



Order F23-63

MINISTRY OF MUNICIPAL AFFAIRS

David Goodis
Adjudicator

August 15, 2023

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Summary: An individual made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Municipal Affairs (Ministry) for records relating to Cultus Lake Park. The Ministry provided access to some records but withheld some information under ss. 12(1) (Cabinet confidences), 13 (advice or recommendations), 14 (solicitor client privilege), 16 (harm to intergovernmental relations), and 22 (unreasonable invasion of personal privacy) of FIPPA. The Ministry later decided to withdraw its reliance on ss. 12(1) and 13. The adjudicator confirmed the Ministry's decision to withhold information under ss. 14, 16 and 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 14, 16(1)(b), 22(1), 22(2), 22(3)(f); *Cultus Lake Park Act*, SBC 1932 c 63.

INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for access to records held by the Ministry of Municipal Affairs (Ministry) relating to Cultus Lake Park.¹

[2] The Ministry gave the applicant access to some information but withheld other information under ss. 12(1) (Cabinet confidences), 13 (advice or recommendations), 14 (solicitor client privilege), 16 (harm to intergovernmental relations), and 22 (unreasonable invasion of personal privacy) of FIPPA. The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to refuse him access to records.

¹ Applicant's request dated March 20, 2020.

[3] Mediation did not result in a full resolution of the matter, and it proceeded to inquiry.

[4] During the inquiry, the OIPC agreed to the Ministry's request to provide some submissions to the OIPC *in camera* because disclosure of these submissions to the applicant would reveal the substance of legal advice sought and received by the Ministry.

[5] Also during the inquiry, the Ministry advised that it was no longer relying on the exceptions at ss. 12(1) (Cabinet confidences) and 13 (advice or recommendations) under FIPPA.

ISSUES AND BURDEN OF PROOF

Issues

[6] In this inquiry I must decide the following issues:

1. Is the Ministry authorized to withhold the information in dispute under ss. 14 and/or 16(1)(b) of FIPPA?
2. Is the Ministry required to withhold the information in dispute under s. 22?

Burden of proof

[7] Under s. 57(2), the applicant must prove that disclosure of another individual's personal information would not be an unreasonable invasion of that person's privacy under s. 22. However, the Ministry bears the burden of showing that the information at issue under s. 22 is "personal information."

[8] Section 57(1) of FIPPA says it is up to the Ministry to prove ss. 14 and 16 apply.

DISCUSSION

Background

[9] Cultus Lake Park (park) is located south of the Chilliwack River in the Fraser Valley. The park is held in trust for the City of Chilliwack (city) and administered by the Cultus Lake Park Board (park board) which is made up of five elected commissioners. The administration of the park is provided for in the *Cultus Lake Park Act* (CLPA).²

² SBC 1932 c 63.

[10] In 2019, the Minister of Municipal Affairs introduced a bill (Bill) to amend the CLPA that proposed specific amendments to modernize it.³ After the Bill was tabled, concerns were raised regarding the park board's ability to approve business activities and residency requirements for membership. Ministry staff together with legal counsel from the Ministry of Attorney General prepared materials to support the Minister in responding to legislative debate about the Bill.

Records and information at issue

[11] There are five records at issue in this inquiry consisting of 16 pages.⁴ The records include emails, a briefing note and a memorandum.

[12] The Ministry has provided a table of records that includes dates and general descriptions of each record and indicates which exceptions it is claiming for each record.

Solicitor-client privilege, s. 14

Introduction

[13] The Ministry has withheld portions of three records⁵ under s. 14 of FIPPA.

[14] Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege.⁶ Section 14 encompasses both legal advice privilege and litigation privilege. The Ministry is claiming legal advice privilege.

[15] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.⁷ In order for information to be protected by legal advice privilege it must be:

- a communication between solicitor and client (or their agent);
- that entails the seeking or providing of legal advice; and
- that is intended by the solicitor and client to be confidential.⁸

³ Bill 3, *Municipal Affairs and Housing Statutes Amendment Act, 2019*.

⁴ Pages 1-6, 8-10, 11, 12-13, 15-18.

⁵ Pages 1-6, 8-10, 15-18.

⁶ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College], para. 26.

⁷ Ibid, para. 31.

⁸ *Solosky v. The Queen*, 1979 CanLII 9 (SCC), p. 837; *R. v. B.*, 1995 CanLII 2007 (BC SC), para. 22.

[16] Not every communication between a solicitor and their client is privileged. However, if the above conditions are satisfied, legal advice privilege applies.⁹

[17] 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.¹⁰ Legal advice privilege also extends to internal client communications that discuss legal advice and its implications,¹¹ as well as communications involving a lawyer’s support staff, and communications dealing with administrative matters if the communications were made with a view to obtaining legal advice.¹² As stated by the Supreme Court of Canada:

... a lawyer’s client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality.¹³

Evidentiary basis for solicitor-client privilege

[18] The Ministry did not provide me with a copy of the specific information it redacted under s. 14 for my review. Instead, it relied on affidavit evidence from a senior official within the Ministry (Senior Official), and a lawyer with the Ministry of Attorney General’s Legal Services Branch (Lawyer). These two individuals say they reviewed the records at issue and describe how the records meet the elements needed to establish legal advice privilege.

[19] The Ministry says that its initial submission and affidavits provide sufficient evidence to decide if s. 14 applies.

[20] Section 44(1) gives me, as the commissioner’s delegate, the power to order production of records to review them during the inquiry. However, due to the importance of solicitor-client privilege to the proper functioning of the legal system, I would only order production of records being withheld under s. 14 when absolutely necessary to adjudicate the issues.

⁹ Ibid, p. 829.

¹⁰ *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83.

¹¹ *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.

¹² *Oleynik v Canada (Privacy Commissioner)*, 2016 FC 1167 at para. 60.

¹³ *Descôteaux et al v Mierzwinski*, [1982] 1 SCR 860, 1982 CanLII 22 (SCC) at pp. 892-893.

[21] In this case, I have sufficient evidence to decide if s. 14 applies. First, I have the Lawyer's sworn affidavit evidence which establishes that he is a practicing lawyer and an officer of the court with a professional duty to ensure that privilege is properly claimed. I am also satisfied that he has reviewed the specific records at issue and he was directly involved in the communications. His evidence is supplemented with the evidence of the Senior Official who was involved in the matter to which the records relate. Further, the Ministry's table of records gives some detail about the three records, and the remaining records that I am able to see also provide context.

Parties' submissions

[22] The Ministry submits the evidence it provided shows that the information withheld under s. 14 is subject to solicitor-client privilege because it reveals confidential communications between Ministry staff and a Ministry of Attorney General legal counsel. The Ministry states that these communications related to the possible amendments to the Bill.

[23] The Ministry submits that all of the information withheld from the records under s. 14 fall within the continuum of communications between the legal counsel and his Ministry clients.

[24] The applicant did not provide any substantive submissions on the applicability of the s. 14 exception.

Analysis and findings, s. 14

[25] I accept the Ministry's sworn evidence and arguments in support of the s. 14 legal advice privilege claim. I am satisfied that the individuals providing the affidavit evidence have direct knowledge of the nature and content of the communications reflected in the records, as well a strong understanding of the scope and purpose of the s. 14 solicitor-client privilege exception. The Ministry's evidence and arguments establish that the withheld information either (1) consists of or would reveal communications between a lawyer and client for the purpose of giving or receiving legal advice in the context of the Ministry's consideration of possible amendments to the Bill or (2) forms part of the continuum of communications in giving or receiving legal advice on this matter.

[26] In addition, I am satisfied that these communications were consistently treated as confidential by both Ministry staff and the Ministry of Attorney General legal counsel.

[27] Accordingly, I find that the Ministry is authorized to withhold the information it claims to be exempt under s. 14 of FIPPA. This information appears on pages 2, 3, 8-10 and 15-16 of the records in dispute.

Intergovernmental relations, s. 16

Introduction

[28] The Ministry relies on s. 16(1)(b) to withhold two records¹⁴ in their entirety. The parts of s. 16 that are relevant here state:

16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:

- (i) the government of Canada or a province of Canada;
- (ii) the council of a municipality or the board of a regional district;
- (iii) an Indigenous governing entity;
- (iv) the government of a foreign state;
- (v) an international organization of states,

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies...

[29] The purpose of s. 16(1)(b) is to “promote and protect the free flow of information between governments and their agencies for the purpose of discharging their duties and functions.”¹⁵

[30] Section 16(1)(b) requires a public body to establish two things: (1) disclosure would reveal information that it received from a government, council or organization listed in s. 16(1)(a) or one of their agencies, and (2) this information was received in confidence.¹⁶

[31] The background to the two records can be described as follows. In 2017, the city received a legal opinion¹⁷ from a lawyer relating to Cultus Lake Park. On February 25, 2019, an official with the park board emailed a copy of the legal opinion to a Ministry policy advisor. That email contained brief comments about the legal opinion.¹⁸ On February 28, 2019, the Ministry policy advisor forwarded the email and legal opinion received from the park board official to a second

¹⁴ Pages 11, 12-13.

¹⁵ Order F19-38, 2019 BCIPC 43.

¹⁶ Order F17-56, 2017 BCIPC 61 at para. 83; Order 02-19, 2002 CanLII 42444 (BC IPC) at para. 18.

¹⁷ Pages 12-13.

¹⁸ Page 11.

Ministry policy advisor. The first policy advisor included in this forwarding email a summary of the legal opinion.¹⁹

[32] The Ministry has withheld both emails and the legal opinion in their entirety.

Did the Ministry receive information from an “agency”?

[33] The Ministry submits that it received the information in pages 11 and 12-13 from the park board. The Ministry further submits that the park board is an agent of the City of Chilliwack, and therefore qualifies as an agent of a municipal council for the purpose of ss. 16(1)(a) and (b).

[34] More specifically, the Ministry states:

The [park board] was created by the [CLPA] to be an agent of both the [city] and the Township of Chilliwack and hold the park in trust for them...

As agent for the [city] and the Township of Chilliwack, the [park board] governs the use, maintenance and enjoyment of the [park], passing by-laws, granting concessions and licenses, [leasing] campsites, [constructing] improvements and [operating] much like a municipality...

Given the purpose of section 16(1)(b), “to encourage the free flow of information...for the purpose of discharging their duties and functions,” if the [park board] is not found to be an agency within the meaning of this section, indirect disclosure of information by a government or council (in this case the [city]) should still be protected by section 16(1)(b).²⁰

[35] The applicant makes no specific submissions on this point.

[36] Based on the Ministry’s submissions and the language of the CLPA, I am satisfied that the park board qualifies as an agent of the city. It is clear that the park board carries out the function of administering the park on behalf of the city. This is a function that, but for the CLPA, would necessarily be the city’s responsibility.

Did the Ministry receive the information “in confidence”?

[37] The Ministry submits that it received the information in pages 11 and 12-13 in confidence based on the following:

¹⁹ Page 11.

²⁰ Ministry’s initial submissions dated November 7, 2022, pages 11-13.

- The information is a legal opinion, information broadly recognized by reasonable people as confidential.
- In the ordinary course, counsel preparing a legal opinion would expect it to be kept confidential.
- The park board sought and was granted the city's permission to share the information with the Ministry.
- The record was supplied voluntarily, suggesting that the park board exercised discretion on behalf of the city and, given the context, sharing the information with the Ministry was likely conditional on the understanding that the Ministry would keep it in confidence.
- The record itself and the affidavit evidence establishes that the parties had an understanding of confidentiality.
- Given the fact that the Ministry found no further related emails, one can infer that the legal opinion was treated confidentially and not forwarded to or shared with others.

[38] The applicant makes no specific submissions on this point.

[39] Together, these two records reveal the contents of the legal opinion itself, together with the views of the park board official about the legal opinion.

[40] In my view, it is reasonable to conclude that the legal opinion itself, and the park board official's views about the legal opinion, were received by the Ministry in confidence.

[41] First, I accept that, in general, a legal opinion is the type of document that parties generally treat as confidential and sensitive.

[42] Second, while it is true that the city shared the opinion with the park board, this is to be expected since the opinion concerned the affairs of the board and, as I found above, the park board is an agent of the city.

[43] Third, while it is also true that the park board official decided to share the opinion with the Ministry, the evidence indicates that the official did so only after having sought the city's permission.

[44] Fourth, the affidavit evidence supports the conclusion that the parties had an understanding that this information would be held in confidence.

[45] Fifth, I accept that because there are no other responsive records that indicate these emails and the legal opinion were shared more broadly with other parties within or outside the Ministry, there is no basis to believe the record was treated as innocuous or as non-confidential.

[46] Finally, my conclusion is consistent with the purpose of this exception; to find otherwise would likely have a chilling effect on the sharing of relevant and useful information between governments and their agencies.

[47] As a result, I find that pages 11 and 12-13 are exempt in their entirety under s. 16(1)(b).

Personal privacy, s. 22

[48] There was some overlap between the Ministry's application of ss. 14 and 22. I will not consider if s. 22 applies to the information that I have already found is protected by s. 14 solicitor client privilege. Therefore, I will only consider if s. 22 applies to the severed information on pages 2, 16 and 18.

Personal information

[49] Section 22 applies only to personal information, so the first step in a s. 22 analysis is to determine if the information in dispute is personal information. Personal information is defined in FIPPA as “recorded information about an identifiable individual other than contact information.” Contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”²¹

[50] The information at issue is contained in a briefing note and an email from the individual to the Minister. Based on my review of this information, I find that it consists of the following:

- page 2: information about a third party's legal and related financial circumstances
- pages 6, 18: information about a third party's financial prospects based on evaluation of its current financial circumstances;
- page 18: a telephone number a third party provided to the Ministry for the purposes of being contacted

[51] I find that all of this information qualifies as personal information about an identifiable individual and their personal legal and/or financial circumstances. In addition, I find that the telephone number on page 18 is not contact information because it is not information to enable an individual to be contacted in any sort of business context. The affidavit evidence before me and the record itself indicate that the individual used this telephone number for the purpose of being contacted in relation to their communications with the ministry about the Bill, and that this

²¹ See Schedule 1 of FIPPA for the definitions of personal information and contact information.

telephone number is not otherwise used in the ordinary course of conducting business affairs.²²

Not an unreasonable invasion, s. 22(4)

[52] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If s. 22(4) applies, disclosure would not be an unreasonable invasion of the individuals' personal privacy. The Ministry submits that s. 22(4) does not apply.

[53] I find that s. 22(4) does not apply in this case. The information in question clearly does not qualify under any of the nine categories listed in paragraphs (a) through (h) of s. 22(4).

Presumed unreasonable invasion of privacy, s. 22(3)

[54] The third step in the s. 22 analysis is to determine whether s. 22(3) applies to the personal information. If so, disclosure is presumed to be an unreasonable invasion of personal privacy.

[55] The Ministry cites s. 22(3)(f) which reads:

22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness

[56] The Ministry submits that "disclosing statements about the third party's current financial circumstances and future financial prospects based on [their] evaluation of [their] current circumstances would be presumptively unreasonable."

[57] I find that the information at issue, with the exception of the phone number, describes the individual's current and future financial circumstances and, therefore, disclosing it is presumed to be an unreasonable invasion of their privacy under s. 22(3)(f).

Relevant circumstances, s. 22(2)

[58] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those

²² Order F23-43, 2023 BCIPC 51, para. 60.

listed in s. 22(2). It is at this step that any applicable s. 22(3) presumptions may be rebutted.

[59] The Ministry submits that none of the s. 22(2) factors apply to the information at issue, the third party individual's legal circumstances and their telephone number.

[60] I have considered whether any relevant circumstances, including those listed under s. 22(2) apply, and I find that none apply.

Conclusion, s. 22(1)

[61] I find that the information about the third party individual's legal circumstances and their telephone number qualifies as personal information. I also find that the s. 22(3)(f) presumption against disclosing information related to a third party's financial information applies to the information other than the telephone number.

[62] Finally, no relevant circumstances weigh in favour of disclosure of the personal information protected by the s. 22(3)(f) presumption or the telephone number. Therefore, the Ministry must withhold all of this information under s. 22(1).

CONCLUSION

[63] For the reasons given above, under s. 58(2) of FIPPA, I confirm the Ministry's decision that it is authorized or required to refuse access to all of the information in dispute under ss. 14, 16(1)(b) and 22(1) of FIPPA.

August 15, 2023

ORIGINAL SIGNED BY

David Goodis, Adjudicator

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