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

Order F10-18

BOARD OF EDUCATION OF SCHOOL DISTRICT 39 (VANCOUVER)

Paul D. K. Fraser, QC, Acting Information and Privacy Commissioner

June 7, 2010

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Summary: Following the trial and conviction of a teacher for indecent assault and gross indecency, the School District commissioned Don Avison to conduct a review of its current policies and practices. The applicant requested a copy of the Avison Report that resulted. The School District released a severed version of the Report and withheld the rest, relying on several sections of FIPPA, including that it was protected by solicitor-client privilege. Legal professional privilege did not apply because Avison was not retained to act as a legal advisor to the School District. As a result, his report did not arise within a solicitor-client relationship.

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

Authorities Considered: B.C.: Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order F05-35, [2005] B.C.I.P.C.D. No. 49.

Cases Considered: *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC); *R. v. Campbell*, [1999] 1 SCR 565; *Gower v. Tolko Manitoba Ltd.*, 2001 MBCA 11; *College of Physicians of B.C. v. British Columbia Information and Privacy Commissioner*, 2006 BCCA 665; *R. v. McClure,* [2003] 1 S.C.R. 445, 2001 SCC 14; *Solosky v. The Queen*, [1980] 1 S.C.R. 82; *Descôteaux et al. v. Mierzwinski,* [1982] 1 S.C.R. 860; *Markovina,* [1992] 6 W.W.R. 47 (BCSC); *Cushing v. Hood,* 2007 NSSC 97, affirmed, 53 CPC (6th) 28 (NSCA); *Wilson v. Favelle* [1994] B.C. No. 1257; *Boyd v. HMTQ in Right of B.C.*, 2001 BCSC 459; *Cushing v. Hood,* 2007 NSSC 97. **Ont.:** *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31; *Ontario Securities Commission and Greymac Credit Corp.,* (1983) 41 O.R. (2d) 328 (Div. Ct.).

Authors Considered: *The Law of Privilege in Canada,* Hubbard, Magotiaux, Duncan, Canada Law Book, May 2008, Looseleaf, para. 11.1000.

1.0 INTRODUCTION

[1] Following the trial and conviction of a teacher for indecent assault and gross indecency, the Board of Education of School District 39 (Vancouver) ("School District") commissioned Don Avison to conduct a review of its current policies and practices. Mr. Avison conducted his review and delivered his report ("Avison Report") to the School District on September 14, 2007.

[2] The School District received several requests under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for the Avison Report, including one from the applicant in this inquiry, a lawyer. The School District disclosed the Avison Report in severed form, withholding much of the contents under ss. 12(3)(b), 13(1), 14, 17(1) and 22(1) of FIPPA.

[3] The applicant requested a review of the School District's decision by this Office. Mediation did not resolve the request for review and the matter proceeded to an inquiry under Part 5 of FIPPA. The Office invited and received representations from the School District and the applicant.

2.0 ISSUE

[4] The notice for this inquiry states that the issues are:

1. Whether the School District is required to refuse access to portions of the Avison Report under s. 22(1) of FIPPA.
2. Whether the School District is authorized to refuse access to portions of the Avison Report under ss. 12(3)(b), 13(1), 14 and 17(1) of FIPPA.

[5] Under s. 57(1) of FIPPA, the School District has the burden of proof regarding ss. 12(3)(b), 13(1), 14 and 17(1). Under s. 57(2), the applicant has the burden of proving that disclosure of third-party personal information is not an unreasonable invasion of third-party privacy.

3.0 DISCUSSION

[6] **3.1 Preliminary Matter**—The parties provided argument and evidence on all five exceptions in their submissions. I have decided to issue my decision respecting s. 14 first. A separate order will deal later with the parties' submissions on the other exceptions.

[7] **3.2 The Avison Report**—The report has four parts: Purpose and Scope of Review; Background and Context; The Vancouver School Board Policy Context-Further Improvements Remain Necessary; and A New VSB Code of Conduct. The School District says it severed the first and second parts

substantially" while it disclosed the third and fourth parts with minimal severing.[1] The School District withheld approximately 11 pages of the 17-page report.

[8] The School District has declined to provide an unsevered copy of the Avison Report for my review in this inquiry. It argued that the report is privileged under s. 14 of FIPPA and I do not need access to it to resolve the issues, in light of the *in camera* evidence the School District submitted.[2] It adds that a previous order states that records over which privilege is claimed should be examined only where the evidence and argument establish it is necessary to do so to decide the issue fairly.[3] The School District argues that a "high threshold of necessity must be established" in the context of determining whether a record is privileged. Privilege is a substantive and constitutionally-protected rule, the School District continues, which may be interfered with only to the extent necessary. While the School District acknowledges it might be helpful for me to view the document, this is not, in its view, a sufficient basis for ordering production of the record.[4]

[9] The applicant is of the view that I should order production of an "unredacted" copy of the report under s. 44(1)(b) of FIPPA, as I cannot properly consider the issues this inquiry raises, in particular whether solicitor-client privilege applies to the severed portions of the report. He also argues that s. 44(3) applies here.[5]

[10] During the course of an inquiry, public bodies routinely provide the Commissioner or his delegate with unsevered copies of records in dispute. This facilitates consideration of individual exceptions. Indeed, in some cases it is not possible to determine if an exception applies without seeing the severed information. In this case, I acknowledge that it would be useful for me to review the severed portions of the Avison Report. However, I conclude that the School District's argument and evidence suffice in this case for me to determine whether solicitor-client privilege protects the severed portions of the records. Thus, in the circumstances of this case, it is not necessary for me to review the complete report in order to resolve the issue of whether s. 14 applies to the severed portions. I have therefore decided to accept the School District's choice not to produce an unsevered copy to me.

[11] **3.3 Terms of Reference**—These are the Terms of Reference for the review which led to the Avison Report:[6]

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[1] Para. 40, Kelly affidavit.
[2] Page 2, School District's summary.
[3] The School District refers here to Order 00-08, [2000] B.C.I.P.C.D. No. 8.
[4] Paras. 1-19, School District's reply submission. The School District also draws my attention to relevant caselaw.
[5] Paras. 2-8, applicant's initial submission; paras. 1-6, applicant's reply submission. The applicant refers to case law he considers relevant.
[6] Each party provided a copy.

Terms of Reference for Independent Review of District Policies and Procedures for Student Safety and Security

I Objective of Review

To review current policies and practices in relation to the safety and security of all students enrolled in the School District.

II Terms of Reference

The Context for the Review

1. Review of the record and circumstances associated with the operation and supervision of Quest Outdoor Education Program.

2. Gather and utilize information regarding the operation and supervision of the former Quest Outdoor Education Program, as background for a review of current Board policies and procedures.

The Review of Current Policies and Procedures

3. Review and evaluate current policies and procedures governing the operation and supervision of outdoor education programs and field studies;

4. Review and evaluate current policies and procedures governing:

    a. standards of conduct for employees;

    b. practices for communicating and disseminating standards of conduct to all district employees; and

    b. allegations of employee misconduct.

Recommendations

5 Review best practices and, where appropriate, make recommendations for change to current policies and practices in the School District.

III Review Process

1. The School Board will appoint a qualified person to conduct the review who is independent of the School Board.

> 2. The person conducting the review will submit a written report to the School Board by February 28, 2007, unless a further period is required and approved by the School Board.

[12] **3.4 Does Solicitor-Client Privilege Apply?—**The School District says it does not take the position that the Avison Report was prepared for the dominant purpose of litigation but rather that legal professional privilege applies to the entire document.[7] The applicant disputes the School District's argument that solicitor-client privilege applies to the Avison Report.[8]

[13] Section 14 says this:

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

[14] Decisions of this office have consistently applied the test for legal advice privilege at common law. Thackray J. (as he then was) put the test this way:[9]

> [T]he 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:
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> 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.

[15] The School District argues as follows:

> 24. The Board says that it is entitled to claim privilege over the report in its entirety. Although the Board did not specifically retain Mr. Avison as a

[7] Paras. 24-25, School District's initial submission.
[8] Para. 6, applicant's initial submission.
[9] *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

> lawyer, the task Mr. Avison in fact performed satisfies all the criteria to allow the Board to claim legal advice privilege over the material redacted from the Report.

[16] Chris Kelly, Superintendent of the School District, deposed as follows about the School District's choice of Don Avison to conduct the review:

> 22. …In selecting Mr. Avison to conduct the review, it was important to the School District both that Mr. Avison was a lawyer, but also that he was familiar with the education system. In addition to being a lawyer, Mr. Avison previously held the position of Deputy Minister of Education, which established him as a credible person to conduct the review.
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> …
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> 33. …Mr. Avison's training as a lawyer was an important part of our decision to retain him. Mr. Avison was not retained as an investigator. Mr. Avison's retainer was to conduct a review on the basis of the Terms of Reference that were provided to him and to provide advice and recommendations to the Board for the improvement of its policies, practices and procedures. ….[*in camera* material][10]

[17] The School District acknowledges that not every communication with a lawyer is privileged but accepts that whether privilege attaches depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it was sought and given.[11] The School District argues that all four conditions required for establishing solicitor-client privilege are satisfied in this case because:

- there is no doubt Don Avison is a lawyer
- he acted as a lawyer and he provided the School District with the legal advice which is contained in the Avison Report
- the Avison Report is a communication of a confidential nature and Don Avison provided it to the School District Superintendent directly for presentation to the Board of the School District
- the School District has treated the Report as confidential and has dealt with it exclusively in *in camera* meetings[12]

[18] The School District notes that case law distinguishes between lawyers acting as investigators and as lawyers. In its view however it is "abundantly clear" that Don Avison was not to act as an investigator—he was not retained as an investigator and he had no mandate to investigate anything. The School

[10] Mr Kelly's affidavit provided further evidence on these points on an *in camera* basis. Besides the Terms of Reference, the School District did not provide any other documentation related to Don Avison's retainer, such as an appointment letter.
[11] The School District referred here to *R. v. Campbell*, [1999] 1 SCR 565 at para. 50.
[12] Paras. 14-31, School District's initial submission; para. 34, Kelly affidavit.

District says that his retainer was to conduct a review on the basis of the Terms of Reference and to "provide advice and recommendations to the School District on improving the School District's policies and practices to best safeguard students' interests and ensure the risk of harm to students was minimized."[13] The School District's objective was to ensure it had "best practices" in place for the proper supervision and care of students.[14]

[19] The School District submits that the Courts have recognized that "the gathering of facts is an essential part of the process of giving legal advice, pointing to *Gower v. Tolko Manitoba Ltd.*[15] which it said was "cited with approval" in *College of Physicians of B.C. v. British Columbia Information and Privacy Commissioner*.[16] Although it believes it is entitled to claim privilege over the entire report, the School District says it elected to disclose some information and argues "it is patently obvious that the portions of the report which have been redacted are properly privileged". The School District says that it considered a number of factors, including the public interest and transparency, in exercising its discretion under the discretionary exceptions and concluded that it was appropriate to withhold the information in dispute.[17]

[20] The applicant argues that the School District did not have a solicitor-client relationship with Don Avison and his report is not a legal opinion, memorandum of law or communications from a lawyer to his client. The applicant disputes that the severed portions of the report are subject to solicitor-client privilege and argues that they "fall within" Mr Avison's familiarity with the education system and his knowledge from his previous position as Deputy Minister of Education. This kind of advice does not attract privilege even if Mr Avison is a lawyer, the applicant argues. In this vein, he refers to relevant orders and case law and argues that Mr Avison, while a lawyer, was not acting in that capacity and was not rendering legal advice to the School District when preparing his report. In accordance with *College of Physicians*, he submits, privilege does not apply to the severed portions insofar as they may contain communications between a third party and Mr Avison. The applicant also refers to *Pritchard v. Ontario (Human Rights Commission)*[18] and *R. v. Campbell* in which the courts considered a lawyer's legal and non-legal responsibilities.[19]

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[13] Paras. 30-35, School District's initial submission; para. 22, Kelly affidavit; paras 51-52, School District's reply submission. Portions of the Kelly affidavit were received *in camera*.
[14] Para. 18, Kelly affidavit.
[15] 2001 MBCA 11.
[16] 2005 BCCA 665.
[17] Paras. 33-35, School District's initial submission; paras. 18-60, Kelly affidavit. The School District submitted some of its argument and a number of paragraphs of the Kelly affidavit evidence on the report's contents and the School District's reasons for severing it on an *in camera* basis.
[18] 2004 SCC 31.
[19] Paras. 45-54, applicant's initial submission; paras. 1-13, applicant's reply submission.

Relevant decisions

[21] In *R v. McClure*, Justice Major said the following about the importance of solicitor-client privilege:

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the justice system depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.[20]

[22] Canadian courts have consistently relied on the following characterization of the conditions precedent to the existence of the privilege from Wigmore:

> Where legal advice is sought from a professional legal adviser **in his capacity as such**, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or his legal advisor, except that the protection be waived.[21] [emphasis added]

[23] In *Descôteaux v. Mierzwinski*, the Supreme Court of Canada considered when a solicitor-client relationship arises such that communications within that relationship are caught by the privilege. That case involved a consideration of whether information provided by a potential client in the course of establishing a solicitor-client relationship would be privileged. The court held that all communications which take place **in the course of seeking legal advice**, including the provision of information prior to the establishment of the formal relationship, are protected by the privilege[22] (my emphasis).

[24] It is not necessary for a retainer to actually be paid or a bill to be rendered.[23] But it is essential that the client have the intent of establishing a solicitor-client relationship within which he or she will receive legal advice. If a lawyer provides advice in friendly conversation or in a context where there the client has no intention of having the lawyer provide representation, then no solicitor-client relationship is established.[24] As stated in *The Law of Privilege in Canada:*

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[20] *R v. McClure*, [2003] 1 S.C.R. 445 2001 SCC 14 at para. 2
[21] See, for example, *McClure* at para. 36; *Solosky v The Queen*, [1980] 1 S.C.R. 821 at page 835; *Descôteaux* at page 872, *Campbell* at para. 49.
[22] *Descôteaux et al. v. Mierzwinski,* [1982] 1 S.C.R. 860.
[23] Re *Markovina,* [1992] 6 W.W.R. 47 (BCSC).
[24] *Cushing v. Hood*, 2007 NSSC 97, affirmed, 53 CPC (6th) 28 (NSCA).

> Until and unless a party intends to retain a lawyer as counsel, there is no solicitor client relationship. The lawyer's hopes and wishes are irrelevant.[25]

[25] Many cases have considered whether the privilege extends to communications to or from a lawyer when he or she is acting in a different professional capacity. It is well understood that, to the extent that a lawyer provides advice other than legal advice, those communications are not caught by the privilege. So, for example, where an in-house lawyer provides business advice or a government lawyer provides general policy advice, it is not captured by the privilege. Similarly, if a lawyer is acting as an employee in a position which could be filled by non-lawyers and doing tasks which would not necessarily have to be done by a lawyers, the communications to and from the lawyer are not covered by the privilege.[26]

[26] In *R. v. Campbell*, the Supreme Court of Canada had this to say about whether or not privilege attaches to all types of advice a lawyer gives:

> 50 It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. … Advice given by lawyers on matters outside the solicitor-client relationship is not protected. … No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer. As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.), at pp. 668-69:
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> > [I]t is not sufficient for the witness to say, "I went to a solicitor's office." ... Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.
>
> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[27] Other cases have considered situations where the lawyer acts in a dual role. The *Gower* case involved a lawyer retained to conduct an investigation and to provide legal advice. The Court considered the lawyer's dual status as lawyer and investigator and found the lawyer's entire report to be protected by legal professional privilege:

> 19. … Courts have consistently recognized that investigation may be an important part of a lawyer's legal services to a client so long as they are connected to the provision of those legal services. …

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[25] *The Law of Privilege in Canada,* Hubbard, Magotiaux, Duncan, Canada Law Book, May 2008, Looseleaf, para. 11.1000.

[26] Re *Ontario Securities Commission and Greymac Credit Corp*., (1983), 41 O.R. (2d) 328 (Div. Ct.).

[28] In *Gower*, the court distinguished that case from *Wilson v. Favelle*.[27] In *Wilson*, a lawyer was retained to conduct an investigation regarding an allegation of misconduct by a provincial employee and to provide advice to the Ministry of Health. While the affidavit from the Ministry stated that the lawyer had been hired to "provide legal services" and to "provide legal advice", the court found that under the terms of the contract, no solicitor-client relationship was established. The contract stated that the lawyer was to

> 1. investigate allegations and unravel the full details by interviewing the complainant and by following up with other persons identified as having knowledge of this matter;
> 2. prepare a confidential report to the Deputy Minister which documents the facts relating to the allegations and provides advice to the Deputy Minister as to any violations of standards of conduct for public service employees, (attached), or which impair the Ministry's ability to perform its function or damages the reputation of either the Crown or its employees.[28]

[29] The court held:

> … Solicitor/client privilege can only arise in the context of a solicitor and client relationship. Notwithstanding the statement in the affidavit of Bell, the independent evidence of Ms. Keating's hiring is clear that she was hired as an investigator and not as a solicitor to act on behalf of HMTQ. Her duties are described as investigating and reporting. She was asked to "provide advice" but the advice was as to "any violations of standards of conduct for public service employees."[29]

[30] In *Boyd v. HMTQ in Right of B.C.*,[30] a lawyer was retained as an independent contractor to conduct a review/administrative audit of the records at Woodlands school. The evidence from the lawyer was that she had been retained "with a view to advising the Ministry in relation to the potential for historic abuse at Woodlands and to provide legal advice regarding the potential legal liability of the Ministry." In that case, a subpœna for the lawyer's evidence was quashed on the basis of the privilege.

[31] In Order F05-35,[31] Commissioner Loukidelis noted that, where a lawyer acts only as an investigator and not as a legal advisor, no privilege protects her or his communications. He also observed that legal professional privilege protects third-party communications only if the third party is performing a function on the client's behalf that is essential to the relationship between solicitor and client. The Commissioner concluded that the public body retained the lawyer in question to investigate an employee's allegations for the purpose of providing the

[27] [1994] B.C.J. No. 1257.
[28] At para. 6.
[29] At para. 12.
[30] 2001 BCSC 459.
[31] [2005] B.C.I.P.C.D. No. 49.

public body with his factual assessments and legal advice based on those assessments, on a confidential basis. He said that the communications between the lawyer and employees of his client, the public body, for the purpose of formulating and giving his legal advice to the clients were not third-party communications. He found that the necessary elements for establishing legal-professional privilege were present in that case and that s. 14 therefore applied to the lawyer's report.

Analysis

[32] I agree that the Avison Report is a "communication" for the purposes of this discussion. I also accept that it was submitted in confidence and that the School District treated it confidentially. There is also no doubt that Mr. Avison is a practising lawyer.[32] Where the School District's arguments fall short, however, is regarding the nature of the relationship it had with Don Avison and the purpose of his "communication" which constitutes his report.

[33] I am constrained in my ability to describe the underlying facts because much of the evidence was submitted *in camera*. However, two key facts emerge from the totality of the submissions. First, it appears from the submissions of the School District that the report contains statements which, if made within a solicitor-client relationship, would constitute the giving of legal advice. However, it also appears to be the case that the School District did not retain Mr. Avison to provide legal advice or to act as its solicitor.

[34] The School District argues that it was important to the School District that Mr. Avison was a lawyer. But nowhere in any of the material does the School District assert that it retained Mr. Avison to provide legal advice. In fact, as noted, the School District's deponent states that the School District "did not specifically retain Mr. Avison as a lawyer." Nowhere does the School District's deponent state that it expected to receive legal advice from Mr. Avison or that the School District was seeking legal advice when it engaged him. Rather, the School District's argument seems to be that, because Mr. Avison was a lawyer, and because the report contains statements that would constitute legal advice if provided by a lawyer to his or her client, the report is privileged, regardless of the fact that School District did not intend to ask for legal advice at the time that it retained Mr. Avison. However, it is clear that the privilege only attaches to statements by a lawyer who has been engaged to act as a solicitor.

[35] If the School District had indeed intended to establish a solicitor-client relationship with Mr. Avison, then it would not matter whether the specific legal advice which it ultimately received was of the type which it expected to receive. However, there is simply no evidence before me that there was any intention to establish a solicitor-client relationship or to seek legal advice.

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[32] The School District provided evidence of this in the form of the relevant entry on the Law Society of BC's website; Exhibit "D", Kelly affidavit.

[36] This distinguishes this case from *Gower*. In that case, there was clear evidence, from the terms of the retainer letter and otherwise, that the lawyer was retained to provide legal advice. In *Gower*, the Court stated that the onus is on the person seeking to claim the privilege to establish all three of the following factors in connection with any particular document:

1. that the document was the giving or obtaining of legal advice;
2. the presence of a solicitor and the presence of a client; and
3. the existence of the solicitor-client relationship.[33]

[37] It is thus not sufficient that there is legal advice provided and that a solicitor involved. It is also necessary to show that a solicitor-client relationship exists on the particular facts. In *Gower*, the Court stated:

> 22. Last, the communication between the client and the lawyer must take place within a solicitor-client relationship. When the solicitor deviates from this or her role as a solicitor the communication to the client is no longer "legal advice". Of course the question of whether the communication was for the purpose of obtaining legal advice is closely related to whether the solicitor was acting in a professional legal capacity as a solicitor.

[38] The lack of evidence to establish a solicitor-client relationship also distinguishes this case from *Boyd*. In that case, the lawyer deposed that she was retained to provide legal advice with respect to liability. There is no such evidence before me here. While the School District may have sought advice and recommendations from Mr. Avison, that was in connection with the safety of students and the adoption of best practices. As in *Wilson*, any advice sought was not legal advice.

[39] By the School District's own admission, Mr. Avison had a mandate to act according to the Terms of Reference. The Terms of Reference specifically require a series of tasks from an independent "qualified person", including reviewing the School District's current policies and practices and making recommendations for changes, "where appropriate". These tasks do not explicitly or implicitly include the provision of legal advice.

[40] I also note that the Terms of Reference specifically provide that "The School Board will appoint a qualified person to conduct the review **who is independent of the School Board**" (my emphasis). Although it would be possible for the School District to retain someone to provide an "independent legal opinion", this is clearly not what occurred or was intended in this case. Rather Mr. Avison was hired to conduct an independent review of current policies and practices. If the School District had wanted to retain a lawyer to conduct the

[33] At para. 18.

review and provide it with legal advice, it could and would have framed the Terms of Reference accordingly.

[41] Finally, I note that, despite the School District's argument that it is entitled to claim the entire report is privileged, the disclosed portions of the report contain comments and recommendations from a policy and operational perspective. I could identify no legal advice in them. In addition, the sample decision letter the School District provided states that it commissioned Don Avison to conduct an independent review of its current policies and practices and to make recommendations.[34] There is no mention that he was retained to provide legal advice as part of this review.

[42] The purpose of solicitor-client privilege is to ensure that a client who seeks legal advice is able to communicate freely with his or her lawyer. Solicitor and client privilege protects communications in order to enable a client to confide in his or her legal advisor. Where the client has not sought legal advice, the purpose of the privilege is not served by protecting subsequent communications. The point of the privilege is not simply to shield certain kinds of statements from disclosure, but rather to foster the particular relationship that exists between a client and a person whom the client has retained to provide legal advice.

[43] In *Cushing v. Hood*,[35] the court considered a claim of solicitor-client privilege with respect to casual conversations between two lawyers and between one of the lawyers and the wife of the other wife. The court held that there was no intention to establish a solicitor-client relationship. The court noted that the claimant could not, after the fact, try to "package" as a solicitor-client relationship something that was not such a relationship at the time the advice was given. The court stated "One cannot put a different "spin" on the facts because it may be beneficial or advantageous at a later time."

[44] The evidence in this case does not establish that there was a solicitor-client relationship between Mr. Avison and the School District. While I accept that the School District retained Mr. Avison to gather facts and provide it with recommendations for improving its policies and procedures, it did not retain him in order to seek legal advice from him. He had no mandate to act as a lawyer or to provide legal advice in conducting his review or in submitting his report. Any advice he may have offered in his report cannot be protected by legal professional privilege. I find that s. 14 does not apply to the Avison Report.

[34] Exhibit "K", Kelly affidavit.
[35] 2007 NSSC 97.

4.0 CONCLUSION

[45] The School District is not authorized to refuse disclosure of the records under s. 14 of FIPPA. Pursuant to s. 44(1)(b) of FIPPA, within 10 days of the date of this Order, as FIPPA defines "day", that is, on or before June 21 2010. I therefore require it to produce an unsevered copy of the Avison Report to me, for the purpose of adjudicating the balance of the exceptions the School District applies here.

June 7, 2010

ORIGINAL SIGNED BY

Paul D. K. Fraser, QC
Acting Information and Privacy Commissioner

OIPC File No. F08-35550