Order F23-88

TOWNSHIP OF LANGLEY

Rene Kimmett
Adjudicator

October 18, 2023

CanLII Cite: 2023 BCIPC 104
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 104

Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Township of Langley (Township) for access to records containing information about noise complaints related to the applicant's land and a neighbourhood the applicant specified. The Township withheld information in the records under several exceptions to disclosure in Part 2 of FIPPA. The adjudicator determined the Township was not authorized to withhold the information in dispute under ss. 13(1) (advice and recommendations) and 15(1)(d) (confidential source of law enforcement information). The adjudicator also determined the Township was authorized to withhold some, but not all, of the information in dispute under s. 14 (solicitor client privilege) and was required to withhold some, but not all, of the information in dispute under s. 22(1) (unreasonable invasion of a third party's personal privacy). The adjudicator ordered the Township to provide the applicant with access to the information it was not authorized or required to refuse to disclose.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* SBC 1996, c. 165, ss. 13(1), 14, 15(1)(d), 22(1), 22(3)(b), and 22(3)(d).

INTRODUCTION

[1] Langley Rod and Gun Club (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Township of Langley (Township) for access to records containing information about noise complaints the Township received regarding the applicant's land and a neighbourhood the applicant specified. The applicant's request covered the period between January 1, 2010 and October 31, 2020.

[2] The Township disclosed some information in the requested records to the applicant but withheld other information under ss. 13(1) (advice and recommendations), 14 (solicitor client privilege), 15(1)(d) (confidential source of law enforcement information), and 22(1) (unreasonable invasion of a third party's personal privacy) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Township's decision. Mediation did not resolve the issues and the matter proceeded to inquiry.

[4] During the inquiry, the Township reconsidered its decision and determined that s. 14 of FIPPA does not apply to one document it had previously withheld. The Township disclosed most of the information in this document but continued to withhold some information under s. 22(1).

PRELIMINARY MATTER - NEW ISSUE, S. 25(1)

[5] The applicant asks me to make an order under s. 25(1) (public interest disclosure).[1] Section 25 was not included as an issue in the Notice of Inquiry nor mentioned in the OIPC Investigator's Fact Report. I must, therefore, consider whether to add s. 25 as a new issue in this inquiry.

[6] The Notice of Inquiry sets out the issues and the parties' submission deadlines and states: "Parties may not add new exceptions or issues into the inquiry without the OIPC's prior consent."[2] The requirement of prior consent is stipulated to ensure fairness to all parties. Adding late issues deprives the opposing party of the opportunity to know the case it has to meet and to put its best case forward from the outset. It also circumvents the OIPC mediation and investigation processes, which are designed to benefit both parties by clarifying the issues and potentially resolving them.

[7] The applicant does not state that it raised or, alternatively, was unable to raise s. 25 at an earlier stage in the OIPC process. The applicant also does not make submissions on how s. 25 applies in the circumstances.

[8] I have decided it would be unfair to the Township to allow the applicant to add s. 25 at this stage in the inquiry so I will not consider s. 25 in this order.

ISSUES

[9] At this inquiry, I must decide the following issues:

- Is the Township authorized to refuse to disclose the information in dispute under ss. 13(1), 14, or 15(1)(d) of FIPPA?
- Is the Township required to refuse to disclose the information in dispute under ss. 22(1) of FIPPA?

[1] Applicant's submission at para 87.
[2] Notice of Inquiry at 1.

[10] Under s. 57(1) the Township has the burden of proving it is authorized to refuse the applicant access to the information in dispute under ss. 13(1), 14, and 15(1)(d).

[11] Under s. 57(2), the applicant has the burden of proving that disclosure of the information in dispute under s. 22(1) would not be an unreasonable invasion of a third party's personal privacy. However, the Township has the initial burden of proving the information at issue qualifies as personal information under s. 22(1).[3]

DISCUSSION

Background

[12] The applicant owns lands and operates a gun club and an outdoor shooting range within the jurisdiction of the Township. The applicant and the Township have an ongoing dispute about whether the applicant is in compliance with the sound control provisions of the Township's Community Standards Bylaw 2019 No. 5448 (the 2019 bylaw).

[13] The applicant states that the 2019 bylaw contains onerous noise regulations and restrictions compared to the Township's Noise Control Bylaw 2015, No.5172 (the 2015 bylaw), which preceded it.[4] The applicant alleges that the Township adopted the 2019 bylaw in direct response to the applicant's operations and to unfairly target the applicant and exert financial pressure on it through repetitive ticketing.[5]

[14] In December 2022, the Township issued three bylaw offence notices, fining the applicant for breaching the noise provisions of the 2019 bylaw in August 2022.[6] The applicant has disputed the tickets.[7]

Records at issue

[15] There are 58 pages of completely or partially severed records in dispute. They consist of emails, email attachments, a letter, a petition, and a service form. I will describe the records in more detail throughout this order.

Solicitor-client privilege – s. 14

[16] Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. The Township has withheld 53 pages, entirely or partially, under s. 14.

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[3] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.
[4] Applicant's submission at para 8.
[5] *Ibid* at paras 12-14.
[6] *Ibid* at para 9 and the applicant's affidavit evidence at Exhibit D.
[7] *Ibid* and the applicant's affidavit evidence at Exhibit F.

[17] In the context of s. 14, the term solicitor-client privilege includes both legal advice privilege and litigation privilege.[8] The Township submits that both types of solicitor-client privilege apply to all the information it has withheld under s. 14.[9]

Sufficiency of evidence to substantiate the s. 14 claim

[18] The Township did not provide me with a copy of the information it withheld under s. 14. While the OIPC's usual practice is to review the records in dispute, the Commissioner makes an exception for records withheld under s. 14 and will only order a party to produce these records if it is necessary to fairly decide the issue.[10]

[19] Where records in dispute are not provided to the OIPC, the public body is required to describe each document it has withheld under s. 14 "in a manner that, without revealing information that is privileged, will enable other parties to assess the validity of the claim of privilege."[11] Evidence is typically provided through sworn affidavits.[12] It is helpful for the party asserting privilege to provide affidavit evidence of a lawyer, who is an officer of the court and has a professional duty to ensure that privilege is properly claimed.[13]

[20] The Township provided two affidavits to support its claim of solicitor-client privilege. One of the Township's affidavits was made by a manager with the Township's bylaw department (manager's affidavit) and the other by a supervisor with the Township's privacy and records management department (supervisor's affidavit).

Additional information

[21] After reviewing the parties' submissions and evidence, I asked the Township to provide two pieces of clarifying information.[14]

[22] First, I asked the Township to provide a Table of Records that, on a page-by-page basis, described each document in the records package and specified the FIPPA exception(s) the Township relies on to withhold the information in dispute.

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[8] *College of Physicians of B.C. v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College of Physicians*] at para 26.
[9] Township's initial submission at para 35.
[10] Section 44(1)(b) of FIPPA gives me, as the Commissioner's delegate, the power to order production of records to review them during the inquiry. See e.g., Order F19-21, 2019 BCIPC 23.
[11] This language is taken from British Columbia Supreme Court Civil Rule 7-1(7) and was used in *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 [*Minister of Finance*] at para 78.
[12] *Minister of Finance, supra* note 11 at para 83.
[13] *Ibid* at para 82, citing Order F20-16, 2020 BCIPC 18 at para 10.
[14] I also gave the applicant the opportunity to reply to this information, but it did not.

The Township submitted a Table of Records and provided parts of it *in camera,* meaning to only the OIPC and not the applicant.

[23] Second, I asked the Township to disclose, or explain why it would not disclose, information in the service form that I inferred were the names of the people inputting the entries or participating in the communications documented in the form.[15] In response, the Township provided the applicant and myself with a version of the service form with the requested information disclosed.

Applicant's concerns

[24] The applicant raises three concerns about the sufficiency of the Township's descriptions of the records withheld under s. 14.

[25] First, the applicant submits that it is unable to assess the Township's claims of privilege because the Township's submissions and evidence were partially redacted[16] and that fairness requires the Township to produce the unredacted version of its evidence.[17]

[26] I find that the Township is not required to provide the applicant with access to the unredacted version of its submission and evidence. The Township made a request to the OIPC to submit portions of its initial written submissions and affidavit evidence *in camera*. An OIPC adjudicator reviewed the request and, after considering fairness to both parties, granted the Township permission to submit parts of its submission *in camera.*[18]

[27] Second, the applicant challenges the Township's decision to rely on affidavit evidence from non-lawyers. It submits that the Township's representatives do not have the necessary skill and competence to adequately assert privilege[19] and that the Township's legal counsel should have provided evidence to support these claims.[20]

[28] It is up to each party to present its best case as it sees fit. The Township has chosen to present its case through the evidence of non-lawyers, and I have considered this evidence with their occupations in mind. In the circumstances, I do not give less weight to the evidence provided by non-lawyers. The manager's affidavit explains her firsthand knowledge of these documents and the supervisor's affidavit explains his role in redacting the information in dispute and the principles

[15] Generally, the names of the sender and recipient of communications should be disclosed, or an explanation given if this information is not provided. See *Minister of Finance, supra* note 11 at para 81.
[16] Applicant's submission at para 54.
[17] *Ibid* at para 55.
[18] See OIPC guidance document "Instructions for written inquires".
[19] Applicant's submission at para 56.
[20] *Ibid* at paras 11(b)(ii) and 32.

he considered when doing so. Neither affidavit asserts privilege, but instead describes the content and context of the withheld records so that I may determine whether privilege applies to the information in dispute.

[29] Third, the applicant argues that the Township's description of the records withheld under s. 14 is "broad, generic, and directly silent about attachments contained within", despite references to attachments in its submissions.[21]

[30] I find the Township's descriptions of the records, which were largely supplied *in camera*, to be overall detailed and specific.[22] The Township's submissions and evidence did not include descriptions of the email attachments withheld under s. 14. However, the Township's Table of Records made it clear that it was claiming privilege over email attachments and provided a description of each of these attachments *in camera* that I found to be adequate to assess privilege. While the Table of Records was provided as a submission and not sworn evidence, the submission is signed by the Township's legal counsel, who is a participant in most of the withheld emails.[23] In the circumstances, I accept the contents of the Table of Records.

[31] Overall, I am satisfied that the descriptions of the records in the Township's submissions, the manager and supervisor's evidence, the unredacted portions of the service form, and the Table of Records are sufficient for me to decide if privilege applies to the withheld records.

Legal advice privilege

[32] The test for legal advice privilege has been expressed in various ways.[24] For the purpose of this decision, I adopt the test as expressed by the Supreme Court of Canada in *Pritchard v Ontario (Human Rights Commission)*,[25] which states that for legal advice privilege to apply there must be:

1. a communication between a solicitor and a client;
2. that entails the seeking or giving of legal advice; and
3. which is intended to be confidential by the parties.[26]

[33] Not every communication between a solicitor and their client is privileged, however, if the conditions above are satisfied, then legal advice privilege applies.[27]

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[21] Applicant's submission at para 58.
[22] For example, the manager's affidavit at para 19 and Schedule A.
[23] Township's submission at para 25 and manager's affidavit at Schedule A.
[24] For example, *R. v B.*, 1995 CanLII 2007 (BCSC) sets out a four-part test for legal advice privilege.
[25] *Pritchard v Ontario (Human Rights Commission),* 2004 SCC 31.
[26] *Ibid* at para 15.
[27] *Solosky v The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at 837.

[34] The communication does not need to specifically seek or give legal advice, so as long as it can be placed in the continuum of communications in which the solicitor tenders advice.[28] The "continuum of communications" involves the necessary exchange of information between a lawyer and their client for the purpose of obtaining and providing legal advice such as history and background information provided by a client or communications to clarify or refine the issues or facts.[29]

[35] Below, I assess whether legal advice privilege applies to the withheld records in the following groups:

1. emails between the Township and the law firm;
2. internal client communications;
3. communications with third parties; and
4. email attachments.

Emails between the Township and the law firm

[36] The manager's affidavit describes these records as emails between the law firm and employees of the Township's bylaw department in which the Township receives legal advice about the applicant's non-compliance with the Township's bylaw.[30] The Township employees included in the emails were the manager, the Senior Advisor to Council, and, in one instance, a bylaw enforcement officer.[31] The manager provided additional details about the content of these emails *in camera.* The manager explains that she is responsible for seeking and receiving legal advice on bylaw enforcement matters for the Township.[32] She also states that the Township regularly seeks and receives legal advice about bylaw enforcement matters from the specified law firm and that it is the Township's practice to treat all communications with this law firm as privileged and confidential.[33]

[37] The applicant does not make submissions on these records.

[38] I accept the Township's evidence that these records contain communications that were: 1) between it and the law firm and no other party; 2) for the purpose of seeking or receiving legal advice; and 3) intended to be confidential.

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[28] *Samson Indian Band v Canada*, 1995 CanLII 3602 (FCA), [1995] 2 FC 762 at para 8.
[29] *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp*] at para 40.
[30] Manager's affidavit at paragraphs 19(a) and 19(e) and Schedule A, lines 2 and 6.
[31] Manager's affidavit at Schedule A, lines 2 and 6, and Table of Records description of pp. 8-9, 17-31, and 43-44.
[32] Manager's affidavit at para 3.
[33] *Ibid.*

The two or three Township employees included in these communications appear to be directly involved in the dispute between the Township and the applicant. I find that the Township has established it is authorized to withhold these records under s. 14.

Internal client communications

[39] Legal advice privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information. For example, legal advice privilege extends to internal client communications that discuss legal advice and its implications.[34]

[40] The Township describes two types of communications that I find are internal client communications: emails forwarded from one Township employee to another and portions of the service form. The Township provided additional details about the content of these emails *in camera.*

[41] The applicant does not make submissions on these records.

Emails forwarded from one Township employee to another

[42] The Township submits that the manager shared some of the legal advice she received with a bylaw enforcement officer.[35]

[43] From the manager's affidavit and the Township's Table of Records, it appears that two emails between the manager, the Senior Advisor to Council, and the law firm, described above, did not initially include the bylaw enforcement officer and were subsequently forwarded to them. I found above that the original emails, including one in which the bylaw enforcement officer was copied, are protected by legal advice privilege. The act of forwarding the emails to another Township employee already involved in the matter did not alter the privileged nature of the communications. I find these forwarded emails are internal client communications, and legal advice privilege extends to them.

Portions of the service form

[44] The Township submits that some of the legal advice sought and received was recorded in the service form.[36] The manager describes the service form as a document that bylaw enforcement officers used to record information about the August 2018 noise complaint and steps taken to address it.[37] The manager

[34] *Bank of Montreal v Tortora,* 2010 BCSC 1430 at para 12; *Bilfinger Berger (Canada) Inc v Greater Vancouver Water District*, 2013 BCSC 1893 at paras 24.
[35] Township's initial submission at para 45.
[36] *Ibid.*
[37] Managers affidavit at para 14.

described the parts of the service form withheld under s. 14 as "various references to correspondence and communications with [the law firm]."[38] She also states that some of the entries reference legal advice she sought and received from the law firm.

[45] Some entries in the service form appear to be from August 2018 and others from May-September 2020. These dates seem to correspond with the timeframe in which the Township received the noise complaint and then communicated with the law firm.[39] Among these communications with the law firm are emails protected by legal advice privilege, as found above.

[46] I accept, based on evidence in the manager's affidavit and the context provided by the unredacted portions of the service form, that the withheld information contains references to communications between Township employees and the law firm about legal advice the Township sought and received in confidence. I find that the entries in the service form are internal client communications about legal advice, or its implications, that if disclosed would reveal privileged information.

Communications with third parties

[47] Legal advice privilege does not attach to communications where a third party merely assists a lawyer in formulating legal advice to their client[40] or passes information to a lawyer so that the lawyer might advise their client.[41]

[48] However, there are instances where legal advice privilege covers communications with third parties. For example, communications with third parties are protected by legal advice privilege where:

1) the third party serves as a line of communication between the solicitor and client by

    a) simply carrying information between the lawyer and the client as a messenger, translator, or amanuensis;[42] or

    b) using its expertise to interpret information provided by a client so that the lawyer can understand it;[43] or

[38] *Ibid* at para 15.
[39] Township's submission at para 25 and manager's affidavit at Schedule A.
[40] *Greater Vancouver Water District v Bilfinger Berger AG*, 2015 BCSC 532 (CanLII) [*Bilfinger*] at para 27(a).
[41] *Ibid* at para 27(c)(ii).
[42] *Ibid* at para 27(b)(i) and *General Accident Assurance Company v Chrusz*, 1999 CanLII 7320 (ON CA) [*Chrusz*] at 46.
[43] *Ibid* at para 27(b)(ii).

2) the third party's function is essential or integral to the solicitor-client relationship. For example, the third party is authorized to direct or seek legal advice from the lawyer on the client's behalf.[44]

[49] The Township describes two types of emails that I find are communications with third parties: emails between the law firm and the acoustic consulting firm and emails between Township employees, a bylaw consultant, and the law firm. The Township provided additional details about the content of these emails *in camera.*

[50] The Township states that communications with third parties may fall within the chain or continuum of communications provided the third party is essential or integral to the solicitor-client relations.[45] However, the Township does not make any submissions about whether the third parties in this case were essential or integral to the solicitor-client relationship at issue.

[51] The Township submits the emails involving the acoustics consulting firm and the bylaw consultant are privileged because "solicitor-client privilege may apply where the evidence establishes a document was prepared and forwarded to a lawyer for their review in order to obtain legal advice in confidence on a matter."[46]

[52] The applicant submits that the Township has not demonstrated that solicitor-client privilege extends to communications with third parties because it has not provided sufficient evidence to prove that the third parties were essential or integral to the solicitor-client relationship.[47]

Emails between the law firm and the acoustics consulting firm

[53] The emails between the law firm and the acoustics consulting firm are plainly not between a solicitor and a client, but instead the law firm and a third party.

[54] I find that the acoustics consulting firm is not acting as a line of communication between a solicitor and a client. It is clear from the Township's description of the emails that the acoustics consulting firm is not carrying information between the law firm and the Township and instead is communicating only with the law firm. The Township does not claim, and I cannot conclude, that the acoustic consulting firm was engaged to assist the lawyer in understanding information provided by the client.

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[44] *College of Physicians, supra* note 8 at para 48, quoting with approval from *Chrusz*, *supra* note 42 at 50.
[45] Township's initial submission at para 48, citing *Huang v Silvercorp Metals Inc.,* 2017 BCSC 795 [*Huang*] at para 83.
[46] Township's initial submission at para 46, citing Order F21-54, 2021 BCIPC 63 at para 36.
[47] Applicant's submission at para 59.

[55] I also find that the acoustics consulting firm's function is not essential or integral to the solicitor-client relationship. The Township does not suggest that the acoustics consulting firm was authorized to direct or seek legal advice from the law firm on behalf of the Township. The Township's submissions and evidence establish that the acoustic consulting firm's function, as a third party to the solicitor-client relationship, was to prepare and provide information to the law firm so that the law firm could formulate legal advice for the Township.[48] I conclude this is not a function essential or integral to the solicitor-client relationship.

[56] The Township's submission that "solicitor-client privilege may apply where the evidence establishes a document was prepared and forwarded to a lawyer for their review in order to obtain legal advice in confidence on a matter"[49] is not relevant in the circumstances. The Township, as the client, did not forward communications with the acoustics consulting firm to their lawyer to get legal advice. Instead, the lawyer directly received information from the acoustic consulting firm, outside of the confidential solicitor-client relationship, and used that information to provide advice to their client.

[57] In summary, I find the emails between the law firm and the acoustics consulting firm are not protected by legal advice privilege.

Emails between Township employees, a bylaw consultant, and the law firm

[58] The emails between the Township, the Township's bylaw consultant, and the law firm are not exclusively between a solicitor and client. I find the bylaw consultant is a third party to the solicitor-client relationship. The word consultant suggests that this person is external to the Township and has expertise that is not otherwise available amongst the Township's employees. The Township also distinguishes between the consultant and its employees, which further supports my finding that this person is a third party in the context of the solicitor-client relationship at issue.

[59] I find that the bylaw consultant is not acting as a line of communication between a solicitor and a client. The Township does not submit, and I cannot conclude, that the bylaw consultant was carrying information between the Township and the law firm or that the law firm required the bylaw consultant's expertise to understand the information provided by the Township.

[60] I find that the bylaw consultant's function is not essential or integral to the solicitor-client relationship. The Township does not suggest that the bylaw consultant was authorized to direct or seek legal advice from the law firm on behalf of the Township. The bylaw consultant's function, as described by the Township,

[48] Township's initial submission at para 47.
[49] *Ibid* at para 46, citing Order F21-54, 2021 BCIPC 63 at para 36.

was to provide advice on bylaw enforcement strategy in relation to the applicant's alleged breach of the 2019 bylaw,[50] so that the law firm could provide legal advice to the Township.[51] Such a function is not essential or integral to the solicitor-client relationship.

[61] Again, the Township's submission that "solicitor-client privilege may apply where the evidence establishes a document was prepared and forwarded to a lawyer for their review in order to obtain legal advice in confidence on a matter"[52] is not relevant in the circumstances. The Township and the law firm included the bylaw consultant, a third party to the solicitor-client relationship, in emails in which the Township says it sought or received legal advice. The Township, therefore, did not "obtain legal advice in confidence" but instead obtained legal advice in the presence of a third party.

[62] In summary, I find the emails between Township employees, a bylaw consultant, and the law firm are not protected by legal advice privilege.

Email attachments

[63] An attachment to an email may be privileged on its own, independent of being attached to another privileged record. Additionally, an attachment may be privileged if it is an integral part of the communication to which it is attached and its disclosure would reveal the communications protected by legal advice privilege, either directly or by inference.[53]

[64] The Township has withheld the following attachments within the responsive records:

a. attachment to the June 2, 2020 email that includes the bylaw consultant;

b. acoustic consulting firm's draft report dated August 7, 2020 attached to the August 7, August 10, and August 11, 2020 emails;

c. attachments to the September 25, 2020 email between the Township and the law firm.

[65] These descriptions are taken from the Township's Table of Records, which included additional details about the content of these attachments *in camera.* The

[50] Township's initial submission at para 58.
[51] *Ibid* at para 47.
[52] *Ibid* at para 46, citing Order F21-54, 2021 BCIPC 63 at para 36.
[53] See Order F20-08, 2020 BCIPC 9 at para 27; Order F18-19, 2018 BCIPC 22 at paras 36-40 and the authorities cited therein.

Township did not provide any submissions supporting its position that these email attachments are subject to legal advice privilege.

[66] I find the Township has not established that the attachment to the June 2, 2020 email is protected by legal advice privilege. I found that the communications that include the bylaw consultant are not privileged. As a result, the attached document must independently meet the test for legal advice privilege. Based on the *in camera* description of this attachment, I find that this record does not meet the test for legal advice privilege because it is not a confidential communication between a solicitor and client made for the purpose of seeking or receiving legal advice.

[67] I also find that the Township has not established that the acoustics consulting firm's draft report is protected by legal advice privilege. The draft report was initially attached to an August 7, 2020 email between the Township's legal counsel and the acoustics consulting firm, which I found is not protected by legal advice privilege. The question then is whether the draft report independently meets the test for legal advice privilege. I find that it does not. The draft report is not a confidential communication between a solicitor and client made for the purpose of seeking or receiving legal advice. Instead, it is a communication between the law firm and a third party who was not acting as a line of communication between the law firm and the Township nor performing a function essential or integral to the solicitor-client relationship.

[68] Lastly, I find that the Township has established that the attachments to the September 25, 2020 email are protected by legal advice privilege. I found that the withheld emails between Township employees and the law firm are protected by legal advice privilege. Based on the *in camera* description of these attachments, I am satisfied that these records, if disclosed, would reveal the communications within the email that are protected by legal advice privilege. As a result, I find these attachments are privileged.

Summary of findings on legal advice privilege

[69] In summary, I find that the Township has established that legal advice privilege applies to the information in dispute in the following records:

- emails between the Township and the law firm and the attachments to the September 25, 2020 email between these parties.
- emails forwarded from one Township employee to another.
- the portions of the service form withheld under s. 14.

[70] The Township may refuse to disclose this information under s. 14.

Litigation privilege

[71] Next, I will consider whether litigation privilege applies to the information that I have found is not protected by legal advice privilege, namely:

- emails between the law firm and the acoustics consulting firm, and the acoustic consulting firm's draft report; and

- emails between the Township, the bylaw consultant, and the law firm, and the attachment to the June 2, 2020 email involving these parties.

[72] Litigation privilege is intended to ensure the efficacy of the adversarial process 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.[54]

[73] To succeed in a claim of litigation privilege the party invoking it must establish that:

1) litigation was ongoing or was reasonably contemplated at the time the document was created; and

2) the dominant purpose of creating the document was to prepare for that litigation.[55]

[74] The threshold for determining whether litigation is "reasonably contemplated" is a low one and it does not require certainty.[56] The essential question is would a reasonable person, being aware of the circumstances, conclude that the claim will not likely be resolved without litigation?[57]

[75] There is no absolute rule for determining whether litigation was the "dominant purpose" for the document's production. A finding of dominant purpose is a factual determination that must be made based on all of the circumstances and the context in which the document was produced.[58]

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[54] *Blank v Canada (Minister of Justice),* 2006 SCC 39 [*Blank*] at para 27; *Raj v Khosravi*, 2015 BCCA [*Raj*] at para 7.
[55] *Gichuru v British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (CanLII) at para 32; *Raj, supra* note 54 at paras 12 and 20.
[56] *Raj, supra* note 54 at para 10.
[57] *Raj, supra* note 54 at para 11, citing *Sauvé v ICBC*, 2010 BCSC 763 at para 30.
[58] *Raj, supra* note 54 at para 17.

Was litigation "reasonably contemplated" at the time the document was created?

[76] The most persuasive evidence that the Township reasonably contemplated litigation at the time the records were created is the manager's statement that the correspondence in question was created in a context where the Township was contemplating all the enforcement options available to it.[59]

[77] The Township states *in camera* the type of litigation that was available to it. However, the Township does not provide other information that supports its conclusion that it reasonably contemplated litigation at the time the documents were created.

[78] For example, the Township asserts that it immediately referred the matter to the law firm.[60] However, lawyers may provide advice about bylaw enforcement that has nothing to do with litigation and the Township has not provided me with evidence that, for example, it only involves the law firm when litigation is contemplated or that, in this instance, it involved the law firm because it contemplated litigation.

[79] Additionally, at no point does the Township assert that it believed, at the time the records were created, that the issues were unlikely to be resolved without litigation. It appears that since 2015, the parties have been engaged, through legal counsel, in discussions about the applicant's operations.[61] The records at issue were created in 2020. The Township issued bylaw offence notices to the applicant in December 2022 related to breaches from August 2022. At the time of its submissions in this inquiry, three years after the records were created, the Township states that it is still pursing voluntary compliance with the applicant.[62] The manager says the Township will need to pursue other enforcement options should voluntary compliance fail. However, the Township does not provide context into how it determines whether voluntary compliance, or any other bylaw enforcement mechanism, has or is likely to fail and has not explained whether any of the criteria in this determination were met at the time the records were created.

[80] I acknowledge that the threshold for determining whether litigation is "reasonably contemplated" is low. However, it still requires the public body to establish litigation was reasonably contemplated. Here, the Township has explained only that the law firm advised them about a variety of enforcement options available to address the bylaw dispute, but not the Township's views on the anticipated need for litigation. The Township has not established that it reasonably contemplated litigation in 2020 when the records were created.

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[59] Manager's affidavit at para 19.
[60] Township's initial submission at para 56.
[61] Applicant's affidavit evidence at Exhibit E, 5-7.
[62] Manager's affidavit at para 21.

Was the "dominant purpose" of creating the document to prepare for litigation?

[81] Having decided that the Township failed to establish that litigation was reasonably contemplated at the time the records were created, I do not need to decide the second part of the test. However, for the sake of completeness I will do so.

[82] For the following reasons, I also find that the Township has not established that the documents in question were produced for the dominant purpose of litigation. At no point does the Township say in its *in camera* or open submissions that the records were created for the purpose, dominant or otherwise, of preparing for litigation. Rather, the Township states that the acoustic consulting firm's draft report was prepared for the purpose of bylaw enforcement,[63] and the bylaw consultant's advice was about strategies to address the applicant's breach of the 2019 bylaw.[64]

[83] Bylaw enforcement is not synonymous with litigation and not every instance of bylaw investigation or enforcement invariably leads to litigation. Litigation privilege may apply to a document created for more than one purpose, but only if the dominant purpose is litigation.[65] Inquiring into the dominant purpose of a record involves determining "whether, and if so when, the focus of the investigation/inquiry shifted to litigation."[66] The Township has not explained whether or when the purpose of its investigation into the applicant shifted to litigation.

[84] In summary, I find that none of the documents listed above in paragraph 71 are protected by litigation privilege and, as a result, the Township is not authorized to refuse to disclose them under s. 14.

Exception for misconduct

[85] As a final point on solicitor-client privilege, the applicant argues that privilege does not attach to records created for an improper purpose.[67] The applicant references both the *Blank*[68] exception and the future crime or fraud exception.

[86] The *Blank* exception prevents parties from raising litigation privilege in relation to "evidence of the [privilege-holder's] abuse of process or similar blameworthy conduct".[69] I found above that litigation privilege does not apply to

[63] Township's initial submission at paras 57.
[64] *Ibid* at para 58.
[65] *Raj, supra* note 54 at para 17.
[66] *Ibid.*
[67] Applicant's submission at para 57.
[68] *Blank*, *supra* note 54.
[69] *Huang, supra* note 45 at para 181, citing *Blank, supra* note 54 at paras 44-45.

the records at issue in this inquiry and, therefore, the *Blank* exception is not relevant in the circumstances.

[87] The future crime or fraud exception prevents legal advice privilege and litigation privilege from attaching to communications where a client obtains legal advice to knowingly facilitate the commission of a crime or a fraud.[70] The exception applies in cases not only where the client's conduct is criminal, but also if it is contrary to law (e.g. is an abuse of the court's process, tort, or other breach of duty).[71]

[88] To successfully raise the future crime or fraud exception, the applicant must establish a *prima facie* case of misconduct. The applicant must set out their allegations in clear and definite terms and they must support those allegations by providing evidence and identifying relevant facts and circumstances.[72] If the applicant is successful in establishing a *prima facie* case, then the decision-maker will order production and review the documents in question to determine whether the exclusion to privilege applies.[73]

[89] The applicant argues that the improper purpose in this case is "the Township's alleged conduct of unfairly targeting the [applicant] with the 2019 Bylaw for the sole purpose of bringing [the applicant] to heel".[74]

[90] I find that the applicant has not established a *prima facie* case that the future crime or fraud exception applies in the circumstances. While the applicant may disagree with the Township's decision to pursue bylaw enforcement, this decision does not appear, on its face, to be contrary to law. I conclude this exception to privilege is not relevant to this inquiry.

Advice or recommendations – s. 13

[91] The purpose of s. 13(1) is to allow public bodies to engage in free and frank discussion of advice and recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of decision-making were subject to excessive scrutiny.[75]

[92] The first step in the s. 13 analysis is to consider whether the information in dispute would reveal advice or recommendations developed by or for a public body or a minister.

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[70] *R. v Campbell,* 1999 CanLII 676 (SCC) at paras 55-63; *Pax Management Ltd. v A.R. Ristau Trucking Ltd.,* 1987 CanLII 153 (BC CA).
[71] *Goldman, Sachs & Co. v Sessions*, 1999 CanLII 5317 (BC SC) at paras 16-17.
[72] *McDermott v McDermott*, 2013 BCSC 534 (CanLII) at para 77; Order F18-26, 2018 BCIPC 29 (CanLII) at paras 57-58.
[73] *Camp, supra* note 29 at para 58.
[74] Applicant's submission at para 57.
[75] Order 01-15, 2001 CanLII 21569 (BCIPC) at para 22; Order F15-61, 2015 BCIPC 67 at para 28.

[93] "Recommendations" include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.[76] "Advice" has a broader meaning than the term "recommendations"[77] and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.[78]

[94] A public body is authorized to refuse access to information under s.13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.[79]

[95] The second step in the s. 13 analysis is to consider whether the information that reveals advice or recommendations falls under s. 13(2). Section 13(2) sets out various kinds of records and information that the head of a public body must not refuse to disclose under s. 13(1) even if this information would reveal advice and recommendations. The applicant raises ss. 13(2)(a) "any factual material" and 13(2)(k) "a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body."

[96] The Township withheld two portions of the service form under s. 13(1). I found, above, that s. 14 applied to the second portion and so, I only consider whether s. 13 applies to the first portion of the service form.

Parties' submissions

[97] The Township submits that the information in dispute under s. 13(1) includes recommendations on bylaw enforcement steps made by the Township's administrators for use by the Township.[80] It says the withheld information contains a recommendation on bylaw enforcement steps the Township should take against the applicant. The Township does not claim any information is advice. The supervisor's affidavit states that he considered the purpose of s. 13 when deciding to withhold this part of the Service Form, including protecting the confidentiality of the Township's deliberative process.[81] The Township argues that the analysis under s. 13 is not about determining whether the Township ought to have disclosed the information but rather is about confirming that the Township's exercise of discretion was not in bad faith or based on irrelevant or extraneous grounds.[82] The

[76] *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras 23-24.
[77] *Ibid* at para 24.
[78] *College of Physicians*, *supra* note 8 at para 113.
[79] Order 02-38, 2002 CanLII 42472 at para 135; Order F17-19, 2017 BCIPC 20 (CanLII) at para 19; Order F20-29, 2020 BCIPC 35 at para 56.
[80] Township's initial submission at para 30.
[81] Supervisor's affidavit at paras 10(b) and 13(c).
[82] Township's initial submission at para 29 citing Order F16-47, 2016 BCIPC 52 at para 27.

Township submits that none of the exceptions in s. 13(2) apply to the withheld information.[83]

[98] The applicant does not make any argument about whether or not the information in dispute is or would reveal advice or recommendations. It submits that the Township has not provided evidence to support its assertions that the exceptions in s. 13(2)(a) and (k) do not apply to the redacted information in the Service Form and, as a result, the Township cannot refuse to disclose this information.[84]

[99] In reply, the Township states that it is not required to prove that the exceptions under s. 13(2) do not apply and that its submission that the redacted information contains recommendations is adequate to justify the redaction, particularly given the supervisor's affidavit evidence that he considered the purpose of s. 13 when deciding to withhold this information.[85]

Analysis

[100] I find that the Township has not established that the redacted information reveals advice or recommendations. The withheld information is a statement and an instruction and not advice or recommendations. The Township has not said that Township staff have the discretion to accept or reject this statement or instruction. It has also not argued that disclosing this information would enable an individual to draw accurate inferences about any advice or recommendations. Therefore, I find that s. 13(1) does not apply to this information.

[101] Given my conclusion that s. 13(1) does not apply, I do not need to consider whether ss. 13(2) or 13(3) apply. Similarly, I do not need to consider the Township's arguments about whether it properly exercised discretion under s. 13.

Unreasonable invasion of personal privacy – s. 22(1)

[102] Section 22(1) of FIPPA requires a public body to refuse to disclose personal information if its disclosure would unreasonably invade a third-party's personal privacy. Numerous OIPC orders have considered the application of s. 22(1)[86] and, as set out below, I will apply the same four-part approach in this inquiry.

[103] The Township relies on s. 22 to withhold information in the petition, service form, and the August 28, 2018 letter to the complainant. The Township describes this information more specifically as:

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[83] *Ibid* at para 32.
[84] Applicant's submission at paras 24-27.
[85] Township's reply submission at para 5.
[86] For example, Order F15-03, 2015 BCIPC 3 (CanLII) at para 58.

- the name, address, and telephone number of the individual who made the complaint;
- details regarding a leave of absence for one of the Township's employees;
- information regarding the location of the homes for the signatories of the petition; and
- the names and addresses of the petition signatories and the length of time they have lived in the area.[87]

[104] I refer to the people who signed the petition interchangeably as "signatories" and "petitioners" throughout my analysis.

Is the withheld information personal information as defined in FIPPA?

[105] Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information."[88] Information is about an identifiable individual when it is reasonably capable of identifying a particular individual or a small group of identifiable people, either alone or when combined with other available sources of information.[89]

[106] 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." Whether information is "contact information" depends on the context in which it appears.[90]

[107] The Township submits that all of the complainant and petitioners' "personal contact information" and information that would assist in identifying their "personal contact information" is personal information as defined by FIPPA.[91] The Township submits that the information regarding the employee's leave of absence is "clearly personal information".[92]

[108] The applicant submits that the Township has not provided sufficient, or any, evidence to support the argument that the information in the petition is personal information.[93]

[109] I find that the following is information about identifiable individuals:

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[87] Township's initial submission at para 76.
[88] The definitions are in Schedule 1 of FIPPA.
[89] Order F05-30, 2005 CanLII 32547 (BC IPC) at para 35.
[90] Order F20-13, 2020 BCIPC 15 at para 42.
[91] Township's initial submission at para 77, referencing Order F16-32, 2016 BCIPC 35 at para 48.
[92] *Ibid* at para 77.
[93] Applicant's submission at para 82.

- the name, address, and telephone number of the individual who made the complaint;
- details regarding a leave of absence for one of the Township's employees; and
- the names and addresses of the petitioners.

[110] I also find that this information is not contact information as defined by FIPPA. While the information includes addresses and a phone number, this information does not appear to correspond to a place of business. I conclude, therefore, that the above is the individuals' personal information.

[111] However, I find that the other two types of withheld information are not about identifiable individuals. First, the statement "regarding the location of the homes for the signatories of the petition" reveals a general circumstance that applies to the property of all the petitioners and may also apply to individuals who did not sign the petition. Second, the length of time the petition signatories have lived in the area is too broad and generic to be about identifiable individuals. Since the names and addresses of the signatories have been withheld, these other two types of information do not reveal information about identifiable individuals. I find this information is not personal information and cannot be withheld under s. 22(1). As a result, I do not include it in the remainder of this analysis.

Is disclosure not an unreasonable invasion of a third party's personal privacy under s. 22(4)?

[112] The second step in the s. 22 analysis is to determine if the personal information falls into any of the categories of information listed in s. 22(4). If it does, then disclosure would not be an unreasonable invasion of a third party's personal privacy.

[113] The Township submits that none of the situations described in section 22(4) apply.[94] The applicant does not address s. 22(4).

[114] I find that s. 22(4) does not apply in the circumstances.

Is disclosure presumably an unreasonable invasion of a third party's personal privacy under s. 22(3)?

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

[94] Township's initial submission at para 78.

[116] The relevant subsections are ss. 22(3)(b) and 22(3)(d), which read as follows:

> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if:
>
> […]
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> […]
>
> (d) the personal information relates to employment, occupational or educational history,
>
> […]

Section 22(3)(b)

[117] Section 22(3)(b) says that disclosure of personal information is presumed to be an unreasonable invasion if the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or continue the investigation.

[118] The Township submits that s. 22(3)(b) applies to the personal information of the signatories in the petition and the complainant in the service form.[95] The Township does not address whether s. 22(3)(b) applies to the withheld information in the August 28, 2018 letter. Regardless, I have considered this information under this subsection because the withheld information in this letter is the complainant's personal information.

[119] For the reasons that follow, I find that s. 22(3)(b) applies to the withheld personal information of the signatories in the petition and the complainant in the service form and August 28, 2018 letter.

[120] In previous OIPC orders, adjudicators have found that the term "law" in this subsection includes local government bylaw enforcement.[96] I see no reason to deviate from this interpretation in the circumstances and find that the Township's bylaws are laws for the purposes of s. 22(3)(b).

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[95] *Ibid* at para 79.
[96] Order F22-12, 2022 BCIPC 14 at para 44; Order 01-12, 2001 CanLII 21566 (BC IPC) at para 17.

[121] I also find that the personal information "was compiled and is identifiable as part of" the Township's investigation into the applicant's possible violation of the Township's bylaw. The manager's affidavit states that the Township started an investigation to consider whether to take bylaw enforcement actions against the applicant following noise complaints.[97] While the petition was originally compiled by individuals, I am satisfied that, once the Township received the petition, it was compiled and became identifiable as part of the Township's investigation. Similarly, I find the complainant's personal information, in the service form and the August 28, 2018 letter, was compiled as part of this investigation. The August 28, 2018 letter to the complainant is mostly disclosed and states that the Township is investigating the applicant's compliance with the Township's bylaws. Previous OIPC orders have reached similar conclusions about complainants' personal information.[98]

[122] The applicant submits that the disclosure of the information in the petition appears necessary to prosecute the alleged violation of the 2019 bylaw or to continue the Township's investigation "since it provides the reference point from which to conclude there has been a breach […] and if so, to what extent and gravity."[99] The applicant does not provide information to support this assertion and I am not persuaded the exception found in s. 22(3)(b) is relevant in the circumstances.

[123] Based on the above, I find that s. 22(3)(b) applies to the personal information of the complainant and petition signatories and that it is presumptively an unreasonable invasion of these third parties' personal privacy to disclose this personal information.

Section 22(3)(d)

[124] The Township submits that s. 22(3)(d) applies to the information about a Township employee's leave of absence but does not elaborate on this position. The applicant does not address s. 22(3)(d).

[125] In previous OIPC orders, adjudicators have found that s. 22(3)(d) applies to information taken from a leave time bank, such as sick leave, because it can reveal an employee's personal circumstances and, therefore, is related to their employment history.[100] I see no reason to deviate from this interpretation and find that s. 22(3)(d) applies to the withheld information about the Township employee's leave of absence. It is presumptively an unreasonable invasion of the third-party employee's personal privacy to disclose this information.

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[97] Manager's affidavit at para 7.
[98] Order F22-31, 2022 BCIPC 34 at para 58-59; Order F02-20, 2002 CanLII 42445 (BC IPC) at paras 28-31.
[99] Applicant's submission at para 84.
[100] Order F15-17, 2015 BCIPC 18 at para 36; Order F21-61, 2021 BCIPC 71 at paras 22-25.

Would disclosure constitute an unreasonable invasion of a third party's personal privacy, considering all relevant circumstances including those listed in s. 22(2)?

[126] Section 22(2) identifies circumstances that are relevant to determining whether disclosure of personal information is an unreasonable invasion of a third party's personal privacy. Section 22(2) is not exhaustive, meaning there can be other circumstances that are relevant to whether the information in dispute is an unreasonable invasion of a third party's personal privacy. It is at this step that any applicable s. 22(3) presumptions may be rebutted.

[127] In their submissions, the parties identify the following paragraphs of s. 22(2) as relevant:

> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
> […]
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
> […]
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
> […]
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant,

[128] The parties also raise unenumerated circumstances that they consider to be relevant. The Township submits that disclosure may cause other individuals to be more reticent to bring forward complaints[101] or may contribute to the intensifying conflict between the parties.[102] The applicant submits that the signatories of the petition have implicitly consented to the disclosure of the personal information they provided in the petition.[103]

[101] Township's initial submission at para 81(f).
[102] Township's reply submission at para 22(d).
[103] Applicant's submission at para 83.

Public scrutiny – s. 22(2)(a)

[129] For this section to apply, disclosure of the specific information at issue must be desirable for subjecting a public body's activities to public scrutiny as opposed to subjecting an individual third party's activities to public scrutiny.[104]

[130] The Township submits that disclosure will not assist in subjecting the Township to public scrutiny.[105] The applicant submits disclosure will help establish the relationship between the complaints and the Township's decision to adopt the 2019 Bylaw as a means to ticket the applicant for its operations.[106]

[131] I am not persuaded that s. 22(2)(a) applies in the circumstances. The applicant has not adequately explained how disclosure of the information at issue would be desirable for the purpose of subjecting the Township or any other public body to scrutiny. The Township has provided the applicant with significant amounts of information in the petition and service form. The information at issue is the personal information of third parties and not information that would reveal information about the Township's activities.

[132] I conclude that this factor does not rebut the presumptions established under ss. 22(3)(b) or 22(3)(d).

Fair determination of the applicant's rights – s. 22(2)(c)

[133] For this section to apply, the personal information in dispute must be relevant to a fair determination of the applicant's rights. This section applies where all four parts of the following test apply:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;

2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;

3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and

4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[107]

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[104] Order 01-07, 2001 CanLII 21561 at para 31.
[105] Township's initial submission at para 81(a).
[106] Applicant's submission at para 85(b).
[107] Order 01-07, 2001 CanLII 21561 (BCIPC) at para 31; Order F15-11, 2015 BCIPC 11 (CanLII) at para 24.

[134] The applicant states that disclosure will help prove or disprove whether it breached the 2019 bylaw since the information in dispute provides the reference point from which to conclude there has been a breach and if so, to what extent and gravity.[108]

[135] I find that that s. 22(2)(c) does not apply in the circumstances. The applicant has the right to dispute the bylaw notices it was issued and appears to be exercising this right in a dispute proceeding. However, the applicant has not explained how the withheld personal information of third parties would assist it in proving or disproving its alleged breach or otherwise have any bearing on the applicant's rights in relation to the bylaw dispute. The applicant has also not claimed that it needs the personal information in dispute to prepare for this proceeding and I do not see how it would be necessary for the applicant to have this information to do so.

[136] I conclude that this factor does not rebut the presumptions established under ss. 22(3)(b) or 22(3)(d).

Unfair harm – ss. 22(2)(e)

[137] Section 22(2)(e) requires a public body to consider whether disclosure of personal information will unfairly expose a third party to financial or other harm. Previous OIPC orders have held that "other harm" for the purposes of s. 22(2)(e) consists of "serious mental distress or anguish or harassment" that goes "beyond embarrassment, upset or a negative reaction to someone's behaviour."[109]

[138] The Township submits that disclosure would unfairly expose the third parties to harm because they could face personal scrutiny regarding their decision to sign the petition or make a complaint to the Township.[110]

[139] I find that the Township has not adequately explained how exposing third parties to "personal scrutiny" resembles the type of harm that past orders have said falls under s. 22(2)(e). While it is possible that personal scrutiny could result in the third parties being upset, there is nothing before me to suggest that revealing their personal information in relation to a noise complaint or petition would result in serious mental distress, anguish, or harassment.

[140] I find that s. 22(2)(e) does not apply in the circumstances.

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[108] Applicant's submission at para 85(a).
[109] Order F15-29, 2015 BCIPC 32 at para 32; Order 01-15, 2001 CanLII 21569 (BC IPC) at para 49.
[110] Township's initial submission at para 81(d).

Supplied in confidence – s. 22(2)(f)

[141] The Township submits that it is its policy to keep complainant's names confidential in accordance with the Township Council Policy on Bylaw Enforcement, Policy No. 08-108 (Bylaw Policy).[111] The Township did not provide me with a copy of this document to review.

[142] The applicant submits that the Township has not provided the policy in effect at the time the petition or complaint were received.[112] The applicant submits that, without access to this information, it is unclear whether the petition signatories expected their identity would be kept confidential.[113] The applicant also submits that petitions, by nature, do not have an "aura of confidentiality" and that when the signatories signed the petition, they did so to lend public support to an issue, knowing that the petition would be further circulated, and their personal information would be seen by others.[114]

[143] I find that the petitioners' personal information was not supplied in confidence. The Township has not explained whether the policy it cites applies to information supplied in a petition rather than a bylaw complaint. It has also not said that it gave, or that the petitioners sought, assurances of confidentiality. Petitions are generally considered to be public information, as individuals sign a petition to publicly lend support to a position.[115] The petition itself is addressed broadly to "The Corporation of The Township of Langley" and makes no claims about confidentiality.

[144] I also find that the personal information of the complainant was not supplied in confidence. I note that many OIPC orders have found that bylaw complaints have been supplied in confidence.[116] However, here, the Township has not provided sufficient information for me to conclude the complainant's personal information was explicitly or implicitly supplied in confidence. I share the applicant's concerns that the Township has not clarified whether the Bylaw Policy it cites was in effect at the time the complaint was received. The Township has not said whether the complainant was made aware of this policy, was given other assurances of confidentiality, or otherwise believed they were providing information in confidence. The August 28, 2019 letter to the complainant, most of which is disclosed, also does not mention confidentiality.

[145] Based on the above, I find s. 22(2)(f) does not apply in the circumstances.

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[111] *Ibid* at para 10.
[112] Applicant's submission at para 73.
[113] *Ibid* at para 74.
[114] *Ibid* at para 80.
[115] Order F16-14, 2016 BCIPC 16 at paras 41-42.
[116] For example, Order F16-32, 2016 BCIPC 35 at para 65; Order F14-38, 2014 BCIPC 41 at paras 33-36; Order F18-31, 2018 BCIPC 34 at paras 49-51 and 82.

Unfair damage to reputation – s. 22(2)(h)

[146] Section 22(2)(h) requires the public body to consider whether disclosure of personal information would unfairly damage the reputation of any person referred to in the record.

[147] The Township submits that disclosure may unfairly damage the reputation of the people referred to in the complaint and petition, as well as the employee who took a leave of absence.[117] The applicant did not make submissions on this point.

[148] I find that s. 22(2)(h) does not apply in the circumstances. The information about the employee's leave of absence does not reveal the reason for leave or the type of leave being taken. The information related to the complaint and petition would reveal that the individuals involved expressed concerns about noise from the applicant's property, but it is not clear to me how disclosing that fact would unfairly damage their reputations.

[149] I find s. 22(2)(h) does not apply in the circumstances.

Impact on future complaints

[150] The Township submits that disclosure may cause other individuals to be more reticent to bring forward complaints in the future.[118]

[151] This type of "chilling effect" argument has been considered and rejected in numerous orders.[119] I am similarly not persuaded by the argument in this case as the Township has provided no further explanation or evidence supporting its assertion.

[152] Moreover, I do not think the potential future impact of disclosure is a relevant circumstance. The question I must answer is whether disclosure of the specific information in dispute would be an unreasonable invasion of the complainant or petitioners' personal privacy. The potential impact on future complaints does not relate to the privacy impacts for these individuals.

Intensifying conflict

[153] The Township submits, in its reply, that disclosure of the information could contribute to intensifying "the conflict" and cites correspondence the applicant's

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[117] Township's initial submission at para 81(e).
[118] *Ibid* at para 81(f).
[119] For example, Order 01-26, 2001 CanLII 21580 (BC IPC) at paras 42-44; Order 03-34, 2003 CanLII 49213 (BC IPC) at para 42; Order F23-02 2023 BCIPC 3 at paras 29-32.

former legal counsel sent to the Township's lawyer to support this assertion.[120] The Township states that this factor weighs against disclosure.

[154] The Township does not specify if the conflict is between the applicant and the Township or the applicant and the third-party complainant and petitioners. Either way, I find the Township has not established this as a relevant circumstance.

[155] The personal information in question is about third parties. I do not see why a conflict between the Township and the applicant should have any bearing on the Township's determination of whether disclosure of third-party personal information is an unreasonable invasion the third parties' personal privacy.

[156] While previous OIPC orders have found that intensifying conflict is a circumstance that weighs against disclosure,[121] the Township has not pointed me to anything, in the correspondence or otherwise, to support the conclusion that the applicant is in conflict with the complainant or petitioners or that this conflict could intensify if the personal information in question is disclosed.

[157] I find that this consideration is not relevant in the circumstances.

Implicit consent

[158] The applicant submits that the signatories of a petition have implicitly consented to the disclosure of the personal information they provided in the petition. In support, the applicant relies on two orders of the Information and Privacy Commissioner of Ontario.[122] These orders found that disclosing the personal information of petitioners did not constitute an unjustified invasion of personal privacy because the petitioners had implicitly consented to the disclosure of their personal information when signing the petition. After finding that the petitioners implicitly consented, under provisions similar to FIPPA's s. 22(4)(a),[123] the adjudicators concluded that disclosure of the personal information would not be an unreasonable invasion of the petitioners' privacy and ended the analysis.

[159] In its reply, the Township analogizes to OIPC Order F16-14, which found that, even though a petition signed by a group of neighbours could not attract an expectation of confidentiality, the disclosure of the information would be an unreasonable invasion of the signatories' privacy.[124] In Order F16-14, the

[120] Township's reply submission at para 22(d).
[121] For example, Order F16-14, 2016 BCIPC 16 at paras 50 and 53.
[122] Applicant's submissions at para 83, referencing Ontario Order MO-1506, 2001 CanLII 26201 (ON IPC); Ontario Order-171, 1990 CanLII 3857 (ON IPC).
[123] Section 22(4)(a) of FIPPA states: a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if (a) the third party has, in writing, consented to or requested the disclosure.
[124] Township's reply submission at para 21, citing Order F16-14 , 2016 BCIPC 16 at paras 41-42 and 47-54.

adjudicator considered the public nature of petitions as a relevant circumstance under s. 22(2). He found that while petitions are ordinarily public information that cannot be withheld under s. 22, each case must be evaluated on its own merits.[125]

[160] In my view, petitions should not be treated as a special class of records that permit the disclosure of third-party personal information on the basis of implicit written consent without a fulsome assessment under s. 22. Public bodies must continue to assess the content of a petition and the context in which the personal information in it was collected, supplied, and used to determine whether its disclosure would be an unreasonable invasion of a third party's personal privacy. The public nature of petitions is only one factor of many to assess under s. 22 and is not determinative.

[161] I have already considered the public nature of petitions under s. 22(2)(f).

Section 22(1) summary of conclusions

[162] All but two pieces of information withheld under s. 22(1) are personal information as defined by FIPPA. The information that the Township cannot withhold under s. 22(1) because it is not personal information is: 1) the statement in the petition about the locations of the petitioners' homes; and 2) the length of time the petitioners have lived in the area.

[163] I have found that disclosure of the name, address, and telephone number of the complainant and the names and addresses of the petitioners is presumptively an unreasonable invasion of these individuals' personal privacy under s. 22(3)(b). I have also found that the disclosure of the details regarding the Township's employee's leave of absence is presumptively an unreasonable invasion of that person's personal privacy under s. 22(3)(d).

[164] I have considered the relevant circumstances and found that none of them strongly weigh for or against disclosure and that the applicant has been unsuccessful in rebutting the presumptions under s. 22(3). I have found that disclosure would not be desirable for the purpose of subjecting the Township to public scrutiny and that the third parties' personal information is not relevant to a fair determination of the applicant's rights. I found that the Township did not establish that the complaint or petition were supplied in confidence, or that disclosure would unfairly expose the third parties to harm or unfairly damage their reputations. I rejected the Township's chilling effect argument that disclosure would negatively impact future complaints and found the Township did not establish that the applicant was in conflict with the third parties or that disclosure may intensify that conflict. I gave no weight to the applicant's argument that the petitioners implicitly consented to have their personal information disclosed.

[125] Order F16-14, 2016 BCIPC 16 at para 47.

[165] In summary, I find that that applicant has not met its burden of proving that disclosure of the personal information in dispute under s. 22 would not be an unreasonable invasion of the third parties' personal privacy. The Township is required to withhold this information from the applicant.

Identity of confidential source of law enforcement information – s. 15(1)(d)

[166] Section 15(1)(d) states:

> (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> […]
>
> (d) reveal the identity of a confidential source of law enforcement information[.]

[167] Based on the wording of the section, I will consider below whether:

- the petitioners are "sources" of "law enforcement information";
- the petitioners are "confidential" sources of law enforcement information; and
- disclosing the disputed information could reasonably be expected to "reveal the identity" of one or more of the petitioners.[126]

[168] The Township withheld two pieces of information under s. 15(1)(d).

[169] First, the Township withheld the personal information of the complainant in the service form. I found, above, that the Township is required to withhold this information under s. 22(1) and, therefore, I do not need to decide if s. 15(1)(d) also applies.

[170] Second, the Township withheld one line of the petition that the Township describes as "information regarding the location of the homes for the signatories of the petition".[127] I found above that this information is not "personal information" as defined by FIPPA and, as a result, it cannot be withheld under s. 22(1). Therefore, I will decide if s. 15(1)(d) applies to this information below.

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[126] This approach is used in numerous OIPC orders. For example, Order F21-57, 2021 BCIPC 66 at para 21.
[127] Township's initial submission at para 76(c).

Are the petitioners a "source" of "law enforcement" information?

[171] I am satisfied, based on my review of the records, that the petitioners provided information to the Township that ultimately formed part of its investigation into the applicant's operations. As a result, I find the petitioners qualify as "sources" of information.[128]

[172] The term "law enforcement" is defined in Schedule 1 of FIPPA as:

> (a) policing, including criminal intelligence operations,
>
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
>
> (c) proceedings that lead or could lead to a penalty or sanction being imposed[.]

[173] The Township states that its investigation into the applicant could lead to enforcement proceedings under the 2019 bylaw, which could result in a penalty being imposed on the applicant, including fines pursuant to the *Local Government Bylaw Enforcement Act*.[129] I am satisfied that the petitioners are sources of "law enforcement information" within the meaning established under s. 15(1)(d) of FIPPA.

Are the petitioners a "confidential" source?

[174] Having found that the petitioners are sources of law enforcement information, the next question is whether they are "confidential" sources. The expectation of confidentiality can be explicitly stated or establish through an implied understanding between the parties.[130]

[175] The Township submits that its Bylaw Policy states complainants' identities will always be kept confidential and, therefore, the petitioners were confidential sources of law enforcement.[131] However, the Township has not explained whether the policy in question applies to information provided in a petition rather than a bylaw complaint. The applicant points out that the Township has not said whether this policy, or a similar policy, was in effect at the time the Township received the petition, which is dated March 30, 2016.[132]

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[128] See Order F21-57, 2021 BCIPC 66 at para 23 and F18-31, 2018 BCIPC 34 at para 48 for a similar approach to "source".
[129] Township's initial submission at para 65 and manager's affidavit at para 8.
[130] Order F18-31, 2018 BCIPC 34 at para 49; Order F07-04, 2007 CanLII 9595 (BC IPC) at para 23 and Order F00-18, 2000 CanLII 7416 (BC IPC) at p8.
[131] Township's initial submission at para 67.
[132] Applicant's submission at para 73.

[176] The Township does not submit that it provided the petitioners with any assurances of confidentiality or that the petitioners sought such assurances. While the Township says it has not disclosed the petitioners' identities,[133] this does not tell me whether the petitioners expected confidentiality when they gave the petition to the Township.

[177] Petitions are generally considered to be public information, as individuals sign a petition to publicly lend support to a position.[134] The petition does not include assurances of confidentiality and is addressed broadly to "The Corporation of The Township of Langley". These circumstances do not support a conclusion that the petitioners implicitly expected the information they provided to be confidential.

[178] I find that the Township has not established the petitioners are confidential sources of law enforcement information.

Would disclosure reveal the identity of a confidential source?

[179] Having decided that the Township failed to establish that the petitioners were confidential sources, I do not need to decide the final part of the test. However, for the sake of completeness I will do so.

[180] The final question under s. 15(1)(d) is whether disclosing the disputed information could reasonably be expected to reveal the identity of one or more of the petitioners.

[181] The Township is not required to prove that disclosure of the disputed information will reveal the identity of a confidential source of law enforcement information, or even that disclosure is more likely than not to reveal the identity of such a source.[135] It need only prove that there is a "reasonable basis for believing" that disclosure of the disputed information could reveal the identity of a confidential source of law enforcement information.[136] The release of the information itself must give rise to a reasonable expectation of revealing the identity of a confidential source.[137]

[182] I find that the Township has not demonstrated there is a reasonable basis for believing that the withheld statement could reveal the identity of the petitioners. The statement is too broad and generic to do so. The statement reveals a general

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[133] Township's reply submission at para 22(c).
[134] Order F16-14, 2016 BCIPC 16 at paras 41-42.
[135] *British Columbia Hydro and Power Authority v British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 2128 at para 93.
[136] *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 v British Columbia (Information and Privacy Commissioner)*, 2018 BCSC 1080 at para 42.
[137] *British Columbia (Minister of Citizens' Services) v British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para 43.

circumstance that applies to the property of all the petitioners and may also apply to individuals who did not sign the petition.

[183] Based on the above, I find that s. 15(1)(d) does not apply to the information in dispute.

CONCLUSION

[184] For the reasons given above, I make the following orders under s. 58 of FIPPA:

1. Subject to item 2 below, I confirm, in part, the Township's decision to refuse to disclose the information in dispute under s. 14.

2. The Township is not authorized under s. 14 to refuse to disclose the information in the following records:

    a) The emails between the law firm and the acoustics consulting firm;

    b) The emails between the Township, the bylaw consultant, and the law firm;

    c) The attachment to the June 2, 2020 email that includes the bylaw consultant;

    d) the acoustic consulting firm's draft report attached to the August 7, 2020 email between the law firm and the acoustics consulting firm.

3. The Township is not authorized to withhold the information in dispute under ss. 13(1) or 15(1)(d). I have highlighted this information in a copy of the records that will be provided to the Township with this order.

4. I confirm, in part, the Township's decision to refuse to disclose the information in dispute under s. 22(1). I have highlighted the information that must not be withheld under s. 22(1) in a copy of the records that will be provided to the Township with this order.

5. The Township is required to give the applicant access to the information described in item 2 and the highlighted information described in items 3 and 4 above.

6. The Township must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant together with a copy of the records disclosed to the applicant in compliance with this order.

[185] Pursuant to s. 59(1) of FIPPA, the Township is required to comply with this order by November 29, 2023.

October 18, 2023

ORIGINAL SIGNED BY

Rene Kimmett, Adjudicator

OIPC File No.: F23-85736