Order F23-99

MINISTRY OF ATTORNEY GENERAL

Rene Kimmett
Adjudicator

November 23, 2023

CanLII Cite: 2023 BCIPC 115
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Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for access to records containing information about himself and his communications with various public bodies. The Ministry of Attorney General (Ministry) disclosed some information to the applicant but withheld other information under s. 14 (solicitor-client privilege). The Ministry also disputed the applicant's claim that the public interest required disclosure under s. 25(1) (public interest disclosure). The adjudicator determined the Ministry was authorized to refuse to disclose access to all of the information withheld under s. 14. The adjudicator also found that s. 25(1) did not require the Ministry to disclose the information in dispute.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c. 165, ss. 14 and 25(1).

INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for access to records containing information about himself and his communications with various public bodies.[1]

[2] In response, the Ministry of Attorney General (Ministry) disclosed some information to the applicant but withheld other information under s. 14 (solicitor-client privilege).

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

[1] The request was addressed to 10 provincial government ministries and agencies. This order deals only with the Ministry of Attorney General's decision regarding the records in its custody or under its control. I do not know whether, or how, the other ministries and agencies responded to the applicant.

[4] During the inquiry, the Ministry informed the applicant that it had found and processed additional responsive records and that it was also refusing to disclose these records under s. 14.

PRELIMINARY MATTER

Duty to assist – s. 6(1)

[5] During the inquiry, the applicant requested permission to add ss. 25 (public interest disclosure) and 6(1) (duty to assist applicants) as new issues. The Ministry opposed adding these new issues. Adjudicator Siew granted the applicant's request to add s. 25 but denied the applicant's request to add s. 6(1).[2]

[6] In his submission, the applicant again raises s. 6(1) as an issue, stating that the Ministry breached its duty to assist him by failing to canvass for records spanning the full timeline he requested.[3]

[7] I recognize that the parties disagree about what time period was specified in the applicant's original access request.[4] However, the OIPC Investigator's Fact Report states that the applicant requested access to records between January 1, 2018 – February 17, 2020. The parties were told that the Investigator's Fact Report is the foundational document going into the inquiry process and were asked to review it carefully and notify the investigator of any questions or concerns they had about this document. My understanding is that neither party raised any concerns about the findings in the Investigator's Fact Report. As a result, January 1, 2018 – February 17, 2020 is the relevant time period for this inquiry.

[8] As noted in Adjudicator Siew's decision letter, if the applicant would like access to information spanning a longer period, he can either make a written complaint to the Ministry following the process outlined in the decision letter. Alternatively, he can make another access request to the Ministry specifying a different date range.

[9] For the reasons above, I will not add s. 6(1) as an issue and do not consider it any further in this order.

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[2] February 3, 2023 decision letter.
[3] Applicant's submission at para 37.
[4] The Ministry says the applicant's request covered the period between January 1, 2018 and February 17, 2020, while the applicant states the period was January 1, 2017 to June 2021.

ISSUES AND BURDEN

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

1) Is the Ministry authorized to refuse to disclose the information in dispute under s. 14?

2) Is the Ministry required to disclose the information in dispute without delay under s. 25(1)?

[11] Under s. 57(1) the Ministry has the burden of proving it is authorized to refuse the applicant access to the information in dispute under s. 14.

[12] Section 57 is silent on which party has the burden of proof under s. 25. I will adopt the approach used in previous OIPC orders that have said it is in the interests of both parties to provide whatever evidence and argument they have to assist the adjudicator in making a determination under s. 25.[5]

DISCUSSION

Background

[13] The applicant is a former Chief of an Indigenous nation (Nation A).[6]

[14] The Province of British Columbia (Province) signed a Settlement Agreement with another Indigenous nation (Nation B), which included the Province transferring lands to Nation B.[7] The Province, represented by the Ministry of Indigenous Relations and Reconciliation (MIRR), conducted consultations with Indigenous nations that could potentially be impacted by the Settlement Agreement (Consultation Process).[8] Nation A was consulted as part of the Consultation Process.

[15] The applicant's position is that the Settlement Agreement disenfranchised Nation A and its members of thousands of hectares of their traditional ancestral lands.[9]

Records at issue

[16] The Ministry has completely withheld eight records totalling 58 pages. The records in dispute are emails (with attachments) between a lawyer employed by

[5] See e.g. F22-10, 2022 BCIPC 10 at para 13; Order F18-49, 2018 BCIPC 53 at para 6.
[6] Applicant's submission at para 1.
[7] Ministry's initial submission at para 10.
[8] Ministry's initial submission at para 11.
[9] Applicant's submission at paras 28 and 41.

the Ministry and two MIRR employees. I describe the records in more detail throughout this order.

Solicitor-client privilege – s. 14

[17] The test for solicitor-client privilege has been expressed in various ways. The applicant relies on a version of the test with four-parts[10] and the Ministry a version with three-parts.[11] I do not see a functional difference between these two versions of the test.[12] 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)*,[13] which states that for solicitor-client 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.[14]

[18] Not every communication between a solicitor and their client is privileged, however, if the conditions above are satisfied, then solicitor-client privilege applies.[15]

[19] Further, a communication does not need to specifically seek or give legal advice to be privileged, as long as it can be placed in the continuum of communications in which the solicitor tenders advice.[16] 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.[17]

[20] 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

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[10] Applicant's submission at para 48, citing the test from *R. v B.*, 1995 CanLII 2007 (BCSC).
[11] Ministry's initial submission at para 17, citing the test from *Solosky v The Queen*, 1979 CanLII 9 (SCC) [*Solosky*] at 837.
[12] See also: *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at paras 70-75.
[13] *Pritchard v Ontario (Human Rights Commission),* 2004 SCC 31.
[14] *Ibid* at para 15, citing *Solosky, supra* note 10.
[15] *Solosky, supra* note 10.
[16] *Samson Indian Band v Canada*, 1995 CanLII 3602 (FCA), [1995] 2 FC 762 at para 8.
[17] *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp*] at para 40.

its disclosure would reveal the communications protected by solicitor-client privilege, either directly or by inference.[18]

Evidence needed to substantiate the s. 14 claim

[21] The Ministry did not provide me with a copy of the information in dispute. Instead, to support its claim of privilege under s. 14, it relied on affidavit evidence from a Senior Legal Counsel with the Legal Services Branch within the Ministry. In this affidavit, the Senior Legal Counsel describes her first-hand knowledge of the content and context of the withheld records and her role as a sender or recipient of them.[19] Her affidavit also includes a table of records that provides the date of the communications and who was involved.

[22] The applicant asks me to use my authority under s. 44(1)(b) of FIPPA to order the Ministry to produce these records for my review in this inquiry.[20] However, solicitor-client privilege plays an important role in the proper functioning of the legal system and it is in the public interest to protect information subject to solicitor-client privilege.[21] As a result, I will only order production of records withheld under s. 14 when it is absolutely necessary for me to fairly decide the issues.

[23] In this case, I find I have sufficient evidence to decide whether s. 14 applies to the withheld information. The Senior Legal Counsel's sworn affidavit evidence establishes that she 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 she was directly involved in the communications and has reviewed the records in the context of this inquiry. As a result, I do not need to order production of the records.

[24] Based on the evidence provided by the Senior Legal Counsel's affidavit, I find the records in dispute to be as follows:

- three email chains between two MIRR employees and the Senior Legal Counsel; and

- five attachments to these emails, consisting of:

    - a Legal Analysis Summary. This is a MIRR document summarizing legal advice MIRR received from the Ministry about matters related

[18] 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.
[19] Senior Legal Counsel's affidavit at paras 8-9 and Exhibit A.
[20] Applicant's submission at para 46.
[21] *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 34; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 10.

to the Settlement Agreement. It is attached to an email one of the two MIRR employees sent to the Senior Legal Counsel and the other MIRR employee.

- four Draft Letters. Three of these Draft Letters were intended to be sent from MIRR to Nation A and one was intended to be sent from MIRR to another Indigenous nation.

Parties' positions on s. 14

[25] The Senior Legal Counsel states that the emails were communications between herself and her client, MIRR, in which two MIRR employees requested her legal advice about, generally, the Consultation Process.[22] She states that, in these emails, she and the two MIRR employees exchanged information relevant to the legal advice sought and she gave her legal advice.

[26] The Senior Legal Counsel states the attachments to the emails all relate to the substance of the legal advice she provided to MIRR, either because they informed her legal advice or because she inserted her legal advice into the attached documents and sent them to one of the MIRR employees.[23]

[27] The Senior Legal Counsel states that she sent and received the emails and attachments intending them to be confidential and that she understood the MIRR employees also expected the communications to be confidential.[24] Finally, she states she is not aware of any circumstances that would amount to the Province, including MIRR, waiving solicitor-client privilege over any of the withheld information.[25]

[28] The applicant submits that there is no evidence that the communications contained in the records were consistently treated as confidential or that the communication were only shared between a client and their solicitor.[26] He submits that it seems highly improbable that communications took place on a confidential basis "considering the number of individuals who were communicating in open discussions about [Nation A], and the nature of the discussions which took place."[27] He submits that too many individuals are privy

[22] Senior Legal Counsel's affidavit at para 17.
[23] Senior Legal Counsel's affidavit at para 18.
[24] Senior Legal Counsel's affidavit at paras 20-21.
[25] Senior Legal Counsel's affidavit at para 22.
[26] Applicant's submission at para 45.
[27] Applicant's submission at para 50.

to, and included in, the email chains, making it impossible for solicitor-client privilege to exist.[28] He submits that it is "difficult to understand in what capacity information was being exchanged between parties, and by whom and whether that information was in a continuum of confidentiality."[29]

[29] In reply to the applicant, the Ministry submits that it has tendered sworn evidence of the Senior Legal Counsel supporting its claim of privilege.[30] It says that the communications are between only three individuals and fit squarely within the confidential solicitor-client relationship between the Senior Legal Counsel and MIRR.[31] It asserts that the communications were not part of any "open discussion" about Nation A involving a "number of individuals" but were instead confidential communications strictly between a lawyer and her client.[32]

Analysis

[30] I accept, based on the Ministry's evidence and submissions, that there was a solicitor-client relationship between the Senior Legal Counsel and MIRR, as represented by its two employees.

[31] I am satisfied that the three email chains are written communications between a lawyer and her client that form part of the continuum of communications in which the Senior Legal Counsel provided legal advice to MIRR.

[32] I accept the Senior Legal Counsel's evidence that the communications did not include anyone outside of this solicitor-client relationship. I am not persuaded by the applicant's argument that the records contain communications between too many people to be confidential. There is nothing before me that supports this conclusion and, I find the applicant's submissions on this subject are speculative. I prefer the Senior Legal Counsel's evidence which satisfactorily establishes that the only people involved in the communications were the Senior Legal Counsel and the two MIRR employees.

[33] I am also satisfied that the five email attachments are subject to solicitor-client privilege.

[34] The Legal Analysis Summary contains a summary of legal advice that the Ministry gave to MIRR about a matter related to the Settlement Agreement. This document was sent by one of the MIRR employees to the Senior Legal Counsel, who used it to formulate legal advice for MIRR. It is clear to me that the

[28] Applicant's submission at para 46.
[29] Applicant's submission at para 47.
[30] Ministry's reply submission at para 10.
[31] Ministry's reply submission at para 11.
[32] Ministry's reply submission at para 14.

information in the Legal Analysis Summary falls within the continuum of communications that the Senior Legal Counsel and MIRR needed in order to provide and obtain legal advice.

[35] I also accept the Senior Legal Counsel's evidence that she inserted her legal advice into three of the Draft Letters and used the fourth Draft Letter to inform the legal advice she gave MIRR about the Consultation Process. All four Draft Letters were attached to emails that are privileged communications, as found above. I am satisfied that the information in the Draft Letters cannot be disclosed without directly revealing the legal advice in the Draft Letters or allowing accurate inferences to be made about the legal advice the Senior Legal Counsel provided MIRR in the withheld emails.

[36] In summary, all the information in dispute in the responsive records is subject to solicitor-client privilege and properly falls under s. 14.

Public interest disclosure – s. 25

[37] The applicant submits that the Ministry must disclose the information in dispute because s. 25 applies to it.

[38] The relevant portions of s. 25 state:

> (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> > (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
> >
> > (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[39] Given what s. 25(2) states, if s. 25(1) applies, it overrides every other provision in FIPPA, including the exceptions to disclosure and the privacy protections. Therefore, the threshold for proactive disclosure under s. 25(1) is very high and only applies in the clearest and most serious situations.[33]

[33] See OIPC guidance document "Section 25: The Duty to Warn and Disclose", December 2018 at 2 (https://www.oipc.bc.ca/resources/guidance-documents/) [Guide].

Evidence needed to substantiate the s. 25(1) claim

[40] I recognize that the applicant believes I should use my authority under s. 44(1)(b) of FIPPA to order the Ministry to produce the records so that I may review the information in dispute before deciding whether s. 25 applies.

[41] I restate that, given the importance of solicitor-client privilege, I will only order production when it is absolutely necessary for me to fairly decide the issues. Here, I am satisfied that I have sufficient evidence about the contents of the records to decide whether s. 25(1) applies without reviewing the records themselves.[34]

Risk of significant harm – s. 25(1)(a)

[42] Section 25(1)(a) requires a public body to immediately disclose information about a risk of significant harm to the environment or to human health or safety. This section applies only to future harms, as indicated by the inclusion of the word "risk" in this section.[35] The following is a non-exhaustive list of types of information that should be disclosed under s. 25(1)(a):

- information that discloses the existence of the risk;
- information that describes the nature of the risk and the nature and extent of any harm; and
- information that allows the public to take the actions necessary to meet the risk or mitigate or avoid harm.[36]

Parties' positions on s. 25(1)(a)

[43] The applicant says the records at issue in this inquiry are about communications and negotiations concerning a specific natural resource development project[37] as well as the Settlement Agreement.[38] To support this position, the applicant provided a letter from Nation A's Deputy Chief to the project's stakeholders, raising concerns about the project's impacts on the environment and aboriginal rights.[39]

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[34] For OIPC orders with a similar approach see e.g. Order F21-15, 2021 BCIPC 19; F21-54, 2021 BCIPC 63.
[35] Order F15-27, 2015 BCIPC 29 para 31; Order F20-57, 2020 BCIPC 66 at para 49.
[36] Order 02-38, 2002 CanLII 42472 (BC IPC) at para 56; Order F20-51, 2020 BCIPC 60 at para 12.
[37] I have not included the name of this project to preserve the anonymity of the Indigenous nations relevant to this inquiry.
[38] Applicant's submission at para 41.
[39] Applicant's submission at para 42.

[44] In reply, the Ministry submits that the applicant misconceives the nature of the information in the records.[40] It submits the information in dispute relates to legal advice about the Consultation Process concerning land transfers to Nation B and does not relate to the natural resource development project or its impacts. It submits that the information in dispute is not about the natural environment or animals, or any risk of harm to the health and safety of Nation A's members or community.[41]

Analysis

[45] I am not persuaded by the applicant's submission that what is being discussed in the records meets the test for s. 25(1)(a) to apply. The Ministry has provided sworn evidence from the Senior Legal Counsel that the information in dispute is about legal advice sought and given about the Consultation Process. The applicant has not explained, and I do not see, how this information would disclose the existence, nature, or extent of a future risk of harm to the environment, health, or safety. As a result, I find the Ministry is not required to disclose the information in dispute under s. 25(1)(a).

Clearly in the public interest – s. 25(1)(b)

[46] Section 25(1)(a) requires a public body to immediately disclose information that is clearly in the public interest. This duty exists only where disclosure is "not just arguably in the public interest, but *clearly* (i.e., unmistakably) in the public interest."[42] What constitutes "clearly in the public interest" under s. 25(1)(b) is contextual and determined on a case-by-case basis. The issue is whether a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that the disclosure is plainly and obviously in the public interest.[43]

[47] The first question to answer when deciding if s. 25(1)(b) applies is whether the information concerns a matter that engages the public interest.[44] For instance, is the matter the subject of widespread debate in the media, the Legislature, or by officers of the Legislature or oversight bodies? Does the matter relate to a systemic problem rather than to an isolated situation? [45]

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[40] Ministry's reply submission at para 23.
[41] *Ibid.*
[42] Order 02-38, 2002 CanLII 42472 (BC IPC) at para 45, italics in original. See also *Tromp v. Privacy Commissioner*, 2000 BCSC 598 at paras 16-19.
[43] See OIPC Investigation Report F16-02 at 6 (https://www.oipc.bc.ca/reports/investigation-reports/) [Report].
[44] See e.g., Order F20-51, 2020 BCIPC 60 at paras 18-19.
[45] Report, *supra* note 43 at 26-27.

[48] If the matter is one that engages the public interest, the next question is whether the nature of the information itself meets the high threshold for disclosure. The list of factors that should be considered include whether disclosure would:

- contribute to educating the public about the matter;
- contribute in a substantive way to the body of information that is already available;
- facilitate the expression of public opinion or allow the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions.[46]

[49] In any given set of circumstances, there may be competing public interests, weighing for and against disclosure, and the threshold will vary according to those interests. FIPPA exceptions themselves are indicators of classes of information that, in the appropriate circumstances, may weigh against disclosure of the information.[47]

Parties' positions on s. 25(1)(b)

[50] The applicant cited components of the test under s. 25(1)(b), but did not make arguments about how this section applies in the circumstances.[48] That said, throughout his submission, the applicant alleges various ministries have not properly discharge their duties to meaningfully engage with Indigenous Peoples, made errors of law, and violated codes of conduct.[49] He also submits that the Settlement Agreement has resulted in Nation A's community and members being disenfranchised of thousands of hectares of their traditional ancestral lands.[50] Based on this information, I understand the applicant's position to be that the information in the withheld records should be disclosed in the public interest because it would inform the public about the wrongdoings of the Province.

[51] The Ministry submits that it has no obligation, under s. 25(1)(b), to disclose the information in the records because this information does not engage the public interest and does not meet the very high threshold for disclosure under s. 25(1)(b).[51] The Ministry submits that the records are solicitor-client

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[46] *Ibid.*
[47] Guide, *supra* note 33 at 3 and Report, *supra* note 43 at 38.
[48] Applicant's submission at para 40.
[49] Applicant's submission at paras 26-28, 31, and 35.
[50] Applicant's submission at paras 28 and 41.
[51] Ministry's Initial Submission at paras 48 and 52.

communications in which MIRR sought and received legal advice from the Senior Legal Counsel. It submits that the information has a specific focus that involves specific parties and engages specific interests, not the wider public interest.[52] The Ministry acknowledges there has been some media coverage about the Settlement Agreement, but submits it is not aware of any "widespread debate" about the Consultation Process in the media, the Legislature, officers of the Legislature, or oversight bodies.[53] Finally, the Ministry submits it is not aware of any problematic circumstances relating to the Consultation Process that are clearly in the public interest and that would compel disclosure of privileged information.[54]

Analysis

[52] Section 25(1)(b) applies only in the clearest and most serious of circumstances where disclosure is plainly and obviously in the public interest. For the reasons that follow, I find that the Ministry is not required to disclose the information in dispute under s. 25(1)(b).

[53] First, the applicant has not provided any evidence to establish that there was widespread public debate, media attention, or discussion by the Legislature about the Settlement Agreement or its impacts, or the Province's behaviour during the Consultation Process. I recognize that the public may have an interest in the manner in which the Province conducts itself during consultations with Indigenous nations. However, the applicant has not established that there was public interest in the specific Consultation Process relevant to the information in dispute in this inquiry.

[54] Second, the applicant has not explained how the information in dispute would, for example, educate the public, allow the public to make informed political decisions, or hold a public body accountable. I cannot conclude, based on the evidence before me, that the information in dispute would assist any of these aims.

[55] In summary, this is not an instance in which the public interest outweighs and overrides all the exceptions to disclosure under FIPPA. It is not, in my view, clearly in the public interest for the withheld information to be disclosed. For these reasons, I find that s. 25(1)(b) does not apply to the information in dispute.

[52] Ministry's Initial Submission at para 49.
[53] Ministry's Initial Submission at para 50.
[54] Ministry's Initial Submission at para 51.

CONCLUSION

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

1. I confirm the Ministry's decision to refuse to disclose the information in dispute under s. 14.

2. I confirm the Ministry's decision that it is not required to disclose the information in dispute under s. 25(1).

November 23, 2023

ORIGINAL SIGNED BY

Rene Kimmett, Adjudicator

OIPC File No.: F21-86833