Decision F07-07

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 49 (CENTRAL COAST)

Justine Austin-Olsen, Adjudicator

September 7, 2007

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Summary: The Board's application to request that an inquiry under Part 5 not be held is denied.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 56.

Authorities Considered: B.C.: Order 01-03, [2001] B.C.I.P.C.D. No. 3; Order 02-57, [2002] B.C.I.P.C.D. No. 59; Decision F05-03, [2005] B.C.I.P.C.D. No. 21; Decision F05-07, [2005] B.C.I.P.C.D. No. 43; Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Decision F07-06, [2007] B.C.I.P.C.D. No. 25.

Cases Considered: *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. Campbell*, [1999] SCJ No. 16; *Maranda v. Richer*, 2003 SCC 67; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39; *Municipal Insurance Association of British Columbia v. British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 2534 (S.C.); *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278, [2003] B.C.J. No. 1093; *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.); *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Sup. Ct. J.).

1.0 INTRODUCTION

[1] The Board of Education of School District No. 49 (Central Coast)[1] (the "Board") has requested, under s. 56 of the *Freedom of Information and*

[1] When the parties made their submissions in this application the Board's corporate name was "The Board of School Trustees of School District No. 49 (Central Coast)." The name change

Protection of Privacy Act ("FIPPA"), that an inquiry under Part 5 of FIPPA not be held with respect to an access to information request made by the respondent.

[2] I have considered the submissions of the parties and, for the reasons that follow, I have exercised my discretion and denied the Board's request that this matter not proceed to inquiry.

2.0 DISCUSSION

The access request

[3] According to the Board, the respondent has since 2003 been a plaintiff in a number of civil proceedings in which the Board has been the defendant. As of March 2007, at least one of these civil proceedings was still ongoing.[2] The Board it its submission indicates that it was on or about February 20, 2004 that the respondent first requested from the Board records relating to litigation proceedings and public expenditure of funds.[3] On February 9, 2006, the Board made a decision to withhold certain of the requested records under s. 14 of FIPPA because, in the Board's view, those records were protected by solicitor-client privilege.[4] On February 27, 2006, the respondent requested that this Office review the Board's decision to deny access to the records.

[4] As a result of mediation through this Office during the review process the Board agreed to release some records to the respondent which, it decided, were not protected by solicitor-client privilege. However, the Board has continued to assert privilege over a sizeable number of records, which consist of bills of account issued to the Board by its solicitors.

[5] On January 26, 2007, the respondent made a second request to the Board for the same type of records that were previously withheld, but for a different time period. Three days later, the Board informed the respondent by letter that the records he had requested were being withheld under s. 14 of FIPPA. Almost immediately the respondent requested a review of the Board's decision. Since the Board's decision and the type of records in dispute were in all material respects identical to those already under review, this second request was added to the existing matter under review.

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reflected here was effected by the *School (Student Achievement Enabling) Amendment Act, 2007*, S.B.C. 2007, c. 49, s. 14.

[2] Board's initial submission, para. 1.

[3] Board's initial submission, para. 2.

[4] Board's initial submission, para. 3. No explanation was given by either party in this application, and no issue was made, about the lengthy period of time that appears to have elapsed between the respondent's initial request and the Board's decision to withhold the records under s. 14 of FIPPA.

[6] The parties were unsuccessful in reaching a mediated resolution, and it was clear that the matter would be sent for an inquiry. It was at this stage that the Board initiated this application under s. 56 requesting the Commissioner to exercise his discretion not to hold an inquiry. As such, the Notice of Inquiry, which would have indicated the issues in dispute and the scope of the records to be considered, was not issued.

[7] With respect to the records from the respondent's second request, the Board says in its submission that "[the respondent] appears to want to add these documents to his request for an inquiry, as they are the same type of documents originally requested, only the year is different."[5] The Board does not in its submission object to including the records from the respondent's later request in the adjudication of this matter. In fact, it provided copies of all of the records along with its submission to this Office "for the purpose of evaluating the solicitor-client privilege claim asserted by the Board."[6]

[8] Given the similarity of the latter records to those from the earlier request, I agree that it is appropriate for both sets of records, and the Board's decisions to withhold them from the respondent, to be dealt with at the same time. I have therefore proceeded on the basis that the records withheld from the respondent relating to both his February 20, 2004 request and his January 26, 2007 request constitute the records in dispute in this application.

The parties' positions

[9] The Board's submission is briefly that the records in dispute are clearly covered by solicitor-client privilege and therefore the Board is authorized by s. 14 of FIPPA to refuse access. The Board says that "it is trite law that billing information and letters of engagement are covered by solicitor-client privilege and are protected from disclosure under s. 14" of FIPPA,[7] and cites both *Municipal Insurance Association of British Columbia v. British Columbia (Information and Privacy Commissioner)*[8] and *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*[9], and two decisions of this Office in support.[10]

[10] The respondent argues generally that public contracts and records of payment of public money are legally subject to disclosure and therefore cannot be subject to solicitor-client privilege.[11] The respondent cites several statutes

[5] Board's initial submission, at para. 6.
[6] Board's initial submission, at p. 2.
[7] Board's initial submission, at p. 2.
[8] *Municipal Insurance Association of British Columbia v. British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 2534 (S.C.).
[9] *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278, [2003] B.C.J. No. 1093.
[10] Decision F05-07, [2005] B.C.I.P.C.D. No. 43; Decision F05-03, [2005] B.C.I.P.C.D. No. 21.
[11] Respondent's submission, at paras. 1-2, and 6-12.

which he says support his contention and refers to the decision of the Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*.[12] The respondent distinguishes the *Legal Services Society* case on the basis that the records in dispute there "addressed disclosure of information from private persons" whereas here the respondent seeks disclosure of information on "public contracts and expenditure of public monies for services engaged in by the public body."[13]

Discussion

[11] Section 56(1) of FIPPA reads as follows:

> 56(1) If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[12] The nature and scope of an application under s. 56 such as this one has been discussed in previous decisions:[14]

> Section 56 confers discretion as to whether to hold a Part 5 inquiry respecting a request for review. As noted in earlier decisions, there are a variety of reasons why this discretion might be exercised in favour of not holding an inquiry. These include circumstances where the principles of abuse of process, *res judicata* or issue estoppel clearly apply. Other circumstances are where it is plain and obvious that the records in dispute are subject to an exception to disclosure or that they fall outside FIPPA's scope. In each case, however, it must be clear that there is no arguable issue which merits adjudication in an inquiry.

[13] In an application of this kind under s. 56, it is the party asking that an inquiry not be held (in this case the Board) who bears the burden of demonstrating why that request should be granted. The respondent does not bear an equal burden of demonstrating why an inquiry should be held. This reflects the current policy of this Office that, when mediation is unsuccessful, the matter in dispute is in most cases referred for an inquiry.[15]

[14] At the outset, I should say that I do not accept the respondent's argument that no solicitor-client privilege can attach to the records in dispute. First, the respondent's suggestion that privilege cannot attach to documents containing information from a public body as opposed to those relating to information from private individuals is clearly wrong. A public body is entitled to claim solicitor-client privilege just as an individual is. It is not the public or private

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[12] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39.
[13] Respondent's submission, at para. 5-6.
[14] Decision F07-04, [2007] B.C.I.P.C.D. No. 20, at para. 16; See also Decision F07-06, [2007] B.C.I.P.C.D. No. 25 at para. 15.
[15] Decision F07-04, [2007] B.C.I.P.C.D. No. 20, at para. 17; Decision F07-06, [2007] B.C.I.P.C.D. No. 25 at para. 15.

status of the client (or its solicitor) that is important, but the existence and extent of a solicitor and client relationship, the nature of the communication between the solicitor and the client, and the circumstances surrounding the communication between them that will determine whether privilege attaches in any particular case.[16]

[15] Second, it is important to emphasize that there is no ambiguity about the type of records in dispute here. The records in dispute are solicitors' bills of account, not public contracts *per se*. In *Maranda v. Richer* the Supreme Court of Canada clearly stated that a solicitor's bill of account falls *prima facie* within the category of solicitor-client privilege.[17] Justice LeBel, writing for the majority, put the matter as follows:[18]

> …As this Court observed in *Mierzwinski*, there may be widely varying aspects to a professional relationship between solicitor and client. Issues relating to the calculation and payment of fees constitute an important element of that relationship for both parties. The fact that such issues are present frequently necessitates a discussion of the nature of the services and the manner in which they will be performed. The legislation and codes of professional ethics that govern the members of law societies in Canada include often complex mechanisms for defining the obligations and rights of the parties in this respect. The applicable legislation and regulations include strict rules regarding accounting and record-keeping, an obligation to submit detailed accounts to the client, and mechanisms for resolving disputes that arise in that respect … The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements.
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> … While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege, which, it will be recalled, is a class privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which this Court forcefully stated even more recently in *McClure*, [2001 SCC 14] at paras. 4-5.

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[16] There are many discussions of this in the jurisprudence, but see, for example the discussions in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 872; and *R. v. Campbell*, [1999] SCJ No. 16, at para. 50.
[17] *Maranda v. Richer*, 2003 SCC 67.
[18] *Maranda v. Richer*, 2003 SCC 67, at para. 32-33.

[16] It is important, however, that the Court did not say in *Maranda* that solicitors' bills of account are always privileged—it said only that there is a presumption this is so. Court decisions predating *Maranda*, which in British Columbia include both the *Municipal Insurance Association* case and the *Legal Services Society* case, are therefore open to reconsideration in this light. This is similarly so for any orders or decisions from this Office dealing with the application of s. 14 of FIPPA to solicitors' bills of account that may not have considered the approach endorsed by the Supreme Court of Canada in *Maranda*.

[17] The determination that a presumption of privilege exists creates a starting point for analysis in a particular case; it is not dispositive of the issue. The question of what test should be applied to determine whether the presumption of privilege has been satisfied in relation to solicitors' bills of account requested under provincial access legislation has been considered in at least two recent Ontario court decisions, *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*,[19] and *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*.[20]

[18] In light of all of the cases referred to above, it should be clear that there are indeed issues here which merit full argument by the parties in an inquiry. I therefore decline to grant the Board's application and direct that this matter be sent for an inquiry under Part 5 of FIPPA.

[19] Although the parties are of course free to argue their respective positions at the inquiry in the manner they see fit, the parties would be well advised to consider the implications in British Columbia of *Maranda* and the Ontario cases referred to above and to make submissions on them.

3.0 CONCLUSION

[20] For the reasons given above, this matter will proceed to inquiry under Part 5 of FIPPA.

September 7, 2007

ORIGINAL SIGNED BY

Justine Austin-Olsen
Adjudicator

OIPC File No: F06-28104 & F07-30989

[19] *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).
[20] *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Sup. Ct. J.).