation of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2010 SKQB 460 at paras. 17-27; *Dhaliwal v. Sims*, 2018 ONSC 6388 at paras. 11-21; *The District of Sechelt v. Information and Privacy Commissioner of British Columbia*, 2021 BCSC 2143 at paras. 71-76.

²⁵ *College*, *supra* note 8 at para. 51; *Bilfinger*, *supra* note 21 at para. 33, citing *Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd.*, 2005 CanLII 25179 (ON CA) at paras. 70-71.

KPMG Reports are not communications between the City and its lawyers. They originate with a third party, KPMG. The City's lawyers gave the City copies of the reports, but that alone does not make the reports themselves privileged.

[38] Further, I am not persuaded that the KPMG Reports are privileged simply because they are marked "privileged and confidential". Such markings are not determinative of the legal status of the document.²⁶ At any rate, the markings are ambiguous as to what kind of privilege and confidentiality applies.

[39] For the reasons provided above, I conclude that the KPMG Reports are not protected by legal advice privilege. I turn now to litigation privilege.

Are the KPMG Reports protected by litigation privilege?

[40] The purpose of litigation privilege is to ensure the efficacy of the adversarial process.²⁷ It does so by creating a protected area in which parties to pending or anticipated litigation are free to investigate, develop and prepare their contending positions in private, without adversarial interference into their thoughts or work product and without fear of premature disclosure.²⁸

[41] Litigation privilege applies to a document if the party asserting the privilege establishes that, at the time the document was produced:

1. litigation was "in reasonable prospect"; and
2. the "dominant purpose" of producing the document "was to obtain legal advice or to conduct or aid in the conduct of litigation".²⁹

[42] Litigation privilege expires when the litigation it relates to ends, unless related litigation persists.³⁰

Was litigation in reasonable prospect when the KPMG Reports were produced?

[43] The first question is whether litigation was in reasonable prospect when the KPMG Reports were produced.

[44] Litigation is in "reasonable prospect" when a reasonable person, fully informed, would conclude it is unlikely that the claim for loss will be resolved

²⁶ See, for example, *Milsom v. Toronto Community Housing Corporation*, 2021 ONSC 7078 at para. 31.

²⁷ *Blank*, *supra* note 20 at para. 27.

²⁸ *Ibid.* See also *Raj v. Khosravi*, 2015 BCCA 49 at paras. 7-20.

²⁹ *Raj*, *ibid* at para. 20.

³⁰ *Blank*, *supra* note 20 at paras. 34-41.

without litigation.³¹ Litigation may be in reasonable prospect “at any point along the continuum between the information-gathering and litigation stages of an inquiry.”³² To satisfy this part of the test, litigation need not be a certainty, but it must be more than mere speculation.³³ This sets a “low” threshold, which the courts have not considered particularly difficult to meet.³⁴

[45] The applicant did not address this specific aspect of the test for litigation privilege.

[46] The City submits that litigation was in reasonable prospect when KPMG produced the disputed reports.³⁵ KR provided evidence in support of the City’s position.

[47] KR’s sworn evidence is uncontested. Based on it, I find that:

- The City commenced litigation against the Employee on April 16, 2010 by filing a writ of summons in the Supreme Court of British Columbia on that date.
- In late June of 2010, the City retained an external law firm to conduct the litigation on its behalf.
- The City amended its pleadings on April 14, 2011, adding individual and corporate defendants whose identities were unknown (i.e., “John Doe” or “Jane Doe” defendants).
- The City’s claims in the litigation are based in part on the information contained in the KPMG Reports.³⁶

[48] As I set out above, KPMG provided the disputed records to the City on April 23, May 19 and July 8, 2010. This means that the KPMG Reports were produced after the City had already commenced litigation against the Employee on April 16, 2010. In other words, the disputed records were produced at a time when litigation was beyond a reasonable prospect and had become a reality. As a result, I find that the first part of the test for litigation privilege is clearly met.

[49] I am also satisfied that the first part of the test for litigation privilege is met even if the question is assessed based on when the City requested the disputed reports rather than when the City received them.³⁷ I am satisfied by the timeline

³¹ *Raj, supra* note 28 at paras. 10-11, citing *Hamalainen (Committee of) v. Sippola*, 1991 CanLII 440 (BC CA) at para. 20 and *Sauvé v. ICBC*, 2010 BCSC 763 at para. 30.

³² *Raj, ibid* at para. 50.

³³ *Raj, ibid* at para. 10.

³⁴ *Raj, ibid* at para. 10.

³⁵ Ministry’s initial submissions at paras. 27-42.

³⁶ Affidavit of KR at paras. 28-32.

³⁷ It is not clear to me whether the relevant date for determining whether litigation is in reasonable prospect is the date on which the party claiming litigation privilege requested an expert report or the date on which the expert actually provided the report. See, for example, *Raj, supra* note 28 at

established by the City's evidence that litigation was in reasonable prospect when the City commissioned the KPMG Reports. The City was already aware of the allegation against the Employee and had retained KPMG to investigate. A preliminary investigation period had passed. In these circumstances, I accept that a reasonable person would conclude it is unlikely that the City's claims relating to the development fees would have been resolved without litigation.

[50] As noted, whether litigation is in reasonable prospect is a low threshold. I am satisfied by the City's evidence that this threshold has been met in this case.

Was the dominant purpose of producing the KPMG Reports to obtain legal advice or to conduct or aid in the conduct of litigation?

[51] The next question is whether the dominant purpose of producing the KPMG Reports was to obtain legal advice or to conduct or aid in the conduct of the litigation.

[52] The courts have noted that this part of the test is more challenging to meet. It requires a factual determination based on all of the circumstances and the context in which the document was produced.³⁸ The inquiry involves determining "whether, and if so when, the focus of the investigation/inquiry shifted to litigation."³⁹ Litigation privilege may apply to a document created for more than one purpose, but only if the dominant purpose is litigation.

[53] The applicant did not address this specific aspect of the test for litigation privilege.

[54] The City submits that the dominant purpose for the production of the KPMG Reports was to aid in the conduct of the litigation.⁴⁰ The City also submits that the KPMG Reports were produced to assist the City's legal counsel in providing legal advice to the City. KR deposes:

... [the KPMG Reports were produced] for the purpose of identifying the parties who should be defendants to a legal action initiated by the City to recover the amounts owing to the City, quantifying the amounts owing to the City by the various parties and capturing the evidence needed to prove the City's claims. I also requested the KPMG Report to assist me in providing confidential legal advice to my client, the City of Surrey, [*in camera*].⁴¹

para. 50; compare *Krieg v. Shallon Marine Service*, 2021 BCSC 670 at paras. 16 and 24-25. However, as I explain above, I find that litigation was in reasonable prospect either way.

³⁸ *Raj, ibid* at para. 17.

³⁹ *Raj, ibid*.

⁴⁰ City's initial submissions at para. 40.

⁴¹ Affidavit of KR at para. 26.

[55] Based on this evidence, and for the following reasons, I am satisfied that the dominant purpose for producing the KPMG Reports was to aid the City in the conduct of the litigation.

[56] Specifically, I accept that the reports assisted the City in identifying the need to add unidentified defendants. As noted above, after receiving the reports, the City amended its pleadings to add unidentified defendants. Identifying and adding defendants is clearly a key part of the conduct of litigation.

[57] I also accept that the City used the KPMG Reports to assist in quantifying the amounts owing to the City. I find that the reports assisted the City in the litigation because it allowed the City to specify its legal claims and the legal remedies it sought.

[58] Further, I accept that the City used the KPMG Reports for evidentiary purposes, to assist it in proving its claims in the litigation. The City's evidence satisfies me that the KPMG Reports were created for use as expert evidence in the litigation.⁴² In my view, the City's *in camera* evidence about the contents of the reports establishes that they included the kind of information that assists counsel in preparing a case for litigation.⁴³ Even if the City never proffered the reports themselves as evidence in the litigation, I accept that the City used the information in the reports to assist it in gathering the evidence required to prove its claims in the litigation.

[59] To be clear, I am persuaded that the dominant purpose for the reports was litigation and not mere investigation. I am satisfied by the City's evidence that the KPMG Reports were produced at a time when the City had shifted its focus to litigation and evidence-gathering rather than mere investigation into whether the City had any claim at all.⁴⁴ In my view, this is supported by the timeline, which shows that the City had already been aware of the allegation against the Employee for some time and KPMG had already been investigating.

[60] For the reasons provided, I conclude that the dominant purpose for the production of the KPMG Reports was to aid the City in the conduct of the litigation. As a result, the test for litigation privilege is met.

Has the litigation privilege expired?

[61] I found above that the KPMG Reports were produced for the dominant purpose of litigation when litigation was in reasonable prospect. However, that is not the end of the matter. Unlike legal advice privilege, which is permanent in

⁴² Affidavit of KR at para. 22.

⁴³ Affidavit of KR at paras. 15 and 44-55.

⁴⁴ Affidavit of KR at Exhibits "D", "F" and "H". For similar reasoning, see, for example, *Raj, supra* note 28 at paras. 51-52.

duration, litigation privilege “expires with the litigation of which it was born”.⁴⁵ Accordingly, I must consider whether the litigation that commenced in April of 2010 has now expired. If it has, litigation privilege no longer protects the KPMG Reports from disclosure.

[62] The applicant questions the status of the litigation. He says there has been “no activity on the case since May 2018”.⁴⁶ The applicant questions why the matter has not been tried in court and resolved so that public funds can be recovered.

[63] The City submits that the applicant’s claim that there has been no recent activity in the litigation is conjecture unsupported by evidence.⁴⁷ The City submits that the litigation is “outstanding and active”.⁴⁸ The City provided sworn evidence from KR that the litigation remains outstanding and has not concluded.⁴⁹ The City’s evidence explaining this is largely *in camera*. The City’s explanation relates to its desire to “ensure that all involved developers and unpaid fees are identified and repaid.”⁵⁰ The City’s approach relates to advice it received from its external lawyer.⁵¹

[64] I understand the applicant’s concern. The City commenced the litigation in April of 2010, which means it has been ongoing for over 11 years. The Supreme Court of Canada has recognized that modern civil litigation has become increasingly protracted.⁵² Even so, over 11 years of litigation seems exceptional, particularly since the evidence before me does not indicate, for example, whether the matter has gone to trial or whether there have been appeal proceedings.

[65] That said, the City provided, *in camera*, a legitimate explanation as to why the litigation remains ongoing. I accept the City’s sworn evidence that, despite its length, the litigation is still live and has not formally concluded. The evidence before me does not include, for example, any court documents on the basis of which I could conclude that the litigation has come to an end. I see no basis to reject the City’s sworn evidence. As a result, I conclude that the litigation is ongoing, so the litigation privilege remains in effect.⁵³

⁴⁵ *Blank*, *supra* note 20 at para. 8 (see also para. 37).

⁴⁶ Applicant’s submissions at para. 13.

⁴⁷ City’s reply submissions at para. 4.

⁴⁸ *Ibid*.

⁴⁹ Affidavit of KR at paras. 34-37.

⁵⁰ *Ibid* at para. 36.

⁵¹ *Ibid* at para. 34.

⁵² *Hryniak v. Mauldin*, 2014 SCC 7.

⁵³ Neither party argued that waiver or the exceptions to privilege apply, and I see no evidentiary basis to suggest that they do.

Conclusion regarding s. 14

[66] For the reasons provided above, I conclude that the City is authorized under s. 14 to withhold the KPMG Reports on the basis that litigation privilege applies, but not on the basis that legal advice privilege applies.

SECTION 22 – THIRD-PARTY PERSONAL PRIVACY

[67] The City is also withholding the KPMG Reports under s. 22(1). That section states that the head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[68] In my view, it is not necessary to decide s. 22(1) in this case because the records are privileged in their entirety, at least so long as the litigation persists.

CONCLUSION

[69] For the reasons given above, under s. 58(2)(b) of FIPPA, I confirm the City's decision that it is authorized under s. 14 to refuse the applicant access to the KPMG Reports.

November 30, 2021

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

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