OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 02-07

THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 61 (GREATER VICTORIA)

David Loukidelis, Information and Privacy Commissioner
January 31, 2002

Quicklaw Cite: [2002] B.C.I.P.C.D. No. 7
Document URL: http://www.oipcbc.org/orders/Order02-07.pdf
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: The applicant school trustee requested copies of invoices from a law firm that was acting for the School District in a particular litigation matter. The School District was authorized to refuse access under s. 14. The applicant's position as a trustee of the School District does not give him special rights of access under the Act.

Key Words: solicitor client privilege – exercise of discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(2), 14.

Authorities Considered: B.C.: Order No. 328-1999, [1999] B.C.I.P.C.D. No. 41; Order 00-25, [2000] B.C.I.P.C.D. No. 28.

Cases Considered: *Corporation of the District of North Vancouver* v. *British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134 (B.C.S.C.); *Legal Services Society* v. *British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.); *Stevens* v. *Canada (Prime Minister)* (1997), 161 D.L.R. (4th) 85 (F.C.A.)

1.0 INTRODUCTION

[1] In February of last year the applicant made a request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to The Board of School Trustees of School District No. 61 (Greater Victoria) ("School District") for copies of all invoices rendered by a particular law firm – which was acting for the School District in a particular lawsuit – for the period from February 1998 to February 2001. The applicant was, and still is, an elected member of the board of trustees for the School District.

[2] The School District refused access to the requested records in mid-March 2001. The School District's Information and Privacy Co-ordinator reminded the applicant that, as a trustee, he receives a monthly *in camera* report from the School District's secretary-treasurer, outlining the total amount the School District spends in legal fees. This report, the Information and Privacy Co-ordinator said, includes fees for the case in which the applicant was interested.

[3] The applicant sent a nine-page request for review of this decision to this Office a few days after the School District's response. Since mediation of the matter did not succeed, I held a written inquiry under Part 5 of the Act.

2.0 ISSUE

[4] The only issue in this case is whether the School District is authorized by s. 14 to refuse access to the requested records on the grounds that they are subject to solicitor client privilege. Section 57(1) of the Act places the burden of proof on the School District.

3.0 DISCUSSION

[5] **3.1 Solicitor Client Privilege** – Section 14 of the Act permits a public body to refuse to disclose information that is "subject to solicitor client privilege". It is clear beyond any doubt that s. 14 incorporates both branches of common law solicitor client privilege, legal professional privilege and litigation privilege. The records in dispute here are individual invoices rendered by outside legal counsel to the School District for the period from late 1998 to March 2001.

Privilege Over Legal Bills

[6] The School District cites two cases to support its contention that the requested records are privileged: *Corporation of the District of North Vancouver* v. *British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134 (B.C.S.C.), and *Legal Services Society* v. *British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.). It also reminded me that, in Order No. 328-1999, [1999] B.C.I.P.C.D. No. 41, I found that the total amount of a legal bill was privileged. In that case, the School District reminds me, I indicated that a public body must establish that it has exercised its discretion in deciding whether or not to waive privilege and that, as part of this exercise, a public body should consider whether the public interest favours disclosure.

[7] The School District relies on an affidavit sworn by Virginia Hortie in support of its claim of privilege. Based on her affidavit, the disputed records themselves and the other material before me, I am satisfied that the disputed records are copies of invoices rendered to the School District by a law firm retained to represent the School District in litigation that was, at the time of the request, still underway.

[8] As I have acknowledged before – for example, in Order 00-25, [2000] B.C.I.P.C.D. No. 28 – the *District of North Vancouver* and *Legal Services Society* cases drive me to the conclusion that the law firm invoices in dispute here are protected by solicitor client privilege under s. 14. I find that the invoices are protected by solicitor client privilege under s. 14, *i.e.*, legal professional privilege.

[9] The School District has periodically disclosed to the elected trustees, through *in camera* reports, the amount of fees the School District has paid for the particular case. This cannot be taken as a waiver of part or all of the related individual invoices themselves, at the very least because disclosure of the amounts to trustees is not disclosure outside the School District. Nor do I consider that public disclosure of the total amount of fees the School District paid is a waiver of privilege over the individual invoices or separate invoice amounts.

[10] It is worth noting here that the position in British Columbia is the same as that under the federal *Access to Information Act*. In *Stevens* v. *Canada (Prime Minister)* (1997), 161 D.L.R. (4th) 85, the Federal Court of Appeal held that the narrative portions of a lawyer's invoice were privileged. Although the government institution had, in that case, disclosed the amounts billed, the Court of Appeal would have held those parts of the invoice to be privileged if the issue had arisen. In his judgement, however, Linden J.A. acknowledged that solicitor client privilege involves tension between competing social interests. At p. 93, he quoted the following passage from Geoffrey C. Hazard Jr., "An Historical Perspective on the Attorney-Client Privilege" (1978), 66 Calif. L. Rev. 1061 at 1085:

> … the definition of the privilege will express a value choice between protection of privacy and discovery of truth and the choice of either involves the acceptance of an evil – betrayal of confidence or suppression of truth.

[11] Protection of invoices by solicitor client privilege necessarily suppresses some 'truth'. Since s. 14 of the Act incorporates this aspect of solicitor client privilege, the balance between confidentiality and 'truth' is, on this point, clear beyond doubt. Still, public bodies should always consider the balance between their interest, as public institutions, in confidentiality and the public interest in disclosure of such information. I will address this issue below in relation to this case.

Applicant's Status and the Right of Access

[12] There are suggestions in the applicant's submissions that, because he is a member of the School District's elected board of trustees, his access request should be treated as if it had been made by the School District itself. He suggests that he is, in effect, acting as the public body itself in seeking access.

[13] The School District says s. 65(3) of the *School Act* provides that "trustees may not exercise the rights, duties and powers of the board." It says this means the applicant, as an individual trustee, has no special right of access to the records by purporting to act for the School District itself. Section 65(3) confirms that an individual elected trustee does

not – on her or his own initiative, without the formal approval of the entire board of trustees as expressed by resolution or bylaw – exercise the powers, duties and functions of the School District or its elected board of trustees. This includes any rights the School District might have to obtain information, under the Act or otherwise. Under the Act, the applicant is for all intents and purposes acting in the same capacity as any other individual in seeking access to these School District records. He stands in no special position under the Act because of his position as an elected trustee.

Significance of Bylaw 9222

[14] Both parties' submissions paid considerable attention to the applicant's entitlement to information, in his capacity as a trustee, under School District Bylaw 9222, titled *Trustee Access to Information*, as well as its relevance to the applicant's access rights under the Act.

[15] The School District says it considered Bylaw 9222 in making decision. It says, at p. 2 of its initial submission, that

> [t]he Bylaw establishes a process through which Trustees can access the information they require in order to properly discharge their statutory responsibility, while at the same time ensuring that the Board's statutory obligation to protect the confidentiality of certain records is respected.

[16] Of course, s. 14 is not a "statutory obligation to protect confidentiality". It is discretionary and, in any case, the School District is free, under the common law rules of solicitor client privilege, to disclose privileged material any time it so chooses, including to individual trustees. This is a theme to which I return below.

[17] For his part, the applicant emphasizes the preamble to Bylaw 9222, which reads as follows:

> Trustees shall have access to information in order to facilitate trustees' carrying out their duties under the *School Act*. However, in respect of the right of employees, students, and parents to a measure of privacy, any information which is deemed to be personal and confidential shall be accessed through the Superintendent, in writing, explaining the rationale of the trustee for the request. If the rationale is thought to be less than satisfactory, the matter shall be referred to the Board for a decision.

[18] The thrust of the applicant's argument is that, by denying him, as a trustee, access to the requested records, the School District is denying itself access to records it needs to manage its affairs. The applicant says he has received information on the total legal costs for the case. He says, however, that he needs to see the detailed invoices to scrutinize the expenditures properly. The applicant argues vigorously, in his reply submission, that Bylaw 9222 guarantees him the right of access to the invoices and that the School District is violating its own bylaw in denying him access to the records.

[19] The School District says the applicant has challenged Bylaw 9222 repeatedly and has also attempted to obtain information on the lawsuit under Bylaw 9222. The Board has rebuffed this attempt. The School District argues that the applicant has no right to the information under Bylaw 9222. In support of this position, the School District has provided me with a number of documents related to a legal opinion it had in the past sought about the validity of the bylaw.

[20] Bylaw 9222 has no bearing on the applicant's right of access under the Act, or on the School District's right to refuse disclosure, to information protected by s. 14. Either disputed information is privileged, and therefore protected under s. 14, or it is not. An applicant's ability to obtain the same information through other avenues – including a bylaw such as Bylaw 9222 – has no bearing on that issue. As s. 2(2) of the Act indicates, the Act does not "replace other procedures for access to information". Nor do other procedures oust or determine the right of access under the Act.

[21] In saying this, I make no comment on whether or not the School District has acted correctly or appropriately in denying the applicant access to information under Bylaw 9222. Nor do I make any comment on what, if any, remedies the applicant might have, under the general law, in relation to his attempts to get information he says he needs to do his job and the School District's refusal to give him what he claims he needs. Again without commenting on what the School District has done here, I must emphasize that my decision here does not suggest that a local public body – whether a school district, improvement district or local government – can or should place obstacles in the way of elected officials who wish to get access, through channels outside the Act, to information they need to discharge their responsibilities to the public. That issue is a matter of governance, to be determined by common law principles and such relevant statutory provisions as may exist, as applicable, under the *Local Government Act* or other enactments (including public body bylaws).

Discretion Under Section 14

[22] The School District was alive to its obligation to consider exercising its s. 14 discretion in favour of disclosure. It says it did so in light of Order No. 328-1999, including by considering the avenue for access to information under Bylaw 9222 and the stricture of s. 65(3) of the *School Act*. It says it also considered the following factors in exercising its discretion under s. 14:

- Litigation was still under way in the case at the time of the request. (The School District adds that the matter was under appeal at the time of the inquiry.)
- The applicant as "a member of the corporate Board receives a monthly in-camera Legal Services Report regarding the total amount of legal fees that have been incurred regarding this case and other matters".
- The applicant has received the total amount of legal fees incurred in the case when requested.
- The School District regularly prepares a public Legal Services Report under s. 72(3) of the *School Act*, which requires school boards to prepare general statements on the matters discussed and the decisions made at *in camera* board meetings.

- There is a process under the *Legal Profession Act* for reviewing a lawyer's account for services and the School District is entitled to have the law firm's accounts reviewed.

[23] I am satisfied that the School District has exercised its discretion in deciding not to waive privilege over the records. I find that the School District is authorized by s. 14 to refuse access to the disputed invoices.

4.0 CONCLUSION

[24] For the reasons given above, under s. 58(2)(b) of the Act, I confirm the School District's decision to refuse access to the records in dispute.

January 31, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia