



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

Order 02-58

BRITISH COLUMBIA ASSESSMENT AUTHORITY

David Loukidelis, Information and Privacy Commissioner
December 10, 2002

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Summary: The applicant sought access to records relating to property assessments conducted by the BCAA under the *Assessment Act*. Section 25(1)(b) does not require the BCAA to disclose them and s. 14 authorizes the BCAA to refuse to disclose the records. The BCAA failed to discharge its s. 6(1) duty to respond without delay, but its ultimate response means no remedy is available respecting its late reply. Since the BCAA has not established that its response to the applicant is complete, it must perform another search for records.

Key Words: respond openly, accurately and completely – legal advice – solicitor-client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 14 and 25(1)(b).

Authorities Considered: B.C.: Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 02-50, [2002] B.C.I.P.C.D. No. 51.

1.0 INTRODUCTION

[1] By a letter dated January 6, 2001, the applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (“Act”), to records of the British Columbia Assessment Authority (“BCAA”) “related to GST inclusion in BCAA assessments” of real property for property tax purposes. The applicant limited his request to any materials produced or stored in the BCAA’s files after July 26, 1995. He specified that date because he had made an earlier access request under the Act for similar materials.

[2] The BCAA did not respond to this request until June 14, 2001. I will say more below about the length of time the BCAA took to respond. The BCAA disclosed four records from which it withheld some information under s. 13(1) of the Act. The BCAA also disclosed some more records on June 21, 2001, but the applicant did not request a review of this response.

[3] On June 25, 2001, the applicant requested a review of the BCAA's alleged "non-performance of duties imposed by the Act, the failure to respond in time, and the incompleteness of the response." It is clear from further correspondence that the applicant also took issue with the BCAA's decision to withhold information under the Act.

[4] The BCAA provided a further response to the applicant on December 20, 2001 because it had located further records that responded to the applicant's request. Its further response indicated that approximately 50 records "were deemed to qualify for inclusion" according to the "parameters" of the applicant's request. These records amounted to "almost 400 pages of material". The BCAA withheld information from the additional records under ss. 13, 14 and 22 of the Act.

[5] During mediation by this Office, the applicant agreed to abandon his request for a review of the BCAA's decision to withhold information under s. 13(1) of the Act. He also agreed to drop the solicitor-client communications or legal professional privilege branch of solicitor-client privilege. At this point, the BCAA still maintained that litigation privilege applied to several records. Because the matter did not completely settle in mediation, a written inquiry was held under Part 5 of the Act.

2.0 ISSUE

[6] The issues stated in the Notice of Written Inquiry are "whether the public body complied with s. 2 and fulfilled its duty under s. 6(1) to assist the applicant and to respond without delay, openly, accurately and completely." Taken together with the applicant's request for review, it is clear that the completion of the BCAA's response is in issue.

[7] The Notice of Written Inquiry indicates that another issue is whether the BCAA is authorized to refuse access to information under s. 14 of the Act.

[8] As regards s. 14, the Portfolio Officer's Fact Report says that the applicant, in requesting that his request for review proceed to inquiry, indicated that he only wished the merits of the litigation privilege aspect of s. 14 to be considered in the inquiry, not solicitor-client communications privilege. The applicant nonetheless provided argument on both branches of solicitor-client privilege in his submissions. The BCAA, in its initial submission of April 26, 2002, stated that it was waiving litigation privilege on several documents.

[9] The BCAA disclosed additional records with a letter of May 2, 2002 to the applicant, together with a chart listing the released records and those records still severed

or withheld and to which it had applied ss. 13 and 14. The BCAA's submissions and the chart listing the relevant records make it clear that the BCAA considers that solicitor-client privilege applies to a number of records, but that it has waived its claim of litigation privilege over the records. The BCAA confirmed this decision in its reply submission of May 3, 2002. While the applicant says in his reply submission that he had not yet received the additional records that the BCAA said it was disclosing, his submission evidently crossed with the BCAA's disclosure letter.

[10] The BCAA's decision not to rely on litigation privilege means it is not necessary for me to consider that issue. Accordingly, despite the fact that the applicant argued both the solicitor-client communications and the litigation privilege branches of privilege, I have considered only the solicitor-client communications aspect of the s. 14 privilege. The Portfolio Officer's Fact Report indicates that the records in dispute under the litigation privilege branch of s. 14 were records that the BCAA designates as jjr 05, jjr 09-12, jjr 14-16, hol 06, s 01-03, jp 03, jp 06-jp 08.

[11] As a result of the BCAA's decision to waive litigation privilege, some of these records are no longer in dispute, while others not listed in the Portfolio Officer's Fact Report evidently are in issue under the solicitor-client communications privilege. My review of the chart of relevant records that the BCAA provided indicates that it considers that the solicitor-client communications branch of s. 14 applies to some or all of the records it designates as leg 01, leg 03(a)-(e), leg 03(g)-(i), leg 05, leg 06, jjr 02, jjr 03, jjr 07, hol 01, hol 02, hol 04, hol 06(a) & (b), hol 07b, hol 08, hol 09(a)-(d), hol 10, hol 11, hol 13, hol 14, hol 15 and s 02(a).

[12] The records that the BCAA designates as s 03 and jp 08, which are duplicates of each other, were severed under s. 13, which, as noted above, is not in issue here.

[13] Section 57(1) of the Act places the burden of proof on the BCAA respecting s. 14; previous decisions have established that the burden of proof on the other stated issues is also on the BCAA.

[14] In his initial submission, the applicant introduced an argument that the BCAA had failed to comply with ss. 7 and 8 of the Act. He also refers to the BCAA's alleged failure to comply with s. 2 of the Act. In my view, the ss. 7 and 8 issues are already encompassed by the s. 6(1) issue. Section 2(1) of the Act is a statement of the legislative purposes of the Act. Section 2(2) confirms that the rights of access under the Act do not replace other procedures for access to information or limit other access to non-personal, public information.

[15] It is not clear how the applicant considers s. 2 raises duties with which the BCAA must comply. He does, however, combine his s. 2 arguments with his arguments under s. 25. The applicant contends in his submissions, for the first time, that s. 25(1) of the Act requires the BCAA to disclose the records. The BCAA has objected to the applicant's attempt to raise the s. 25(1) issue at such a late date. I will deal with this issue first.

3.0 DISCUSSION

[16] **3.1 Is Public Interest Disclosure Required?** – I agree with the BCAA that the applicant’s attempt to raise s. 25(1) at this late stage, in his initial submission, is inappropriate. I have considered the applicant’s submissions respecting public interest disclosure under s. 25(1), however, in light of its mandatory nature. Applying the principles set out, most recently, in Order 02-50, [2002] B.C.I.P.C.D. No. 51, I have no hesitation in deciding that s. 25(1) does not require disclosure of the disputed information. I note in passing that the BCAA incorrectly argues that s. 25 “is to be invoked only upon the risk of serious harm to the environment or to protect the health or safety of the public” (p. 3, reply submission). Section 25(1)(b) explicitly contemplates compulsory disclosure where it is clearly in the public interest that information be disclosed.

[17] **3.2 Duty to Assist the Applicant** – Section 6(1) of the Act reads as follows:

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[18] The thrust of the applicant’s concerns under s. 6(1) is, first, that the BCAA failed to respond within the time required by the Act and, second, that it eventually responded in an incomplete fashion.

BCAA’s failure to respond in a timely fashion

[19] The applicant says he needed the records for the purposes of an appearance before the Property Assessment Appeal Board in an appeal of a real property assessment under the *Assessment Act*. He raises the possibility that the BCAA deliberately delayed its response to deny him access to materials related to inclusion of GST in property assessments for the purposes of that appeal.

[20] The BCAA does not dispute that its response was late. It says that, “owing to human error”, the applicant’s access request was not received by its Information and Privacy Officer in a timely fashion. The BCAA’s response took over five months. The BCAA says it has since corrected the communications lapse that caused delay in this case, such that all access requests under the Act are referred directly to the Information and Privacy Officer in the first instance. It also says that its records management system is under revision, apparently as a means of ensuring that responsive records are found more quickly and accurately in the future.

[21] The applicant has offered hearsay information that, he says, supports his allegation that the BCAA’s Information and Privacy Officer knew about his request shortly after it was made, not five months later. In the absence of sworn evidence from the third party on this point, I am not prepared to conclude that this is enough to support his allegation of intentional delay.

[22] It is in any case abundantly clear that the BCAA failed to respond in time. It therefore failed to comply with its s. 6(1) duty to respond to the applicant “without delay” and its s. 7 duty to respond within 30 days, failing an extension of the response time. I find that the BCAA failed to comply with its duty to the applicant under s. 6(1) and failed to comply with its duty under s. 7.

Completeness of the BCAA’s response

[23] The BCAA has not provided any concrete evidence that its first response was, despite the two later disclosures, a complete response. Moreover, in support of his view that the BCAA still has not provided a complete response to his request, the applicant points to a number of apparent gaps in the records provided to him, at para. 55 of his initial submission:

- 55 The Applicant submits that BCAA’s response is still incomplete and inadequate. The Applicant brings the following inconsistencies to the Commissioner’s attention
- a. Appendix C of Record #4 released June 14, 2001 is blank. The cover page for Appendix C is p. 17 and the immediate next page is Appendix D. This implies that maybe the material for Appendix C was not attached to the report. Nevertheless, page 3 of Record #4 states that Appendix C contains (or should have contained) three 1998 decisions of the Manitoba Municipal Board. If relevant to GST, these decisions should have been included.
 - b. Of the documents identified as relevant to the Applicant’s request, nearly all are since 2000. There are 7 for 1998 and 1 for 1999. The Applicant’s request was for all documents since 1995. There are no documents relating to the 1996 BC Supreme Court decision or any documents from the assessor’s counsel of that time, Mr. J. Shevchuk.
 - c. There are no documents from the Assessment Commissioner.
 - d. Document holl2 refers to an All Area Assessor’s Memo of November 20, 1996 by Nancy Peck relating to the first [applicant’s name] appeal.
 - e. The same document (holl2) is truncated abruptly with no period at the end of the page. It appears that other pages were part of the memo, but they are not included.

[24] At least some of these alleged gaps – those noted at paras. 55a., d. and e. of the applicant’s initial submission – are a reasonable basis for concluding that pages are missing from the BCAA’s responses. Other alleged inconsistencies may or may not indicate that records are missing. Although the BCAA made submissions on the completeness of its response, it did not address any of the applicant’s specific allegations about incompleteness.

[25] The BCAA has the burden of establishing that it has complied with its s. 6(1) obligations. In the absence of any explanation from the BCAA for the inconsistencies the applicant has noted in its response, at least some of which indicate the BCAA's response was not complete, I find that the BCAA has not complied with its s. 6(1) duty to respond to the applicant's request openly, accurately and completely. The appropriate order is made below.

[26] **3.3 Solicitor-Client Privilege** – Section 14 of the Act authorizes the BCAA to refuse to disclose “information that is subject to solicitor-client privilege.” That section incorporates both branches of common law legal professional privilege, *i.e.*, confidential solicitor-client communications privilege and litigation privilege. For reasons I indicated earlier, although the applicant provided argument on both branches of solicitor-client privilege, I have addressed only the legal professional or solicitor-client communications branch of solicitor-client privilege. I have, without repeating them here, applied the principles set out in Order 00-08, [2000] B.C.I.P.C.D. No. 8.

Confidential Solicitor-Client Communications

[27] The BCAA has withheld some information under this branch of privilege. It has, in some cases severed records and disclosed non-privileged portions. The BCAA says the portions it has withheld are confidential communications between solicitor and client and are therefore privileged. It has applied s. 14 to approximately 30 records.

[28] The BCAA provided short general arguments on the applicability of s. 14 to the withheld records in its initial and reply submissions, saying the withheld portions are confidential communications related to the giving or seeking of instructions or legal advice by in-house or external legal counsel. It addressed the specifics of the records in only two cases, relying on an affidavit sworn by Nancy Peck, who is a lawyer employed by the BCAA as a legal and legislative analyst. She deposed that, as with the BCAA's manager of legal services, one of her duties is to take instructions in legal matters from BCAA staff, to provide legal advice to the BCAA, to retain and instruct external legal counsel and to communicate with external legal counsel. I am satisfied that her evidence supports the BCAA's claim of solicitor-client privilege over records leg 01 and hol 01.

[29] For some reason, the BCAA did not provide argument or affidavit evidence on the other records to which it has applied s. 14. It would, of course, have been preferable had the BCAA done so. In this particular case, however, from my review of the records themselves and the accompanying BCAA decision chart – which sets out reasons for claiming privilege in each case – I am satisfied that the other records also fall under s. 14, in that they are all confidential communications between solicitor and client that relate to the giving or seeking of legal advice. These other records are therefore also privileged.

4.0 CONCLUSION

[30] For the reasons given above, under s. 58 of the Act, I confirm that s. 14 authorizes the BCAA to refuse to disclose to the applicant the information it withheld under that section from records leg 01, leg 03(a)-(e), leg 03(g)-(i), leg 05, leg 06, jjr 02, jjr 03, jjr 07,

hol 01, hol 02, hol 04, hol 06(a) & (b), hol 07b, hol 08, hol 09(a)-(d), hol 10, hol 11, hol 13, hol 14, hol 15 and s 02(a).

[31] For the reasons given above, under s. 58 of the Act, I require the BCAA to conduct another search for records responsive to the applicant's request. Under s. 58 of the Act, I require the BCAA to complete this search within 40 days after the date of this order and to deliver to me (with a copy to the applicant directly and concurrently), within 10 days after its completion of its further search for records, an affidavit sworn by a knowledgeable person as to the efforts in undertaking that search and the results of that search. That affidavit is to be accompanied by any records found during the further search, subject of course to any severing of information authorized or required by the Act.

December 10, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia