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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 61-1995
November 1, 1995

****** This Order has been subject to Judicial Review ******

INQUIRY RE: A refusal by the District of North Vancouver to disclose an interim legal bill about a current court case

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria on August 2, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by an applicant of a decision by the Corporation of the District of North Vancouver (the District) to refuse access, under sections 14 and 17 of the Act, to a record of legal costs incurred to date by the District in defending a civil lawsuit involving the issue of whether a lacrosse box maintained by the District of North Vancouver is a nuisance and, if so, what should be done about it.

The legislated ninety-day time limit for this review began on May 4, 1995 and expired on August 2, 1995.

2. Documentation of the inquiry process

On July 20, 1995 the Office of the Information and Privacy Commissioner (the Office) issued a Notice of Written Inquiry to the applicant and District. Initial submissions were due on July 27, 1995 and rebuttals on August 2, 1995. On July 28, 1995, having requested and been granted status as a third party in this inquiry, the Municipal Insurance Association of British Columbia also received a copy of the Notice of Inquiry. Its general counsel, John R. Singleton, made a submission to me. Sandra Carter of Bull, Housser & Tupper provided several legal opinions to the District (its client) in connection with this inquiry, which it forwarded to me in its submissions.

3. Issues under review at the inquiry

The issues to be resolved in this case are whether the record in question was properly withheld as solicitor-client information under section 14 of the Act, and whether disclosure of the record could reasonably be expected to harm the financial or economic interests of the District of North Vancouver as contemplated by section 17 of the Act.

These sections read in appropriate part 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.

Disclosure harmful to the financial or economic interests of a public body

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

> (a) trade secrets of a public body or the government of British Columbia;
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
> ...
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

Section 57(1) of the Act places the burden of proof on the public body in this case to prove that the applicant has no right of access to the record or part thereof.

4. The record in dispute

The record in dispute is an interim invoice dated December 30, 1994 from the Municipal Insurance Association to the District for legal costs incurred up to that point by the District in defending a lawsuit.

5. The applicant's case

The applicant, a private individual, states that he wants the information in dispute as part of a proposal by neighbours and the North Vancouver School Board for the District to remove a lacrosse box from public property:

At issue is the public's right to scrutinize the government's use of the taxpayers' money. Specifically, the District is arguing that it has insufficient funds to relocate the facility in question, yet is able to find adequate funding to defend its right to maintain this Lacrosse Box on School Board property, in a residential neighbourhood, to the detriment of the neighbours and the School. The District's decision to expend significant taxpayer funds to litigate rather than relocate is worthy of public scrutiny.

The applicant added that:

The District's argument that public disclosure of this information might force it to justify its expenditures to the public is anti-democratic. What the District is suggesting, in essence, is that citizens should be kept in the dark about municipal expenditures, so that the District will not be embarrassed by questions about these expenditures.
The applicant also questions the District's argument that current release of its legal costs in this particular case would somehow harm its ability to achieve stable insurance coverage.

In his reply submission, the applicant further emphasized that the public body has not met its burden of proof under the Act: "The potential harm argued by the District is speculative and general; there is no evidence that in this case disclosure would have any detrimental effects." (Reply Submission of the Applicant, p. 5)

The applicant also cited Ontario Orders Nos. P-624 (February 8, 1994), M-274 (February 23, 1994), and P-676 (May 11, 1994) in support of his argument that the information in dispute in this case (legal accounts) is not covered by section 14. In his view, the second case in particular is directly on point. (Reply Submission of the Applicant, pp. 3, 4)

The applicant also cited Ontario Orders Nos. P-219 (January 31, 1991), P-248 (November 5, 1991), and P-394 (January 6, 1993) in support of the proposition that, under the section equivalent to section 17 of the Act, "financial information must itself have an intrinsic monetary value, or be saleable by the public body for money." A public body must also present "detailed and convincing evidence" that disclosure could reasonably be expected to harm its financial interests. (Reply Submission of the Applicant, pp. 4, 5)

6. The District's case

The District declines to waive solicitor-client privilege under section 14 of the Act until the conclusion of the litigation in question. It also argues that release of the information could reasonably be expected to harm its financial interests under section 17. In an effort to satisfy the applicant, the District also provided him with "general information which fairly accurately conveys the range of costs which litigation of this nature costs the District." It subsequently offered to disclose the information in dispute once the litigation in question was concluded.

The District denies that it is acting in an anti-democratic fashion in order to avoid embarrassment: "There is no embarrassment to us to diligently and conscientiously deflect any attempt to curtail our ability to settle matters of litigation judiciously and without harm to the

economic interests of the municipality and the general public we serve." (Reply Submission of the District, p. 5)

I have discussed other specific parts of the District's argument below, as I deemed it appropriate to do so.

7. The Municipal Insurance Association's (MIA) case

MIA is an effort of approximately 170 municipalities in this province to self-insure for liability purposes through a reciprocal insurance program. Its primary general concern is the potential negative impact on all of its members of disclosure of the information in dispute.

As the insurer for the District, the MIA, for reasons expanded on below, strongly objects to the disclosure of legal costs of ongoing litigation as in the present case. It cited various parts of section 17 of the Act in particular for that purpose. In a brief reply submission, MIA even objected to the District's willingness to disclose the costs of litigation to the applicant after the dispute is settled.

8. Discussion

The context of this case is a dispute in a neighbourhood as to whether a lacrosse box should be removed. Despite efforts by the District to effect improvements that would satisfy all area residents, a couple directly affected by the location of the lacrosse box brought suit in 1993 against both the District and the School Board. The District claims that the applicant is associated with the Ross Road Parent Advisory Council, which wishes the lacrosse box removed and replaced by a playground for younger children. (Reply Submission of the District, pp. 1, 2)

The District submitted copious information about the nature of the dispute and the lawsuit, which is not relevant to my decision in this inquiry. (Reply Submission of the District, pp. 1-3)

The District also claims that the applicant's motives are at least suspect:

[He] does not wish to scrutinize the government's use of the taxpayers' money but rather wishes to use information on the municipality's expenditure of public funds in the public interest for the advancement of his personal goal to pressure the municipality to spend the money instead on an activity of his preference, namely the removal of the lacrosse box and redevelopment of the site for younger children. (Reply Submission of the District, p. 5)

The motives of an applicant are as irrelevant as the uses to which he or she wishes to put the information requested. However, providing an applicant like the present one with information to participate in an informed manner in a public debate is well within the broad goals of the Act. (See section 2(1)(a))

Disclosure of comparable information by the School Board

The applicant sought the same information about the costs of the same lawsuit to date from both the District of North Vancouver and the District of North Vancouver School Board. The latter disclosed, through its law firm, that it had spent $12,000 for legal fees and disbursements through April 27, 1995.

The fact that a related public body was quite prepared to release comparable information in dispute has assisted me in evaluating the arguments on both sides and in making the decision rendered below.

The record in dispute

The District supplied me with the information that would be responsive to the applicant's request. It is a simple, straightforward, one-page invoice from the Municipal Insurance Association that quotes lump sums and describes none of the services provided. The only information revealed is which firm(s) have worked on the litigation in question and the sum total of their billings.

Section 14: Solicitor-client privilege

The District submitted its own lawyer's opinion on this matter, which argued, in the context of a discussion of my Order No. 29-1994, November 30, 1994, that "[c]ommunication between the client and a solicitor regarding legal fees remains a `communication' notwithstanding that the communication does not consist of a legal opinion."

In our view, legal fees have a unique relationship to legal advice, particularly in an ongoing litigation matter. To disclose the extent of legal fees to date may convey information about the extent of legal work completed and, in consequence, the perceived difficulty of the litigation issues. The conclusions drawn from such information could prejudice or otherwise hamper the ability of the District to adequately defend the case.

Whether legal accounts are protected by solicitor-client privilege has been the subject of a number of cases in British Columbia and Ontario. The B.C. Supreme Court in Taves v. Her Majesty the Queen in Right of Canada (August 5, 1994), held that a document in the nature of a statement of account, which contains a description of services rendered to the client, is privileged. The court followed an Ontario High Court decision in Mutual Life Assurance v. Deputy Attorney General of Canada (1984). The latter case decided that:

The privilege attaches not only to communications made by the client but obviously to communications made by the solicitor to the client as well[,] and generally speaking covers all communications relating to the obtaining of legal advice. That general rule in my view would cover a statement of account.

The account in the latter case contained no legal advice, but referred to professional services rendered by a number of lawyers in the firm. It included a statement about the number of hours worked and contained an itemized list of disbursements.

Madam Justice Baker, in Taves, followed this by saying that:

... the court would have `no difficulty' in deciding that a statement of account like that described is ordinarily a document to which the solicitor-client privilege attaches on the basis that a statement of account is a communication by solicitor to client `relating to the obtaining of legal advice.' (my emphasis)

Both of these cases were deciding whether a section of the *Income Tax Act* applied to exclude legal accounts from privilege as "an accounting records of a lawyer." Although, they are important precedents to assist in determining whether legal accounts are covered by the privilege, it is my view that the legal account at issue in this inquiry is of a different character in that it does not describe legal services rendered to the client.

There are some other authorities to support my position. In Re Ontario Securities Commission and Greymac Credit Corporation [1983] 41 O.R. (2d) 328 (Ont. Div. Ct.), it was held that solicitors' trust accounts, with advice to the client deleted, were not privileged. It was held that:

Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege only applies to communications. Oral evidence regarding such matters, and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged ...

The Ontario Information and Privacy Commissioner has reviewed various authorities and decided several cases on this issue.

Ontario Order M-274 (February 23, 1994, Anita Fineberg, Inquiry Officer) decided the issue of whether a lawyer's non-itemized bill is covered by Ontario's equivalent of section 14 of the Act. The applicant in Ontario wanted to know the total cost of legal fees incurred on behalf of the Town of Oakville in defending an action brought against it by the applicant. The Inquiry Officer concluded that:

... the common law position on whether legal accounts are protected by the solicitor-client privilege is still unclear ... The result, therefore, is that my determination on whether section 12 [of the Municipal Freedom of Information and Protection of Privacy Act] applies to the information at issue in this appeal must be based exclusively on the wording and intent of the Act. (Ontario Order M-274, p. 3)

In this Ontario Order, the Inquiry Officer concluded that the dollar figure at issue bore no direct connection with "seeking, formulating or giving legal advice" and that solicitor-client privilege did not apply.

In Ontario Order M-213, Assistant Commissioner Irwin Glasberg concluded that:

... the implication of this decision [Order 126] is not that the solicitor-client privilege example will apply automatically to records of this nature, but rather that the decision maker must determine, based on the contents of each legal account, whether the information contained in the

document related in a tangible and direct way to the seeking, formulating or provision of legal advice. (Quoted in Ontario Order M-274, p. 4)

In Order P-624 (Ministry of Agriculture and Food, February 8, 1994), at page 6, Assistant Commissioner Irwin Glasberg considered the application of section 19 of the Ontario legislation to a legal bill, at page 6:

Although a legal account arises out of a solicitor-client relationship, this record category differs qualitatively from legal opinions or other communications which purport to provide legal advice from a lawyer to his or her client (and which have traditionally attracted the solicitor-client privilege at common law). To put the matter somewhat differently, the essence of a legal opinion is that it provides legal advice to a client with respect to discrete legal issues. The essence of a legal account is that it requests payment for legal services previously rendered.

It is also important to note that legal accounts do not always assume the same form. In some cases, the breakdown of services provided is extremely detailed such that a review of the account would reveal the substance of the legal advice requested or provided, or the legal strategies pursued. In other cases, the accounts contain nothing more than a general statement that legal work was undertaken and that a specific global amount is payable. In these latter situations, the fact that the invoice is a legal account can sometimes only be gleaned by referring to the letterhead on the statement.

The Assistant Commissioner concluded his analysis of the common law as follows:

As I indicated in Order M-213, for a legal account to qualify for exemption under the municipal equivalent of section 19, its contents must relate in a direct and tangible way to the seeking, formulating or provision of legal advice. On this basis, the application of section 19 to a legal account (or to a part of such an account) must be judged on a document by document basis. It necessarily follows that a record will not automatically attract the section 19 exemption simply because it is characterized as a legal account.
...
... I must now determine whether any of the information contained in the 16 legal accounts related in a direct and tangible way to the seeking, formulating or provision of legal advice. From a practical perspective, that test will be satisfied where the disclosure of the information contained in the account would reveal the subject(s) for which legal advice was sought, the strategy used to address the issues raised, the particulars of any legal advice provided or the outcome of these investigations. This approach reflects the fact that some information contained in a legal account may relate to the seeking, formulation or provision of legal advice, but also allows the principle of severance to be applied in a predictable fashion. (Ontario Order P-624, p. 10)

I adopt Ontario's approach on this issue. While the common law is not entirely clear, it appears that there is a general rule, which has been applied in British Columbia, that a legal account sent to a client is privileged where it discloses communications relating to the obtaining of legal advice (Taves, Mutual Life, Greymac). It is my view that the Ontario orders are consistent with this general rule. If a legal account does not disclose such communications, it is not covered by

the privilege. Thus under the British Columbia Act, I must decide on the application of section 14 on the basis of the information contained in each legal account.

The result of these orders in Ontario is that institutions ("public bodies" in B.C.) must apply the applicable exemptions ("exceptions" in B.C.) to the legal bill and then disclose any remaining information. Of course, one of the applicable exemptions may be information that is protected by solicitor-client privilege if, for example, the legal bill contains information that reveals legal advice.

On the basis of these Ontario precedents, and my own reading of the Act, I conclude that section 14 does not apply to the information in dispute in this inquiry.

Section 17(1)(a): Trade secrets of a public body

The Municipal Insurance Association attempted to argue on the basis of the Information and Privacy Branch's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual (Section C4.8, pp. 9-10) that the information in dispute in this case can be contained within the scope of "trade secrets." (Submission of MIA, pp. 3, 4) I find that the information in dispute in this inquiry bears no proximate relationship to what the Act seeks to protect as "trade secrets." (See also the definition of trade secrets in Schedule 1 of the Act.)

Section 17(1)(b): Financial, commercial, scientific or technical information that belongs to a public body and that has, or is reasonably likely to have, monetary value

The Municipal Insurance Association sought to argue against disclosure on the basis of this section, because the information in dispute has monetary value. It then equated this data with "underwriting statistics," which is not in fact the focus of this inquiry. I do not regard my current decision "as a dangerous precedent which could result in significant financial harm." (Submission of MIA, p. 4) As the applicant pointed out:

The only information that could reasonably be expected to threaten any harm to the MIA would be a large sampling of total litigation costs. A single sample of a portion of one litigation cost at one municipality can not [*sic*] reasonably be expected to offer any value to a competitor or interfere with the MIA's ability to conduct business. (Reply Submission of the Applicant, p. 6)

I find that section 17(1)(b) does not protect, or even cover, the information in dispute in this inquiry. As the applicant pointed out on the basis of Ontario decisions, "[i]nformation about legal costs paid to date by the District part way through a case has no intrinsic value and is not saleable to anybody." (Reply Submission of the Applicant, p. 5)

Section 17(1)(e): Information about negotiations carried on by or for the District

The lawyer for the District argued under this section that disclosure of legal costs to date could prejudice settlement negotiations in the case and thus harm the financial interests of the District.

For example, "legal costs incurred may have a direct effect on the settlement amount which either party may find satisfactory." Furthermore:

Legal costs as a practical matter are a significant factor in developing strategy, promoting settlement, considering offers to settle, and determining the extent and vigor with which a particular outcome may be pursued.

Based on the evidence submitted to me, this type of concern does not appear to be a real problem in this particular case. It is difficult to equate information about negotiations with efforts to settle this particular litigation (if indeed there have been any).

The Municipal Insurance Association claims that disclosure of "detailed statistical information" about the nature, frequency, cost of defending, and payment of claims will have a negative impact:

In the present case, the information being sought to be disclosed would therefore have considerable economic benefit to MIA's competitors or would-be competitors in the marketplace, and, if disclosed, could ultimately result in irreparable financial harm to MIA and its members, including North Vancouver. Interference with the stability MIA and its members have been successful in establishing over the past seven years raises the reasonable threat of chaos returning to the marketplace.... (Submission of the MIA, p. 2)

I think that this level of concern fails to recognize that what the applicant wants here is information about legal costs to date in one particular case for use in a local debate. He is not asking for systematic data with the potential negative impact described above.

The District, in material submitted to me, relied on my Order No. 14-1994, June 27, 1994 for support of its view that disclosure of current litigation costs could harm its financial interests. In Order 14, disclosure of the estimated costs of treaty settlements would have implicitly disclosed the negotiating position of the government. Here, disclosure of a legal cost does not have a comparable impact.

I find that the District has not met its burden of proof under the Act with respect to providing evidence of harm to its financial interest.

9. Order

I find that the District of North Vancouver was not authorized or required to refuse access to the information in the record in dispute. Under section 58(2)(a) of the Act, I require the District to give the applicant access to the record.

November 1, 1995

David H. Flaherty
Commissioner