Order F05-35

CITY OF RICHMOND

David Loukidelis, Acting Information and Privacy Commissioner

November 9, 2005

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Summary: The City retained a lawyer to investigate a City employee's allegations of wrongdoing within a City department for the purpose of providing a fact-finding report and legal advice to the City. Resulting report from the lawyer to the City was protected by legal professional privilege and the City was authorized by s. 14 of the Act to refuse to disclose it to the applicant journalist.

Key Words: solicitor-client privilege.

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

Authorities Considered: B.C.: Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 01-20, [2001] B.C.I.P.C.D. No. 21.

Cases Considered: *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, [2002] B.C.J. No. 2779; *B. v. Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.); *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 270, [2003] 1 F.C. 219; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773; *Canada (Information Commissioner) v. Atlantic Canada Opportunities* Agency, [1999] F.C.J. No. 1723 (C.A.); *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)* (1997), 4 Admin. L.R. (3d) 96 (T.D.); *R. v. Campbell*, [1999] 1 S.C.R. 565.

1.0 INTRODUCTION

[1] A City of Richmond ("City) employee made widely publicized allegations of harassment and other wrongdoing within the City department in which the employee worked. The City retained a lawyer to investigate the allegations for the purpose of providing a fact-finding report and legal advice to the City.

[2] The City denied the request of the applicant, a journalist, for access under the *Freedom of Information and Protection of Privacy Act* ("Act") to the lawyer's report to the City on the ground that it was protected by solicitor-client privilege and therefore protected from disclosure by s. 14 of the Act.

[3] The applicant requested a review of the City's decision to deny access and, because mediation by this office did not resolve the issues, I held a written inquiry under s. 56 of the Act.

2.0 ISSUE

[4] The issue before me is whether the City is authorized by s. 14 of the Act to deny access to the report in question. Under s. 57(1) of the Act, the City has the burden of establishing that s. 14 authorizes it to withhold the information it withheld.

3.0 DISCUSSION

[5] **3.1 Solicitor-Client Privilege**—Section 14 of the Act reads as follows:

> **Legal advice**
>
> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[6] Section 14 of the Act incorporates both kinds of legal privilege recognized by Canadian law—legal professional privilege and litigation privilege. The principles governing the application of s. 14 have been discussed in numerous orders and court decisions. See, for example, Order 02-01[1] and *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*.[2]

[7] It is clear that the City relies on legal professional privilege here. This privilege serves to promote full and frank communications between a lawyer and her or his client. It does this by protecting confidential communications between them that are related to the seeking or giving of legal advice. The elements that must exist for legal professional

[1] [2002] B.C.I.P.C.D. No. 1.
[2] 2002 BCCA 665, [2002] B.C.J. No. 2779.

privilege to be established were set out in the following passage from the judgement of Thackray J. in *B*. v. *Canada*[3]:

> As noted above, the privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.
>
> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

[8] According to the applicant, the City told the wife of the City employee who made the allegations of wrongdoing that the City's lawyer would not be acting as legal counsel, but that he was being hired to conduct an independent, outside investigation and would get to the root of the problem. The employee and his wife co-operated, the applicant says, although they were suspicious of the City's motives and thought the City might try to cover things up, rather than address the problem. The City later said it had been mistaken and that the lawyer was in fact acting as legal counsel to the City.

[9] The applicant did not provide first-hand affidavits or statements on these matters, but he did provide some emails between a City official, the complaining employee and his wife. The emails indicate that the City official informed the wife that the lawyer was not the City's legal advisor and then corrected this statement in another email sent within 48 hours of the first.

[10] Where a lawyer acts only as an investigator and not as a legal adviser, there is no privilege protecting his or her communications. The applicant's argument, essentially, is that misinformation from the City about the lawyer's role negated the protection of legal professional privilege to the lawyer's report to the City.

[11] The applicant provided me with a City news release to the effect that the lawyer's investigation found that the evidence did not support the allegations. The applicant also

[3] [1995] 5 W.W.R. 374 (B.C.S.C.).

provided me with the City's own executive summary of the lawyer's report—which the applicant says was leaked to his newspaper—and interprets that summary as acknowledging that there was evidence supporting many of the allegations. The applicant concludes as follows at p. 1 of his submission:

> I believe the public should be given access to the substance of the entire 34 page report produced by [the investigator] for the sake of having a full, fair reckoning of the issue.

[12] The City says it did not mislead its employee or his wife about the lawyer's role as legal advisor to the City in order to gain their co-operation. In any case, the City official who misinformed the wife about the lawyer's role quickly corrected his error and the employee and his wife do not appear to have been confused. The City points to another email, sent by the wife to the City official within an hour of his incorrect email, in which she states that the lawyer told her he was legal adviser to the City and was acting as such.

[13] **3.2 Application of Section 14**—I have concluded that, on the face of the terms of reference signed by the City and the lawyer and the resulting report, the criteria for establishing legal professional privilege have been met and the report is privileged.

[14] The lawyer was retained to conduct an investigation of the City employee's allegations against the City for the purpose of providing the City with the lawyer's factual assessments and legal advice based on those assessments. The report is a communication from the lawyer to the City that provides legal advice formulated on the basis of his assessment of information from City employees.

[15] It seems the lawyer made promises of confidentiality to City employees with whom he spoke. The promises would not have enabled the City, or the lawyer on its behalf, to dictate the City's obligations under the Act[4] and I am not sure the lawyer would have been able to live up to his promises of confidentiality if the City had later decided otherwise. However, in terms of the elements of legal professional privilege, the confidential character of the report is made out by the terms of reference signed by the City and the lawyer, which specifically contemplate its confidentiality as between lawyer and client.

[16] Legal professional privilege protects third-party communications only if the third-party is performing a function on the client's behalf that is integral to the relationship between the solicitor and the client. Accordingly, in *College of Physicians*, the opinions of medical experts consulted by the College's lawyer were third-party communications that were not protected by legal professional privilege.

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[4] Order 01-20, [2001] B.C.I.P.C.D. No. 21, para. 80; *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 270, [2003] 1 F.C. 219; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773; *Canada (Information Commissioner) v. Atlantic Canada Opportunities* Agency, [1999] F.C.J. No. 1723 (C.A.); Canada *(Information Commissioner) v. Canada (Immigration and Refugee Board)* (1997), 4 Admin. L.R. (3d) 96 (T.D.).

[17] The facts are different in this case, since the City's lawyer obtained and assessed factual information from City employees in order to formulate and give legal advice to the City. Communications between the lawyer and employees of his client, the City, for the purpose of formulating and giving the lawyer's legal advice to the client were not third-party communications.

[18] Courts have remarked on the need to distinguish between when counsel is acting or is not acting as a legal adviser.[5] I conclude on the evidence in this case that there was never any real question that the City retained the lawyer as its legal adviser to prepare the report the applicant has requested. The one erroneous email from the City official to the complaining employee's wife about the nature of the lawyer's retainer, which did not in fact mislead anyone and was quickly corrected, is of no significance.

[19] Some legal commentators have criticized application of solicitor-client privilege to lawyer-conducted internal corporate or government investigations on the ground that it facilitates the practice of channelling communications through counsel for the purpose of attracting solicitor-client privilege, with the result that lawyer-conducted investigations have become big business for legal professionals because they can give clients confidentiality rights that are not available for investigations conducted by other professionals.[6] These criticisms are just that—they are not shared by all commentators and are not the law in this area as the Court of Appeal stated it in *College of Physicians*.

[20] The lawyer in this case was acting on the instructions of his client, the City, to obtain facts from City employees and assess those facts to render legal advice to the City with respect to its employee's allegations of wrongdoing within the City department in which the employee worked. As I have already noted, these facts are different from the facts in *College of Physicians*. However, applying the Court of Appeal's statement of the law in this area in *College of Physicians*, I conclude, on the present evidence, that the lawyer's report to the City requested by the applicant is protected by legal professional privilege and the City was authorized by s. 14 of the Act to refuse to give the applicant access to it.

[21] The City's decision to refuse access to the lawyer's report did not refer to s. 22 of the Act. Nor was the application of s. 22 argued in the inquiry. Because it is a mandatory exception, I think it appropriate nonetheless to say that, quite apart from issues of solicitor-client privilege and the applicability of s. 14 of the Act, a large amount of information in the report is third-party personal information that s. 22(1) very likely required the City to refuse to disclose to the applicant.

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[5] *B. v. Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.) and *R. v. Campbell*, [1999] 1 S.C.R. 565.

[6] See, for example, Garry D. Watson & Frank Au, "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation" (1998), 77 Can. Bar Rev. 315, and William H. Simon, "The Confidentiality Fetish: The Problem with Attorney Client Privilege", *The Atlantic Monthly* (December 2004) 113.

4.0 CONCLUSION

[22] For the reasons given above, under s. 58 of the Act, I find that s. 14 of the Act authorized the City to refuse to give the applicant access to the requested report and I confirm the City's decision in that regard.

November 9, 2005

ORIGINAL SIGNED BY

David Loukidelis
Acting Information & Privacy Commissioner
for British Columbia

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