



Order F22-04

CITY OF RICHMOND

Ian C. Davis
Adjudicator

January 12, 2022

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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 Richmond (City) for access to records relating to delays in the construction of a recreational centre. The City withheld the records and information under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege), 17(1) (harm to the financial or economic interests of a public body), 21(1) (harm to business interests of a third party) 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 some, but not all, of the records on the basis that solicitor-client privilege applies. The adjudicator ordered the City, under s. 44(1)(b), to produce the remaining records to the Information and Privacy Commissioner for the purposes of adjudicating the other exceptions.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 44(1)(b), 44(2.1) and 44(3).

INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the City of Richmond (City) for access to “correspondence and internal reports discussing reasons for delays in the construction of the Minoru Centre for Active Living.”¹ The date range for the request is 2013-2019.

[2] In response, the City disclosed some records to the applicant, but withheld 3,865 pages of records in their entirety under several FIPPA exceptions to disclosure.² Specifically, the City refused access under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege), 17(1) (harm to the financial or

¹ Access request form stamped as having been received by the City on February 22, 2019.

² Investigator’s Fact Report at para. 2.

economic interests of a public body), 21(1) (harm to business interests of a third party) 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 this inquiry.

ISSUES AND BURDEN OF PROOF

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

1. Is the City authorized to refuse the applicant access to the disputed information under ss. 13(1), 14 and 17(1)?
2. Is the City required to refuse the applicant access to the disputed information under ss. 21(1) and 22(1)?

[5] According to s. 57(1), the burden is on the City to prove that it is authorized to refuse the applicant access under ss. 13(1), 14, 17(1) and 21(1).

[6] According to s. 57(2), the burden is on the applicant to prove that disclosure of the disputed information would not be an unreasonable invasion of a third party's personal privacy under s. 22(1). However, the City has the initial burden of proving that the disputed information is personal information under s. 22(1).³

BACKGROUND

[7] In 2014, the City decided to build a new facility called the Minoru Centre for Active Living (Centre).⁴ The Centre is an aquatic, recreational and seniors' centre owned and operated by the City to support active living and wellness for all ages.

[8] Following a competitive procurement process, the City entered into a November 1, 2014 master agreement with Stuart Olson Construction Ltd. (Stuart Olson). Under that agreement, Stuart Olson agreed to provide construction management services to the City over a five-year term for selected City capital projects, including the Centre. The master agreement set out the process and terms under which the City and Stuart Olson would enter into separate contracts relating to specific projects.

³ Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.

⁴ The information in this background section is based on the evidence, which I accept, in the Affidavit of MY at paras. 4-8.

[9] Subsequently, the City and Stuart Olson entered into a contract under which Stuart Olson agreed to provide construction of, and construction management for, the Centre.

[10] On February 22, 2019, the applicant made the access request at issue in this inquiry.

[11] The Centre opened in stages during 2019 and 2020. In early 2020, Stuart Olson commenced a lawsuit against the City in the Supreme Court of British Columbia.

RECORDS IN DISPUTE

[12] There are 3,865 pages of records in dispute.⁵ The City is withholding all of the records in their entirety under ss. 13(1), 14, 17(1), and 21(1), and withholding some information in the records under s. 22(1).⁶

SOLICITOR-CLIENT PRIVILEGE – SECTION 14

[13] 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 legal advice privilege (also commonly known as “solicitor-client privilege”) and litigation privilege.⁷ In this case, the City claims solicitor-client privilege and not litigation privilege.⁸ When I say “solicitor-client privilege” below, I mean legal advice privilege only.

[14] The test for solicitor-client privilege has been expressed in various ways, but the essential elements are that there must be:

1. a communication between solicitor and client (or their agent⁹);
2. that entails the seeking or giving of legal advice; and
3. that is intended by the solicitor and client to be confidential.¹⁰

[15] The confidentiality ensured by solicitor-client privilege allows clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better

⁵ Investigator’s Fact Report at para. 6.

⁶ Investigator’s Fact Report at paras. 2 and 5-6; City’s initial submissions at paras. 22, 31 and 41. However, I note that the City did not say anything about s. 21(1) in its inquiry submissions.

⁷ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.

⁸ City’s further submissions dated December 3 and 7, 2021.

⁹ *Descôteaux et al. v. Mierzewski*, [1982] 1 S.C.R. 860 at pp. 872-873 and 878-879.

¹⁰ *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837.

assist their clients.¹¹ Given its function, solicitor-client privilege is so important to the legal system that it should apply broadly and be as close to absolute as possible.¹²

Evidentiary basis for deciding the City's s. 14 privilege claims

[16] The City did not provide the disputed records for my review. The City relies on affidavit evidence to support its privilege claims.

[17] Past court cases and OIPC orders set out the legal principles that apply in these circumstances. The laws and practice in civil litigation guide the adjudication of privilege claims in an OIPC inquiry.¹³ Although there are no steadfast rules and each case depends on its own facts, some general rules have been established, including that:

- a party claiming privilege must list each disputed record separately and provide, without revealing privileged information, a description of the record in sufficient detail to allow an opposing party to assess the claim of privilege;
- the description of the record should include the date it was created or sent, the nature of the communication (e.g., “email”) and the names of the author and the recipient(s);
- in addition to a proper description of the disputed records, the party claiming privilege must provide evidence to substantiate the privilege claim;
- ideally, affidavit evidence in support of a privilege claim should avoid hearsay and come from an affiant with direct knowledge of the disputed records; and
- it is helpful, and in some cases even necessary, to have affidavit evidence from a lawyer, who is an officer of the court and has a professional duty to ensure that privilege is properly claimed.¹⁴

[18] If the party claiming privilege does not provide the above information, “[c]ertainly an explanation would be required”.¹⁵

¹¹ *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34. For more on the rationale behind solicitor-client privilege, see *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA) per Doherty J.A.

¹² *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].

¹³ *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para. 76 [Minister of Finance]. See also Order F20-16, 2020 BCIPC 18 at paras. 8-10.

¹⁴ See, for example, *Minister of Finance*, *ibid* at paras. 76-93 and Order F20-16, *ibid*.

¹⁵ *Minister of Finance*, *ibid* at para. 81.

[19] In the City's initial submissions, it provided one affidavit, sworn by MY, the City's Manager of Capital Buildings Project Development.

[20] Based on my review of MY's evidence and the City's initial submissions, I determined that the City had not provided a sufficient evidentiary foundation to establish that all of the records are subject to solicitor-client privilege. I made this determination based on the legal principles set out above.

[21] Given the significance of solicitor-client privilege, I wrote to the City, and offered it an opportunity to provide further s. 14 evidence and submissions.¹⁶ The City responded by providing an affidavit from LB, one of the City's staff lawyers.¹⁷ I then wrote to the City a second time, again highlighting concerns with the City's evidence.¹⁸ In response, the City said that it had provided a sufficient evidentiary foundation to establish that the disputed records are privileged.¹⁹

[22] I recognize that, under s. 44(1)(b) of FIPPA, the commissioner has the discretion to order a party to produce for inspection records that a public body claims are subject to solicitor-client privilege. The court has a similar discretion.²⁰ However, the preference and practice in civil litigation is to proceed on the basis of affidavit evidence.²¹ The court will exercise its discretion to inspect the records only where doing so would facilitate a fair and expedient resolution to the privilege claim.²² For example, the court may inspect the records where it is satisfied that the party claiming privilege cannot prove privilege through affidavit evidence without revealing the privileged information itself.²³

[23] Neither party argued that I should order the City, under s. 44(1)(b), to produce the disputed records for my inspection before deciding whether they are privileged.

¹⁶ Letter from the OIPC to the City and the applicant dated November 18, 2021. I took this approach in an effort to follow the Court's practice of considering whether to grant a party an opportunity to file further evidence where it finds that the evidence presented is not sufficient to establish privilege: see, for example, *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 [*Keefer Laundry*] at paras. 71-90; *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at paras. 94-125. The adjudicator also took this approach in Order F19-36, 2019 BCIPC 40, upheld on judicial review in *The District of Sechelt v. Information and Privacy Commissioner of British Columbia*, 2021 BCSC 2143.

¹⁷ Letter from the City to the OIPC and the applicant dated December 3, 2021.

¹⁸ Letter from the OIPC to the City and the applicant dated December 6, 2021.

¹⁹ Letter from the City to the OIPC and the applicant dated December 7, 2021.

²⁰ Rule 7-1(20) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

²¹ *Keefer Laundry*, *supra* note 16 at para. 74; *Minister of Finance*, *supra* note 13 at para. 83.

²² *Keefer Laundry*, *supra* note 16 at paras. 72-77; *Huang*, *supra* note 16 at paras. 122-125; *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 36-45.

²³ *Keefer Laundry*, *ibid* at para. 75.

[24] In any case, I do not consider such an order appropriate here. I see no legitimate basis to interfere with the City's decision to present its case as it sees fit, which is to rely on affidavit evidence and not the records themselves. The City does not say, and I am not persuaded, that it cannot prove its privilege claims unless I review the records. Further, I am not persuaded that delaying these proceedings further for me to review thousands of pages of disputed records would produce a just and speedy determination of the City's privilege claims.²⁴

[25] Given the circumstances set out above, I will assess the City's s. 14 privilege claims based on the affidavit evidence it has chosen to present.

Positions of the parties regarding s. 14

[26] The applicant submits that the City has not provided adequate evidence to establish that all of the records are privileged.²⁵ The applicant notes that the City has not even described all of the records.²⁶ The applicant argues that privilege only applies to a "small portion" of the disputed information.²⁷

[27] More generally, the applicant seeks transparency and accountability.²⁸ The applicant submits that the City owes its citizens a full explanation for the delays in construction of the Centre. The applicant is also concerned about the financial aspects of construction of the Centre for taxpayers, as well as the physical safety of the Centre.

[28] The City submits that all of the disputed records meet the test for privilege, so it is authorized to withhold them in their entirety under s. 14.²⁹ The City says it agrees with the fundamental principles of transparency and accountability under FIPPA; however, it notes that there are exceptions to these principles that apply in this case.³⁰

Are the disputed records subject to solicitor-client privilege?

[29] Attached as exhibits to LB's and MY's affidavits are tables setting out descriptions of only 288 pages of the 3,865 pages of records in dispute.³¹ Based on this evidence, I find that the 288 pages of records are:

²⁴ In *Keefer Laundry, ibid*, the Court stated that parties should be discouraged from relying on the decision-maker to review documents "as a method of saving the parties the time and trouble of preparing the evidence necessary to establish the basis for privilege."

²⁵ Applicant's further submissions dated December 20, 2021 at p. 1.

²⁶ Applicant's response submissions at p. 2.

²⁷ Applicant's response submissions at p. 1.

²⁸ Applicant's response submissions at pp. 1-4; applicant's further submissions dated December 20, 2021 at p. 1.

²⁹ City's initial submissions at para. 13.

³⁰ City's reply submissions at paras. 5-6.

³¹ Affidavit of MY, Exhibit "C"; Affidavit of LB, Exhibit "A".

- emails, some with attachments, between City employees and LB or the City's external lawyer or both (City-lawyer emails);³² and
- one email, including attachments, between City employees (internal email).³³

[30] The balance of the disputed records (over 3,500 pages) are not listed or described in MY's or LB's evidence in the same way that the City-lawyer emails and internal email are. I will refer to these records as the "unlisted records".

[31] I analyze the City-lawyer emails, the internal email and the unlisted records separately and in turn below.

City-lawyer emails

[32] LB and MY both provided evidence regarding the City-lawyer emails (and the internal email). In general, I prefer LB's evidence because he is a lawyer and his table descriptions are more detailed.

[33] LB states that he is familiar with the delays in the construction of the Centre and provided legal advice to the City throughout the construction process.³⁴ He says that the City also retained an external lawyer to act for it in relation to the construction of the Centre and the litigation with Stuart Olson.³⁵

[34] LB reviewed the City-lawyer emails and deposes:

Based on my involvement in this project, I can confirm that [the City-lawyer emails] are confidential communications between the City and its outside or internal legal counsel, or both, that are related to the seeking or giving of legal advice regarding the Minoru Centre³⁶

[35] Based on LB's evidence, I find that, at all relevant times, the City was in a solicitor-client relationship with its internal and external lawyers. Since the City-lawyer emails are between the City and its lawyers, they meet the first part of the test for privilege.

[36] I also find that the City-lawyer emails were intended to be confidential. I accept LB's sworn evidence that they were. Further, I can see from the City's descriptions of the City-lawyer emails that no one outside of the solicitor-client

³² Records at pp. 423-433, 434-439, 440-445, 446-451, 543, 544-546, 560-572, 638-642, 764-766, 782-784, 1157-1160, 1176-1181, 1288-1291, 1327-1336, 1378-1382, 1385-1390, 1391-1394, 1395-1398, 1430-1434, 1958-2097, 2268-2270, 2466-2468, 2480-2484, 2727, 3333-3337, 3338-3343, 3353-3354, 3522-3523, 3646-3648, 3649-3652 and 3773-3774.

³³ Records at pp. 416-422.

³⁴ Affidavit of LB at para. 2.

³⁵ Affidavit of LB at para. 4.

³⁶ Affidavit of LB at para. 5.

relationship was included in these communications. This satisfies me that the City-lawyer emails were intended by the City and its lawyers to be confidential. Accordingly, the second part of the privilege test is met.

[37] The third part of the test is whether the disputed communications relate to the seeking or providing of legal advice. Privilege applies to the “chain of exchanges” or “continuum of communications” between lawyer and client and “not just the culmination of the lawyer’s product or opinion”.³⁷

[38] I accept that the City-lawyer emails entail the seeking and providing of legal advice. Specifically, I accept LB’s evidence that the disputed communications relate to legal advice that he and the City’s external lawyer provided to the City regarding issues that arose in relation to the construction of the Centre and the litigation with Stuart Olson.³⁸ MY’s and LB’s evidence clearly shows that issues arose relating to the construction of the Centre. It makes sense that the City would have sought legal advice on those matters. I am satisfied by the City’s evidence, including its table descriptions, that the City-lawyer emails comprise privileged back-and-forth between lawyers and City employees working together to deal with legal issues and litigation relating to the Centre.

[39] Some of the City-lawyer emails include attachments. Not all attachments to solicitor-client emails are necessarily privileged, but they are if they contain or would reveal legal advice.³⁹ LB’s evidence is that the attachments relate to the legal advice he or the City’s external lawyer provided and would reveal that advice.⁴⁰ LB was personally involved in the communications and reviewed the records, so I find his evidence reliable and I accept it. I am satisfied that the attachments would reveal legal advice, so they are privileged.

[40] For the reasons given, I conclude that the City-lawyer emails are subject to solicitor-client privilege, so the City is authorized to withhold these records under s. 14.

Internal email

[41] The internal email is between City employees only and does not involve any lawyers. Attached to it are five letters.

[42] The City’s evidence is that the email and attached letters relate to its request to its external lawyer for legal advice.⁴¹ LB’s records table indicates that

³⁷ *Camp*, supra note 12 at para. 40 (see also paras. 43-45); *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 33.

³⁸ Affidavit of LB at paras. 2 and 4-5.

³⁹ *Minister of Finance*, supra note 13 at paras. 108-112.

⁴⁰ Affidavit of LB at para. 5 and Exhibit “A” (under “Privilege Application”).

⁴¹ Affidavit of LB, Exhibit “A” (Records numbers 1-2).

these letters were later sent from LB to the City's external lawyer in a separate email. LB deposes that the internal email is a confidential internal City communication that relates to the seeking or giving of legal advice or that discloses such advice.⁴²

[43] In my view, the internal email and its attachments are privileged. I accept LB's evidence that the email and attachments are confidential and relate to legal advice. No third parties are involved in the email, so I am satisfied it was intended to be confidential.

[44] Further, it is well-established that solicitor-client privilege applies to requests for legal advice.⁴³ I accept that the email and attachments relate to the City's request for legal advice and would allow accurate inferences as to the nature of the request and the legal advice the City's lawyers ultimately provided. In my view, the email and attachments cannot be disclosed without any risk of revealing privileged information.

[45] I conclude that the internal email and its attachments are subject to solicitor-client privilege, so the City is authorized to withhold them under s. 14.

Unlisted records

[46] As noted, the unlisted records comprise over 3,500 pages of records that the City chose not to provide to the OIPC for the purposes of this inquiry. Neither MY nor LB listed or described the unlisted records in their evidence, as they did for the City-lawyer emails and the internal email. LB did not provide any evidence about the unlisted records; he only provided evidence about the City-lawyer emails and the internal email.⁴⁴

[47] MY did, however, provide some affidavit evidence about the unlisted records. MY states:

Based on my review of the Records as a whole, I believe them all to be records created or compiled in confidence within the continuum of the solicitor-client relationship between the City and both its in-house and outside lawyers and therefore they are all confidential communications related to the seeking or giving of legal advice.⁴⁵

[48] In addition, MY deposes that all of the disputed records, including the unlisted records:

⁴² Affidavit of LB at para. 5.

⁴³ *Descôteaux*, *supra* note 9 at pp. 876-877. See also *Lee*, *supra* note 37 at para. 35.

⁴⁴ Affidavit of LB at para. 5.

⁴⁵ Affidavit of MY at para. 13.

- contain advice or recommendations, including expert background information, developed by or for the City;
- relate to, and were created or compiled in the context of, an “increasingly difficult working relationship with Stuart Olson” that resulted in litigation; and
- public disclosure of the records would disclose the City’s confidential analysis of certain issues and its litigation strategy and would result in various kinds of harm to the City’s interests.⁴⁶

[49] In my view, MY’s evidence, combined with the City’s submissions, is not sufficient to establish that the unlisted records are subject to solicitor-client privilege.

[50] The City has not listed all of the unlisted records individually or in categories.⁴⁷ The City provided no descriptions of the records, not even the date of the records, the nature of the records or the names of the authors and recipients of the disputed communications. The City has not provided any persuasive explanation as to why it could not provide this information, and it is not clear to me why it could not do so in this case.

[51] Further, MY’s evidence is very general and does not address individual records or specific categories of records. Where affidavit evidence is relied upon to support a claim of solicitor-client privilege, the evidence should address the specific documents subject to the privilege claim.⁴⁸ MY’s evidence opines on the elements of solicitor-client privilege in a blanket fashion in relation to thousands of pages of records. In my view, this evidence is too general and lacking in detail to establish that all of the unlisted records meet the three elements of the privilege test. I say this mindful of the significance of solicitor-client privilege and the burden of proof on a balance of probabilities.

[52] In addition, I note that MY’s credentials are “B.Eng., M.Eng.,” so it seems he is a professional engineer.⁴⁹ There is no evidence that he is a lawyer. I must consider how much weight to place on his evidence given that he is not a lawyer and thus not obviously qualified to reliably opine on the application of solicitor-client privilege.⁵⁰

⁴⁶ Affidavit of MY at paras. 14-17.

⁴⁷ Where the records are voluminous, it may be sufficient to set out groups of documents rather than individual descriptions: see *Huang*, *supra* note 16 at para. 95.

⁴⁸ *Minister of Finance*, *supra* note 13 at para. 91.

⁴⁹ Affidavit of MY at para. 1. See, for example, *Ketler v. Nova Scotia (Attorney General)*, 2015 NSSC 170 at para. 178, where a professional civil engineer had the same credentials.

⁵⁰ *Ralmax Properties Ltd. v. Pt. Ellice Properties Ltd.*, 2021 BCSC 2454 at para. 16 [*Ralmax*]. The parties did not cite this case and it was issued during my deliberations. However, I am not bound to rely on the authorities relied on by the parties and am entitled to seek assistance on the issue beyond the authorities cited: *R. v. Badhesa*, 2019 BCCA 70 at para. 18. At any rate, I consider *Ralmax* simply an application of established principles.

[53] MY states that he “believe[s]” the records were “created or compiled within the continuum of the solicitor-client relationship” and relate to “the seeking or giving of legal advice.”⁵¹ This is an opinion, not a statement of fact. Moreover, it is an opinion on the application of legal concepts—i.e., confidentiality, legal advice and the protected “continuum”—to actual communications.⁵²

[54] In my view, MY’s opinion stretches the limits of the kind of evidence he is qualified to, and can reliably, provide. Applying the legal elements of solicitor-client privilege requires some analysis, which can be complex. Because of their expertise and experience, lawyers are best qualified to conduct this analysis. The City did not provide any persuasive evidence to show that MY, a non-lawyer, is qualified to provide a reliable opinion on the elements of privilege.

[55] The other issue with MY’s evidence is that, not being a lawyer, MY is not subject to the professional obligation and ethical duty of a lawyer, as an officer of the court, to claim privilege only where it is justifiable.⁵³ The courts are clear that some deference is owed to lawyers claiming privilege, given their professional obligation to properly claim privilege.⁵⁴ However, non-lawyers like MY do not have the same professional obligation as lawyers. As a result, no deference to their opinions about privilege is required and, in my view, no such deference is warranted in this case.

[56] For these reasons, I give MY’s evidence minimal weight. Without more from the City, I am not persuaded that MY’s evidence, and the City’s submissions relying on that evidence, are sufficient to meet the City’s burden to establish on a balance of probabilities that the unlisted records satisfy the three parts of the test for privilege.

[57] To be clear, I am not saying that affidavit evidence from a lawyer is required to establish privilege in every case. In some cases, an affidavit from an instructing client may be sufficient depending on the evidence it contains.⁵⁵ Indeed, in this case, I accept that MY is an employee of the City and has personal knowledge of the communications in the unlisted records, having reviewed them and having been involved in the background circumstances. However, I am not satisfied that MY’s review and involvement renders his opinion sufficiently reliable to establish privilege over the unlisted records. In this particular case, I find that MY’s sweeping non-lawyer opinion about the elements of solicitor-client privilege as applied to thousands of pages of records,

⁵¹ Affidavit of MY at para. 13.

⁵² In legal terms, MY’s evidence opines on a question of “mixed law and fact”: *Ralmax*, *supra* note 50.

⁵³ *Minister of Finance*, *supra* note 13 at para. 86.

⁵⁴ *Minister of Finance*, *ibid*.

⁵⁵ *Minister of Finance*, *ibid* at para. 83.

unsupported by document descriptions, is not persuasive enough to establish privilege over the unlisted records.

[58] I am also not persuaded by the City's arguments based on MY's evidence that the unlisted records relate to its litigation with Stuart Olson or that it would reveal the City's confidential analysis of issues and harm the City's interests in the litigation. I do not see how these considerations relate to or meet the requirements of the three-part test for solicitor-client privilege. That test does not refer to harm to litigation interests. To my mind, these considerations potentially relate to litigation privilege; however, the City clearly stated that it is not claiming litigation privilege.⁵⁶

[59] I conclude that the City has not discharged its burden to prove on a balance of probabilities that the unlisted records are subject to solicitor-client privilege.

Overall conclusion regarding s. 14

[60] For the reasons provided above, I conclude that the City is authorized under s. 14 to withhold the City-lawyer emails and the internal email (as defined above) on the basis that solicitor-client privilege applies. However, the City is not authorized under s. 14 to withhold the unlisted records (as defined above) because the City has failed to meet its burden to establish on a balance of probabilities that those records are subject to solicitor-client privilege.

OTHER FIPPA EXCEPTIONS – SECTIONS 13, 17, 21 AND 22

[61] Since I found above that the City is authorized to withhold the City-lawyer emails and the internal email under s. 14, there is not need to consider whether any other FIPPA exceptions apply to the information in those records.

[62] However, as I found above that s. 14 does not apply to the unlisted records, the issues left to be determined in this inquiry are whether ss. 13(1), 17(1), 21(1) and 22(1) apply to the information in dispute in the unlisted records. The City is withholding the unlisted records in their entirety under ss. 13(1) and 17(1), and is withholding some information in those records under s. 22(1).⁵⁷ The Investigator's Fact Report says the City is withholding information under s. 21(1),⁵⁸ but the City did not say anything about that section in its submissions.

[63] Again, the City did not provide the unsevered records to the OIPC. As a result, I am not able to review the information in dispute under ss. 13(1), 17(1), 21(1) and 22(1).

⁵⁶ City's further submissions dated December 3 and 7, 2021.

⁵⁷ City's initial submissions at paras. 22, 31 and 41.

⁵⁸ Investigator's Fact Report at paras. 2 and 5-6.

[64] Order F10-18 dealt with similar circumstances.⁵⁹ Then Acting Commissioner Paul D. K. Fraser, Q.C., considered whether a school district was authorized to withhold a report under s. 14, as well as various other FIPPA exceptions. The school district did not provide the report to the Acting Commissioner for his review. The Acting Commissioner decided that s. 14 did not apply to the report. Under s. 44(1)(b), he ordered the school district to produce the report to the OIPC for the purposes of adjudicating the other exceptions. Subsequently, in a separate order (Order F11-04), then Commissioner Denham adjudicated the other exceptions.

[65] The relevant parts of s. 44 state:

44 (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:

...

(b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.

...

(2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.

(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1).

[66] In my view, the approach taken in Order F10-18 is also appropriate here. I am not satisfied that I can determine whether ss. 13(1), 17(1), 21(1) and 22(1) apply without reviewing the actual information in dispute. Those exceptions do not have the same significance as solicitor-client privilege under s. 14 and cannot be dealt with only on affidavit evidence. They require detailed line-by-line analysis that cannot be conducted without reviewing the disputed information itself.

[67] Accordingly, following Order F10-18, I order the City under s. 44(1)(b) to produce the records that remain in dispute under ss. 13(1), 17(1), 21(1) and 22(1) to the OIPC for the purposes of adjudicating those exceptions.

⁵⁹ Order F10-18, 2010 BCIPC 29. See also Order F11-32, 2011 BCIPC 38 at para. 15.

CONCLUSION

[68] For the reasons given above, I make the following orders:

1. Under s. 58(2)(b) of FIPPA, I confirm the City's decision that it is authorized under s. 14 to refuse access to the records listed in Exhibit "A" to LB's affidavit (i.e., the City-lawyer emails and the internal email, as defined above in paragraph 29), but not the balance of the records (i.e., the unlisted records, as defined above in paragraph 30).
2. Under ss. 44(1)(b) and 44(3) of FIPPA, by January 26, 2022, the City is required to produce to me, through the registrar of inquiries, all of the records that it is withholding under ss. 13(1), 17(1), 21(1) and 22(1), clearly indicating which specific information it is withholding and under which section(s) of FIPPA.

January 12, 2022

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

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