

S E237729

No.
Vancouver Registry



In the Supreme Court of British Columbia

THE CORPORATION OF THE TOWNSHIP OF LANGLEY

Petitioner

and

THE INFORMATION AND PRIVACY COMMISSIONER OF
BRITISH COLUMBIA and LANGLEY ROD AND GUN CLUB

Respondents

PETITION TO THE COURT

ON NOTICE TO:

Office of the Information & Privacy Commissioner
PO Box 9038, Stn. Prov. Govt.
Victoria, BC V8W 9A4

AND ON NOTICE TO:

Langley Rod and Gun Club
c/o Eyford Partners
1744 - 1055 Dunsmuir Street, PO Box 49254
Vancouver, BC
Canada V7X 1L2

AND ON NOTICE TO:

Attorney General of the Province of British Columbia
Ministry of the Attorney General
Legal Services Branch
1001 Douglas Street
Victoria, BC V8V 1X4

This proceeding is brought for the relief set out in Part 1 below, by

The person named as petitioner in the style of proceedings above

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

- (b) serve on the petitioner
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or, and
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: The Law Courts 800 Smithe Street Vancouver, British Columbia V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner is: Norton Rose Fulbright Canada LLP 1800 – 510 West Georgia Street Vancouver, British Columbia V6B 0M3 Fax number address for service (if any) of the petitioner: N/A E-mail address for service (if any) of the petitioner: nathan.lapper@nortonrosefulbright.com AND tammy.tam@nortonrosefulbright.com

(3)	<p>The name and office address of the petitioner's lawyer is:</p> <p>Norton Rose Fulbright Canada LLP 1800 – 510 West Georgia Street Vancouver, British Columbia V6B 0M3 Attention: Nathan Lapper</p>
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Claim of the Petitioner

Part 1: ORDERS SOUGHT

1. The Petitioner, the Corporation of the Township of Langley (the "Township") seeks:
 - (a) a declaration that the Township is entitled to withhold email correspondence between its external legal counsel and an acoustics consulting firm and related documents (the "Privileged Documents"), which are a subject of Order F23-88 dated October 18, 2023 (the "Order"), as such documents are protected by litigation privilege and thus constitute an exception pursuant to section 14 of the *Freedom of Information and Privacy Protection Act* ("FIPPA");
 - (b) an order that the portion of the Order of the adjudicator of the Information and Privacy Commissioner (the "Adjudicator") requiring the Township to provide the Privileged Documents pursuant to FIPPA be quashed or set aside;
 - (c) an order extending the automatic 120-day stay of the Order pursuant to section 59(2) of FIPPA, if necessary, pending the final determination of this petition; and
 - (d) an order that the Township may file under seal an affidavit attaching the *in camera* evidence, submissions and correspondence of the Township relating to the Order.
2. Costs; and
3. Such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

1. The Petitioner is a municipal corporation pursuant to the provisions of the *Community Charter*, S.B.C. 2003, c. 26, with an address for service in this proceeding at 1800 – 510 West Georgia, Vancouver, BC.
2. The Respondent, the Information and Privacy Commissioner for British Columbia (the "IPC"), is an officer of the Legislature appointed pursuant to and with the powers conferred by FIPPA.
3. The Respondent, Langley Rod and Gun Club (the "LRGC") is the applicant to the Order under review, and operates a recreational gun club at a property it owns, which is located within the jurisdiction of the Township.

4. On November 27, 2020, the LRGC made a freedom of information ("FOI") request to the Township for access to records containing information about noise complaints received by the Township related to LRGC's land and neighbouring areas.

Affidavit #1 of Mariana Olivo De Cerqueira made November 15,
2023 ("Cerqueira Affidavit"), Ex. L, para. 2

5. In response to LRGC's FOI request, the Township disclosed some information requested but withheld other information under ss. 13(1), 14, 15(1)(d) and 22(1) of *FIPPA*.
6. Among other documents, the Township withheld the Privileged Documents, which contain communications (and related documents) between the Township's external legal counsel, Norton Rose Fulbright Canada LLP ("NRF"), and persons at BKL Consultants Ltd. ("BKL"), an acoustic consultancy firm, on the basis that these documents were subject to litigation privilege and therefore exempt from disclosure under s. 14 of *FIPPA*.

Cerqueira Affidavit, Ex. L, para. 10

7. The LRGC requested that the IPC review the Township's decision to withhold, among other documents, the Privileged Documents. On November 8, 2022, the IPC ordered an Inquiry to consider, among other things, whether the Township was:

- (a) authorized to withhold records under ss. 13(1), 14 and 15(1)(d) of *FIPPA*; and
- (b) required by s. 22(3)(b) of *FIPPA* to withhold certain information in the records.

Cerqueira Affidavit, Ex. A

8. The parties made written submission in the Inquiry. On December 21, 2022, the IPC permitted certain submissions and affidavit evidence submitted by the Township in the Inquiry to be submitted *in camera*, and viewable only by the adjudicator for the Inquiry and not the LRGC.

Cerqueira Affidavit at para. 5

9. Between January 23 and September 12, 2023, the parties made written submissions and provided evidence to the IPC in the Inquiry.

Cerqueira Affidavit, Ex. D – R

10. On October 18, 2023, the Adjudicator of the IPC released the Order, permitting the Township to withhold certain records under s. 14 of *FIPPA*, but also finding that the Township was not authorized by s. 14 to refuse to disclose the Privileged Documents.

Cerqueira Affidavit, Ex. S

11. The Township seeks a judicial review of the Order as it concerns the Privileged Documents.

Part 3: LEGAL BASIS

1. The Petitioner relies on:
 - (a) *Supreme Court Civil Rules*, B.C. Reg. 168/2009, 1-3, 2-1, 14-1, 16-1 and 22-2;
 - (b) *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 as amended;
 - (c) *Administrative Tribunals Act*, S.B.C. 2004, c. 45 as amended;
 - (d) *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 as amended;
 - (e) *Community Charter*, S.B.C. 2003, c. 26, as amended;
 - (f) *Local Government Act*, R.S.B.C. 2015, c. 1, as amended; and
 - (g) the inherent jurisdiction of this Honourable Court.

Grounds for Judicial Review

2. The Adjudicator erred in law in concluding that the Township is required to disclose the Privileged Documents on the basis that litigation was not reasonably contemplated and the Privileged Documents were not created with the dominant purpose to prepare for litigation and therefore not protected by litigation privilege.
3. *FIPPA* does not grant a right of appeal of an order of the IPC. A review of the Order must be undertaken pursuant to a judicial review brought by petition to this Court.

FIPPA

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 at s. 2(1)

The Statutory Provision Under Review

4. The *FIPPA* provision under review provides the following:

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

FIPPA, s. 14.

Standard of Review

5. The *Administrative Tribunals Act* does not apply to the IPC, as the IPC's enabling statute, *FIPPA*, is not subject to the *Administrative Tribunals Act*. Therefore, determination of the appropriate standard of review is not based in statute but is determined on the basis of the common law alone.

Weyerhaeuser Company Ltd. v. British Columbia (Assessor of Area No. 4 – Nanaimo Cowichan), 2010 BCCA 46 at para. 32

6. This Court has confirmed that the correctness standard of review applies to a judicial review of an IPC order as it relates to decisions under s. 14 of *FIPPA*.

British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner), 2021 BCSC 266 [BC (Finance)] at para. 32

7. The application of the correctness standard to decisions of the IPC relating to s. 14 of *FIPPA* is consistent with the Supreme Court of Canada's emphasis of the "fundamental importance" of solicitor-client privilege, which necessitates a uniform protection of solicitor-client privilege.

Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53 at para. 20

8. This Court has further recognized that privacy protection has a quasi-constitutional status. This status supports the application of the correctness standard, rather than presumptive standard of review of reasonableness.

BC (Finance) at para. 33

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 [Vavilov] at para. 17

9. In reviewing a decision of the IPC pursuant to s. 14 of *FIPPA*, the ultimate question before the Court is whether the adjudicator properly determined the scope of privilege.

The District of Sechelt v. Information and Privacy Commissioner of British Columbia, 2021 BCSC 2143 at para. 49

10. The correctness standard is not deferential to the decision-maker. Rather, it allows the reviewing Court to make an assessment on its own accord based on the evidentiary record that was before the decision-maker:

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

Vavilov at para. 54

The Elements of the Litigation Privilege

11. The term "solicitor client privilege" in s. 14 of *FIPPA* includes both legal advice privilege and litigation privilege.

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

12. Litigation privilege protects against the disclosure of communications and documents which were created for the dominant purpose to prepare for litigation. The purpose of litigation privilege includes the assurance that a lawyer's preparation of a client's case is not inhibited by the possibility that materials prepared be taken out of the file and presented to the court "in a manner *other than* that contemplated when they were prepared" [emphasis added].

Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52
[*Lizotte*] at paras. 1, 20 and 24

13. Litigation also serves to ensure the efficacy of the adversarial process. It is temporary and lapses when litigation ends, applies to non-confidential documents, and is not solely directed at communications between solicitors and their clients.

Lizotte at paras. 22 and 24

14. Notably, while litigation privilege is generally based upon the need for a protected space to facilitate investigation and preparation of a case for trial, it is not limited to actual *ongoing* litigation, and includes investigations undertaken when litigation is pending or "may reasonably be apprehended".

Blank v. Canada (Minister of Justice), 2006 SCC 39 at paras. 28
and 38

15. The two-part test for determining whether a document is protected by litigation privilege, on a balance of probabilities, is as follows:

- (a) litigation was ongoing or was reasonably contemplated at the time the document was created; and
- (b) the dominant purpose of creating the document was to prepare for that litigation.

Gichuru v. British Columbia (Information and Privacy Commissioner), 2014 BCCA 259 at para. 32

16. Litigation can be considered reasonably contemplated when a reasonable person, with the same knowledge of the situation as one or both of the parties, would find it unlikely that the dispute will be resolved without it. It is a test that is "not...particularly difficult" to meet. Litigation can reasonably be contemplated from the outset of an incident or dispute.

Hamalainen v. Sippola, 1991 CanLII 440 (BCCA) at p. 13

17. A document is for the dominant purpose of litigation when it was produced to obtain legal advice, or to conduct or aid in the conduct of litigation. It is a factual determination to be made based on all of the circumstances of the case, and the context in which the document was produced.

Raj v. Khosravi, 2015 BCCA 49 at paras. 12 and 17

The Privileged Documents are Protected by Litigation Privilege

The Adjudicator's findings

18. For the first branch of the test for litigation privilege, the Adjudicator found:

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 [Privileged Documents were] created.

Cerqueira Affidavit, Ex. S, para. 80

19. Under the second branch of the test for litigation privilege, the Adjudicator noted:

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. Inquiring into the dominant purpose of a record involves determining "whether, and if so when, the focus of the investigation/inquiry shifted to litigation." The Township has not explained whether or when the purpose of its investigation into the applicant shifted to litigation. [footnotes omitted]

Cerqueira Affidavit, Ex. S, para. 83

20. Accordingly, the Adjudicator found that the Privileged Documents are not protected by litigation privilege and that the Township is not authorized to refuse to disclose them under s. 14 of *FIPPA*.

The evidentiary record before the Adjudicator

21. As part of the written inquiry in response to LRG's request to the IPC to review the Township's response to the FOI request, the Township submitted to the Adjudicator written representations dated January 23, 2023.

Cerqueira Affidavit, Ex. H

22. The Privileged Documents at issue relate to communications between Township's external legal counsel, NRF, and BKL. Specifically, the Privileged Documents related to acoustic testing to be completed in respect of the LRG's non-compliance with the Township's *Community Standards Bylaw* 2019 No. 5448 (the "Bylaw").

Cerqueira Affidavit, Ex. G, paras. 8 and 19 and Schedule "A"

23. In its written representations, the Township explained that it received noise complaints relating to LRG's land and its operations as a gun range, and referred the matter to NRF for handling and advice when the LRG retained legal counsel.

Cerqueira Affidavit, Ex. H, paras. 4-5

24. The Township further explained that it started an investigation into the matter to consider whether to take bylaw enforcement actions. As the matter was not resolved between the Township and LRG, the Township confirmed in its written representations that discussions surrounding the LRG's voluntary compliance with the Township's bylaws are ongoing to date and the Township has reserved all of its rights to take enforcement steps against the LRG.

Cerqueira Affidavit, Ex. H at paras. 10-14 and 17-19

25. The Township provided further evidence *in camera* to the Adjudicator to support its position that the Privileged Documents were subject to litigation privilege.

Cerqueira Affidavit, para. 5; Ex. G and H

26. The Adjudicator found that these submissions, which primarily involved the Township's description of withheld records, were sufficiently detailed to make findings of privilege on the withheld records.

Cerqueira Affidavit, Ex. S, para. 31

The Adjudicator erred by failing to consider relevant evidence

27. In coming to her decision, the Adjudicator failed to consider relevant open and *in camera* evidence and submissions provided by the Township relating to the litigation privilege it claimed over the Privileged Documents.

28. For example, and as noted above, the Adjudicator found that the Township only explained "that the law firm advised about a variety of enforcement options available to

address the bylaw dispute, but not the Township's views on the anticipated need for litigation".

Cerqueira Affidavit, Ex. S, para. 80

29. This finding fails to take into account the Township's affidavit evidence, including in particular the evidence of Ruby Senghera, then Manager for Bylaw Enforcement for the Township, that:

The Township also started an investigation into the matter to consider whether to take bylaw enforcement actions. The issue has not been resolved but discussions surrounding the LRGC's voluntary compliance with the Township's bylaws are ongoing to date and the Township has reserved all of its rights to take enforcement steps against the LRGC ... [*in camera*].

Cerqueira Affidavit, Ex. G, para. 7

30. The Adjudicator also found that:

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... the Township states that it is still pursuing voluntary compliance with the applicant. 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.

Cerqueira Affidavit, Ex. S, para. 79

31. The Township was not required to tender evidence on when and how it would determine that voluntary compliance could not be met. The question is whether litigation was reasonably contemplated. Moreover, this finding fails to take into account the following evidence from Ms. Senghera in her affidavit, which demonstrates that the Township was contemplating litigation:

9. The Township may also pursue [*in camera*] in relation to the LRGC's breaches of the Township's bylaws, [*in camera*]. As above, the Township continues to seriously consider this option, as the Township has been unable to obtain voluntary compliance from the LRGC in respect of the LRGC's breaches of the Sound Control Provisions.

[...]

21. To date, the Township has sought to resolve the matter through voluntary compliance by the LRGC, but no such resolution has been reached. The Township continues to consider all its enforcement options.

22. In light of the ongoing discussions with the LRGC, and reasonable prospect the Township will need to [*in camera*] should such voluntary compliance fail, the disclosure of the above information, and in particular the legal advice from NRF, would create a significant risk of harm to the Township's position and its potential legal claims against LRGC, [*in camera*]. In particular, it would make public the Township's legal strategy in this particular case (as well as provide insight into its legal strategy for bylaw enforcement more generally) and could expose considerations regarding [*in camera*].

23. [...] Disclosure of the records could reveal to the public the Township's litigation strategy for bylaw enforcement matters. [emphasis added]

Cerqueira Affidavit, Ex. G, paras. 9 and 21-23

32. Regarding the dominant purpose of the Privileged Documents, the Adjudicator found that:

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, and the bylaw consultant's advice was about strategies to address the applicant's breach of the 2019 bylaw. [footnotes omitted]

Cerqueira Affidavit, Ex. S. para. 82

33. This does not account for relevant and specific *in camera* evidence from Ms. Senghera regarding the purpose and future use of the Privileged Documents.

Cerqueira Affidavit, Ex. G, para. 19(d) [*in camera*]

34. Further, while the Adjudicator refers to the *in camera* submissions in her reasons regarding the application of litigation privilege, she does not state that she reviewed and considered all of the *in camera* evidence. Such evidence includes details regarding the reason the Township sought legal advice, which supports a finding that litigation was reasonably contemplated by the Township.

Cerqueira Affidavit, Ex. G, para. 15 [*in camera*]

The Adjudicator erred in her application of the law on litigation privilege

35. The Adjudicator incorrectly applied the first step of the legal test for litigation privilege.
36. The Adjudicator acknowledged that the threshold for determining whether litigation is reasonably contemplated is low, but failed to apply that standard as it concerns the Privileged Documents.

Cerqueira Affidavit, Ex. S, para. 80

37. As set out above, and as further detailed in the Township's *in camera* evidence, the Township was clearly contemplating litigation at the material time. In the face of this evidence, the Adjudicator applied a higher standard than that prescribed by law.

The Adjudicator erred in assessing the dominant purpose of the Privileged Documents

38. While the Adjudicator's conclusion on the first branch of the litigation privilege test was determinative of the Order with respect to the Privileged Documents, the Adjudicator also erred in finding that the Privileged Documents were not made for the dominant purpose of litigation.
39. As noted above, the evidence supports a finding that voluntary compliance by the LRGC was not forthcoming and that the dominant purpose of the Privileged Documents was for litigation.

Conclusion

40. As a result of the errors committed by the Adjudicator set out above, the Order should be quashed or set aside in part, without a rehearing, and this Court should declare that the Township is entitled to withhold the Privileged Documents on the basis that they are protected by litigation privilege and thus are exempt from disclosure under s. 14 of *FIPPA*.

Richmond (City) v. Campbell, 2017 BCSC 331 at paras. 96-98

BC (Finance) at para. 168

Part 4: MATERIALS TO BE RELIED ON

1. Affidavit #1 of Mariana Olivo De Cerqueira made November 15, 2023.
2. Affidavit #2 of Mariana Olivo De Cerqueira, to be made.
3. Such further and other material as counsel may advise and this Honourable Court may allow.

The Petitioner estimates that the hearing of the petition will take 1 day.

Norton Rose Fulbright Canada LLP

Date: 15/November/2023

per: 
Signature of lawyer for petitioner

for: Nathan Y. Lapper

To be completed by the court only:

Order made

- in the terms requested in paragraphs _____ of Part 1 of this petition
- with the following variations and additional terms:

Date: _____

Signature of Judge Master

No.
Vancouver Registry

In the Supreme Court of British Columbia

Between

THE CORPORATION OF THE TOWNSHIP OF
LANGLEY

Petitioner

and

OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER FOR BRITISH COLUMBIA and
LANGLEY ROD AND GUN CLUB

Respondents

PETITION

NORTON ROSE FULBRIGHT CANADA LLP

Barristers & Solicitors
1800 – 510 West Georgia Street
Vancouver, BC V6B 0M3 ,
Telephone: (604) 687-6575
Attention: Nathan Lapper and Nathan Jones

NYL/NAJ:odc

Matter# 1000380414