OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order No. 328-1999

INQUIRY REGARDING MINISTRY OF ATTORNEY GENERAL RECORDS

David Loukidelis, Information and Privacy Commissioner
November 19, 1999

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Summary: Applicant sought legal costs associated with gaming-related legal issues. Ministry refused to disclose information under s. 14 (solicitor client privilege). Ministry noted litigation was still underway. Ministry authorized to withhold information. Applicants have practical incentives to cooperate with, and assist, public bodies by making specific and clear requests wherever reasonably possible.

Key Words: Solicitor client privilege – public interest.

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

Authorities Considered: B.C.: Order No. 61-1995; Order No. 179-1997; Order No. 325-1999.

1.0 INTRODUCTION

On December 17, 1998, the applicant requested from the Ministry of Attorney General ("Ministry")

> a copy of all legal costs associated with gaming related legal issues (Carpentier suits, Cities of Vancouver and Surrey, BC Association of Charitable Gaming) entered into by the Attorney-General since January 1, 1996.

In its response letter of February 3, 1999, the Ministry denied the request. It said "the information requested is excepted from disclosure under the Act, on the basis that it is subject to solicitor-client privilege (section 14)." By a further letter to the applicant dated

May 26, 1999, the Ministry told the applicant that "the Province is not a party to the City of Vancouver case."

Unhappy with the Ministry's February 3, 1999 response, the applicant requested a review of the Ministry's decision, under s. 52 of the *Freedom of Information and Protection of Privacy Act* ("Act"). The applicant made this request in a letter to our Office dated March 3, 1999.

2.0 ISSUES

The issue in this case is simple. Was the Ministry authorized, by s. 14 of the Act, to refuse to disclose the requested information because it is "subject to solicitor client privilege"? Under s. 57(1) of the Act, the Ministry bears the burden of establishing that it was authorized by s. 14 to refuse to disclose this information.

3.0 DISCUSSION

3.1 Was This A Request For Records? – The first question, to my mind, is whether the applicant's request actually was a request for access to a "record" within the meaning of s. 5(1) of the Act. The applicant's request was arguably only a question to which the Ministry was expected to respond. The Ministry, however, clearly treated the request as a request for any records that contained the requested information. Public bodies often do this, partly because of their obligation under s. 6(1) of the Act to assist an applicant and partly because it is often more expedient to do so. The Ministry is to be commended for having assisted the applicant in this case by treating the request as a request for access to a record or records.

3.2 How Applicants Can Assist the Process – Although it is not necessary to do so for the purposes of this case, I would like to make a few comments about how applicants make requests. It should be made clear that the following discussion is a general one and does not arise on the facts of this case. The request made by the applicant in this case posed no difficulty for the public body. The following discussion, therefore, does not reflect on the applicant's behavior in this case. It is intended to offer some observations as to how applicants, generally, can improve the processing of requests for all involved.

Public bodies are under a legal duty, under s. 6(1) of the Act, to

> … make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

The Act does not impose a corresponding legal duty on applicants. As a general matter, however, applicants should assist public bodies, wherever it is reasonably possible to do so, by formulating specific and clear requests for records. A vaguely formulated or scattergun request will almost always delay a public body's response and will cost the public body more to process. Faced with such a request, a public body may be more inclined to levy a fee under s. 75. This, in turn, can lead to lengthy and costly disputes

over the amount of the estimated fee and about any fee waiver that might be sought by the applicant.

Specific and precise access requests enable public bodies to respond much more quickly and cost-effectively. This avoids the delay often entailed when all-encompassing or imprecise access requests are made. Applicants therefore have an incentive, in my view, to cooperate with public bodies by, whenever it is reasonably possible to do so, making clear, specific and not unnecessarily broad access requests. They also have an incentive to cooperate, when reasonably asked to do so, by clarifying requests and, in some cases, by narrowing requests. To be clear, the Act does not impose any legal duty on applicants to cooperate in the ways I have just described. But a responsible applicant will recognize that his or her request will be handled more quickly and cheaply if some effort is made to cooperate with a public body. A responsible applicant will also recognize that cooperation with the public body will reduce the overall costs, in times of restraint, of complying with the Act generally.

For their part, public bodies should, where practicable, contact applicants whose requests are vague or apparently too broad and attempt to clarify or narrow the request. This is, in my view, one way in which public bodies should comply with their s. 6(1) duty to assist applicants. Such a practice also can reduce the costs of processing access requests considerably.

3.3 Ministry's Objection to Applicant's Reply Submission – The applicant's initial submission in this inquiry was, to say the least, brief. It was prepared by a lawyer who represented the applicant. The core of the submission simply put the Ministry to "the strict burden of proving" its case, and asserted that the information in dispute "is not subject to solicitor client privilege under the Act."

In response to the Ministry's more detailed initial submission, the applicant filed a reply submission responding to the arguments initially made by the Ministry, including regarding the case law relied upon by the Ministry. The Ministry asked for leave to file a further reply submission, on the ground the applicant had made arguments in its reply submission that could have been made in its initial submission. The Ministry provided its further reply submission for my consideration, if I decided to accept the Ministry's further reply.

The notice of this inquiry issued to the parties on July 12, 1999 says, at p. 2, that "a reply submission should not include new facts or raise new issues." Where this happens, I have a discretion to reject the new facts or issues or allow the other parties in the inquiry to make a further reply submission. In this case, I have decided to permit the Ministry to make a further reply submission. This is because the applicant raised a new issue in its reply submission, *i.e.*, the argument that a public body must establish harm from disclosure of privileged information before s. 14 protects it. The applicant could reasonably have made this submission in the first place, but did not do so.

3.4 Is the Record Privileged? – For the following reasons, there is no doubt in my mind that the Ministry was authorized by s. 14 to refuse to disclose the disputed record. Section 14 of the Act authorizes a public body "to refuse to disclose to an applicant information that is subject to solicitor client privilege." A number of British Columbia court decisions, and orders by the previous commissioner, leave no room for doubt on this point. Some discussion of the parties' arguments is, nonetheless, necessary.

The Ministry argued that several court decisions establish that the amount of a legal bill is subject to solicitor client privilege. The Ministry cited, in support, the British Columbia Supreme Court decisions in *Corporation of the District of North Vancouver* v. *Information and Privacy Commissioner* (1996), 143 D.L.R. (4th) 134 and *Legal Services Society* v. *Information and Privacy Commissioner*, [1996] B.C.J. No. 2034. The Ministry also cited the Federal Court of Appeal decision in *Stevens* v. *Canada (Prime Minister)*, [1998] F.C. 89. In addition, the Ministry noted that my predecessor had, in Order No. 179-1997, ruled that "legal accounts enjoy the same privilege as any other solicitor-client communications" (p. 5). The decisions relied upon by the Ministry leave no doubt that the amount of a legal bill rendered by a lawyer is protected by solicitor client privilege.

The applicant's reply accepted the Ministry's "characterization of the law generally as it applies to solicitor-client privilege" (p. 1). But the applicant also argued, at p. 2, that in cases such as this

> … it is important to examine the documents in question, the applicant's purpose in requesting the documents, and whether the Public Body can show that it might be injured or harmed by the release of the information requested.

Unlike a number of the Act's other exceptions to the rights of access, s. 14 does not require a public body to establish a reasonable expectation of harm to its interests before it is authorized to withhold information. Once a public body establishes that information in a requested record is subject to solicitor client privilege, it is authorized to withhold the information. Harm or injury does not enter into the analysis, although it will be a factor the public body should consider when exercising its discretion under s. 14. This issue is discussed below.

In reply, the applicant tried to distinguish between communications between lawyer and client, which are privileged, and statements of fact, which the applicant said are not privileged. The applicant said that any "account ledger" that disclosed the legal fees paid by the Province was a statement of fact and therefore was not privileged, even though the same information would be privileged if it were contained in a bill rendered by the Province's lawyer. I agree with the Ministry's argument, in its further reply submission, that the applicant's attempted distinction is not tenable as regards amount of legal fees paid respecting a particular case. In my view, the information in dispute here is subject to solicitor client privilege.

Of course, it is always open to a public body to waive the protection of s. 14 and disclose privileged information. In Order No. 325-1999, I observed, at p. 4, that "a public body must be prepared to demonstrate that they have exercised their discretion", respecting a

discretionary exception such as s.14, by considering whether information should be released even though it is technically covered by the exception. In this case, the Ministry noted that the litigation matters covered by the applicant's request are still underway (in some cases because they are under appeal). In the circumstances of this case, I am satisfied the Ministry considered that the requested information should not be released because the litigation matters are still underway. The Ministry's legal bills are paid by the Province's taxpayers. This means the Ministry – and other public bodies – should always consider whether the public interest favors disclosure of this kind of information, including, of course, once a matter to which a legal bill relates has been completed.

4.0 CONCLUSION

For the reasons given above, I find that the Ministry is authorized under s. 14 of the Act to refuse to give access to the record in dispute. Under s. 58(2)(b) of the Act, I confirm the decision of the Ministry to refuse access to the record in dispute.

November 19, 1999

David Loukidelis
Information and Privacy Commissioner
for British Columbia