OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

MINISTRY OF ATTORNEY GENERAL

Order 03-28

David Loukidelis, Information and Privacy Commissioner
July 15, 2003

Quicklaw Cite: [2003] B.C.I.P.C.D. No. 28
Document URL: http://www.oipc.bc.ca/orders/Order03-28.pdf
Office URL: http://www.oipc.bc.ca
ISSN 1198-6182

Summary: The applicant journalist requested access to records relating to billings by lawyers acting at public expense for an Air India bombing accused. Section 14 authorizes the Ministry to refuse to disclose the records, which are privileged, in their entirety. Section 25(1) does not require disclosure of the privileged information in the public interest.

Key Words: solicitor-client privilege – exercise of discretion – public interest – risk of significant harm – clearly in the public interest.

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

Authorities Considered: B.C.: Order 01-10, [2001] B.C.I.P.C.D. 11; Order 01-20, [2001] B.C.I.P.C.D. 21; Order 02-38, [2002] B.C.I.P.C.D. 38; Order 02-50, [2002] B.C.I.P.C.D. 51.

Cases Considered: *Descoteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860; *Lavallée, Rackel & Heintz* v. *Canada (Attorney General)* (2002), 216 D.L.R. (4th) 257 (S.C.C.); *Municipal Insurance Assoc. of British Columbia* 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, [1996] B.C.J. No. 2034; *Stevens* v. *Canada (Prime Minister)*, [1998] 4 F.C. 89 (C.A.); *Legal Services Society* v. *British Columbia (Information and Privacy Commissioner),* 2003 BCCA 278, [2003] B.C.J. No. 1093; *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, [2002] B.C.J. No. 2779 (application for leave to appeal to the Supreme Court of Canada denied, [2003] B.C.J. No. 83); *General Accident Assurance Co.* v. *Chrusz* (1999), 180 D.L.R. (4th) 241 (Ont. C.A.); *Desjardins Ducharme Stein Monast* v. *Canada (Department of Finance)*, [1999] 2 F.C. 381 (T.D.); *Jobb* v. *Nova Scotia (Department of Justice)*, [1999] N.S.J. No. 85 (S.C.); *Almecon Industries Ltd.* v. *Anchortek Ltd.* (1997), 85 C.P.R. (3d) 30

(F.C., T.D.); *British Columbia (Ministry of Environment, Lands & Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.).

1.0 INTRODUCTION

[1] This order concerns a request for access to accounts of the lawyers who, at public expense, defended an individual in criminal proceedings. An indictment filed June 5, 2001 jointly charged three individuals with first-degree murder and other offences under the *Criminal Code*. The charges arose out of the June 23, 1985 deaths of 329 passengers and crew aboard Air India Flight 182, which exploded off the coast of Ireland. The Province (as represented by the Ministry of Attorney General) agreed to fund defence counsel for all three accused.

[2] In letters to the Ministry dated May 2, 2002, the applicant journalist made nine separate access requests under the Act. The requests, each of which named a different lawyer, were for "access to copies of all documents, reports and emails dealing with fees" paid to the named lawyers "for work on the Air India case". The applicant also asked for "access to all invoices and billings for work, received by the government" from the various lawyers. A further May 2, 2002 letter from the applicant also sought "access to a list of all lawyers representing the defendants, "and paid for by the government, in connection with the Air India case."

[3] In a July 10, 2002 letter to the applicant, the Ministry refused access on the ground that the requested records contain information excepted from disclosure by s. 14 of the Act. The applicant asked, in a July 17, 2002 letter to this office, for a review of the Ministry's decision. In an August 30, 2002 letter to the applicant, the Ministry then varied its position as follows:

> Upon further consideration we have determined the requested records do not fall within the scope of the Act pursuant to section 3(1)(h) as the documents relate to a prosecution which has not been completed. Once the prosecution has been completed the documents would then be excepted pursuant to Section 13 (Policy Advice); Section 14 (Legal Advice); and Section 17 (Financial interest of the public body).

[4] Because the matter did not settle in mediation, this office issued a notice of inquiry on October 29, 2002. In early February of this year, the third accused pleaded guilty to manslaughter by, to quote the new indictment against him, "aiding and abetting in the construction of an explosive device placed on board" Air India Flight 182, "which exploded and caused its destruction, contrary to Section 217 of the Criminal Code of Canada". He was sentenced for that offence and the Crown stayed the other charges against him.

[5] I received submissions on the s. 3(1)(h) issue that the Ministry had raised and, on March 28, 2003, decided that the requested records relating to the two accused against whom charges are still outstanding (and whose trial is now underway) were excluded from the Act's scope. I decided that the requested records relating to the third accused who had pleaded guilty and been sentenced were not excluded from the Act by s. 3(1)(h).

Those records alone are the subject of this order. The parties to the inquiry, at this stage, have been the applicant, the Ministry and the third accused, as a third party under the Act.

[6] On April 9, 2003, the applicant's counsel requested access, on a confidentiality undertaking, to the disputed records for the purpose of making submissions for the applicant in the inquiry. Having heard from the parties, on May 20, 2003, I denied that request. The parties then completed their submissions on the substantive issues.

2.0 ISSUES

[7] The Ministry had applied ss. 13(1), 14 and 17(1) to information in the disputed records, but, in its initial submission, it abandoned reliance on s. 13(1). In light of my conclusion that s. 14 authorizes the Ministry to refuse to disclose all of the disputed records, it is not necessary for me to resolve the applicability of s. 17(1).

[8] In his initial submission, the applicant also argued, for the first time, that s. 25(1)(b) of the Act requires the Ministry to disclose the disputed records without delay, in the public interest. Because of the mandatory nature of s. 25, and because the parties all made submissions on the point, I have considered it following my discussion of s. 14.

[9] Section 57(1) of the Act puts the burden on the Ministry to establish that s. 14 applies to the disputed records.

[10] For the s. 25 issue, I have taken the approach to burden of proof that was explained in Order 02-38, [2002] B.C.I.P.C.D. No. 38 and Order 02-50, [2002] B.C.I.P.C.D. No. 51. That is, s. 25(1) requires a public body to disclose information where certain facts exist, whether or not an access request has been made. There is no statutory burden on the applicant to establish that s. 25(1) applies to the disputed information or on the Ministry or the third party to establish that it does not apply. As a practical matter, however, it is in the interests of each of the parties to provide submissions and evidence as to their respective positions on whether or not s. 25(1) compels disclosure.

3.0 DISCUSSION

[11] **3.1 Description of the Disputed Records** – At para. 4.02 of its initial submission, the Ministry describes the disputed records as follows:

> - A Defence Counsel Agreement between the Province and DISR Management Corporation, with appended Review Agreement;
> - Records containing the monthly amounts billed by counsel representing … [the third-party accused] ("Defence Counsel");
> - Correspondence dealing with amounts billed by Defence Counsel, as well as the amounts paid by the Ministry to Defence Counsel;
> - Review Certificates, which include all Defence Counsel fees and disbursements payable by the Province under the Defence Counsel Agreement for a particular month. Fees are broken down for each

> lawyer. An itemized list of disbursements is appended to the Review Certificates.

[12] Having reviewed the disputed records as part of my deliberations regarding the s. 3(1)(h) issue, mentioned above, and again in relation to the ss. 14, 17(1) and 25(1) issues, I confirm that the Ministry's description of the disputed records is accurate.

[13] I will only add that, with some minor exceptions, the various legal bills have been severed to remove details of the services rendered by defence counsel. The Ministry's submissions say that the records were severed by the external reviewing lawyer the Ministry had retained, with the third party's agreement, to review defence counsel fees and disbursements. The reviewing lawyer severed these details before he delivered the bills to the Ministry as appendices to his review certificates. Information in the bills under "description of services" was severed, with minor exceptions. The severed bills disclose dates for each billing entry, the initials of the lawyers who billed time, the number of hours spent for each entry, the hourly rate for each lawyer and the amount of the fee for services billed for each entry. In the case of disbursements incurred by the billing lawyers, the invoices have attached to them copies of various third-party invoices for services or for goods supplied. These invoices provide details of the disbursements incurred.

[14] The third party submits that he instructed his counsel to enter into the special funding agreement with the Ministry. Bills rendered by the third party's counsel were submitted to the external reviewing lawyer, who determined the amount of fees and disbursements payable under the funding agreement and certified those amounts to the Ministry. The Ministry paid the certified amounts to the third party's counsel. The third party says he expected, at all times, "that the funding agreement, the accounts submitted by his counsel and all other communications respecting the payment of his legal costs would remain confidential and privileged" (para. 4, initial submission). This is consistent with the terms of the defence funding agreement itself.

[15] **3.2 Solicitor-Client Privilege** – Section 14 of the Act authorizes the Ministry to refuse to disclose "information that is subject to solicitor-client privilege." The Ministry and third party submit that legal professional privilege applies here. This privilege protects confidential communications between lawyer and client (or the client's agent) that relate to the seeking or giving of legal advice. The principles to be applied under s. 14 have been discussed in many cases, including Order 01-10, [2001] B.C.I.P.C.D. No. 11. The Ministry and the third party rely on cases that affirm the importance and near inviolability of solicitor client privilege: *Descoteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860; *Lavallée, Rackel & Heintz* v. *Canada (Attorney General)* (2002), 216 D.L.R. (4th) 257 (S.C.C.). They also rely on decisions in the access to information field which upheld claims of solicitor-client privilege in the face of access requests relating to legal retainers and bills: *Municipal Insurance Assoc. of British Columbia* 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, [1996] B.C.J. No. 2034; *Stevens* v. *Canada (Prime Minister)*, [1998] 4 F.C. 89 (C.A.); *Legal Services Society* v. *British*

Columbia (Information and Privacy Commissioner), 2003 BCCA 278, [2003] B.C.J. No. 1093, leave to appeal in relation to s. 13 denied, [2003] S.C.C.A. No. 83. These cases, all of which (except *Stevens*) are binding on me, hold that the nature and terms of a legal retainer are generally privileged. The privilege extends to bills – narrative portions, itemized disbursements, time spent and amounts charged – and to composite data from which it is possible to deduce privileged information. The privilege exists whether the beneficiary of the privilege is a public body or a third-party recipient of government-funded legal aid.

[16] The Ministry and the third party argue that, in paying the costs of the third party's legal defence, the Ministry was acting as his agent. The disputed records are, therefore, "communications between a lawyer and an agent of the client", *i.e.*, between the third party's defence counsel and the Ministry. The third party's defence counsel provided information to the Ministry, as agent of the client, for the limited purpose of paying the third party's legal costs.

[17] Alternatively, if the Ministry was not acting as an agent for the third party in entering into the defence counsel agreement or communicating with counsel and paying counsel's bills, its role was nonetheless central to the purpose of the solicitor-client relationship between defence counsel and the third party. The Ministry and the third party rely on the decision of the Court of Appeal in *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, [2002] B.C.J. No. 2779 (application for leave to appeal to the Supreme Court of Canada denied, [2003] B.C.J. No. 83). Levine J.A. there agreed that, where a third party performs a function central to the solicitor-client relationship, the third party should be treated as standing in the client's shoes for the purpose of communications and the question of whether they are privileged. In doing so, she referred to the reasoning of Doherty J.A. in *General Accident Assurance Co.* v. *Chrusz* (1999), 180 D.L.R. (4th) 241 (Ont. C.A.).

[18] Whether or not the Ministry's role was that of an agent for the third party, as the concept of agency is understood under Canadian law, the Ministry's functions respecting the funding of the third party's defence were central to the solicitor client relationship between the third party and his lawyers. Similarly, the reviewing lawyer retained by the Ministry, with the third party's agreement, performed functions that were also central to the solicitor client relationship. The reviewing lawyer acted as a conduit between the third party's lawyers and the Ministry for communications respecting the funding of the defence. His review certificates, made under the defence funding agreement, contain or reveal communications from those lawyers respecting their billings and work. These certificates, which append copies of bills for fees and disbursements, have the same privileged status as a Ministry-generated record that reproduces or reveals such communications.

[19] I am satisfied that the necessary element of confidentiality is present in relation to the disputed records and that the communications they represent, or would reveal, relate to the seeking or giving of legal advice. In light of *Lavallée*, the above-mentioned British Columbia decisions and *Stevens*, there is no doubt in my mind that the disputed records

must be found to be privileged and therefore protected under s. 14. The fact that almost all of the descriptions of services have been removed does not affect this conclusion, since even the remaining portions of the communications relate to the provision of legal advice and services as contemplated by the British Columbia court decisions.

[20] In reaching my decision, I have considered *Desjardins Ducharme Stein Monast* v. *Canada (Department of Finance)*, [1999] 2 F.C. 381 (T.D.), and *Jobb* v. *Nova Scotia (Department of Justice)*, [1999] N.S.J. No. 85 (S.C.), cases which at first blush appear to be at odds with the *Legal Services Society* and *Municipal Insurance Assoc.* decisions. Both *Desjardins* and *Jobb* have distinguishing features, however, and, even if they were on all fours with this case, they are not binding on me, whereas the British Columbia cases mentioned above are binding on me.

[21] I therefore find that s. 14 authorizes the Ministry to withhold the disputed records. Since they are privileged in their entirety, this is not a case for disclosure under s. 4(2) of information in the disputed records that is not excepted under s. 14. Section 14 is a discretionary exception to the right of access under the Act. The privilege here is the third party's, however, not the Ministry's. The third party obviously has not waived his privilege. Nor does the defence funding agreement suggest that the third party agreed to allow disclosure of privileged communications – the agreement is to the contrary effect. As I said in Order 01-10, at para. 48, the Legislature's use of the word "may" is not – constitutional considerations aside – the irresistibly clear derogation from solicitor-client privilege necessary to encroach on or override that right. This view is consistent with the common law position, which is that privilege can only be waived by all of the parties to whose benefit it accrues. See, for example, *Almecon Industries Ltd.* v. *Anchortek Ltd.* (1997), 85 C.P.R. (3d) 30 (F.C., T.D.). Accordingly, I see no basis on which to question the Ministry's refusal to disclose information despite the discretionary language of s. 14.

[22] **3.3 Public Interest Disclosure** – Sections 25(1) and (2) read as follows:

> **Information must be disclosed if in the public interest**
>
> **25** (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[23] Section 25(1) explicitly overrides any other provision of the Act. On the face of it, this would include s. 14. The third party nonetheless contends that s. 25(1) does not dilute or encroach on solicitor-client privilege and that, if it did, s. 25(1) would be "struck down", presumably as unconstitutional (para. 11, reply submission). It is also a well-established rule of statutory interpretation that legislation should be interpreted so as not to restrict solicitor-client privilege. Even where legislation expressly purports to restrict

the privilege, it must be interpreted to restrict the privilege only to the extent absolutely necessary to achieve the ends sought by the legislation. See, for example, *British Columbia (Ministry of Environment, Lands & Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.), at para. 50. Also see Order 01-10.

[24] Interesting issues are raised here about the paramountcy and effect of s. 25(1) when information protected by solicitor-client privilege is involved. I do not find it necessary to resolve these issues, however, because, assuming s. 25(1)(b) does apply to the disputed records and that it is paramount to s. 14, in my view it does not compel disclosure.

[25] The applicant submits that matters of public interest under s. 25(1)(b) need not be matters in urgent need of immediate disclosure. I disagree. Section 25(1)(b) has been discussed on many occasions, including in Order 01-20, [2001] B.C.I.P.C.D. No. 21, and Order 02-38. As I concluded in Order 02-38, at para. 53:

> The s. 25(1) requirement for disclosure "without delay", whether or not there has been an access request, introduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.

[26] The applicant also submits that this case meets the "clearly in the public interest" threshold in s. 25(1)(b) for the following reasons (initial submission, p. 10):

> (a) Hundreds of Canadian families were directly affected. Disclosure of information relating to the prosecution of the perpetrators of the crime is clearly in their interest, and, in many cases, full disclosure may have a therapeutic effect on grieving families by providing a sense of closure to the ordeal and providing an assurance that the right person was convicted, given he was allocated ample resources to dispute the allegations made against him.
>
> (b) The British authorities were involved in the extradition of [the third party] for the purposes of his prosecution. Disclosure of the comprehensiveness of his legal defence may provide assurances (or not) to the international community that extradited persons will be given due process in Canada.
>
> (c) This matter was the subject of a very lengthy and expensive RCMP investigation. Disclosure of the amount of public funds spent on the defence of [the third party] may justify the intensity of the investigation undertaken by the Air India Task Force.
>
> (d) Issues of financial accountability come into play in that eight counsel are purported to have worked on this defence. In this regard, disclosure of the Information would encourage public debate as to what, if any limits,

should have been placed on the defence costs in this matter. Clearly, a large expenditure of public funds requires public scrutiny.

(e) The matter has been widely publicized, both in Canada and internationally. The bombing of Flight 182 is a matter of intense interest to the families of the victims, those who follow the criminal justice system, persons interested in public expenditure and accountability and, as evidenced from the extent of the media coverage, Canadians in general, as openness in government facilitates the expression of public opinion and the making of political choices.

[27] The applicant says this case is analogous to the government of Alberta's January 16, 2001 release of the legal and settlement costs of defamation litigation brought against Stockwell Day when he was a member of the Alberta Legislative Assembly. The Alberta government news release that the applicant has submitted to me indicates that the information was disclosed under s. 31.4 (now s. 32) of the Alberta *Freedom of Information and Protection of Privacy Act*, which is very similar to s. 25 of the Act. The release also says the Premier of Alberta was proposing new regulations that would require disclosure of legal costs paid by government on behalf of members of the Legislative Assembly. It is not at all clear to me, however, that the circumstances in the Stockwell Day case would have been sufficient to trigger s. 25(1)(b) of the Act as I have interpreted it.

[28] As I have previously indicated, there will be cases in which arguments respecting one of the Act's exceptions to the right of access converge with the public interest disclosure analysis under s. 25. See, for example, Order 02-50. This is one of those cases. I have found that the disputed information is protected by solicitor-client privilege and is therefore excepted from disclosure by s. 14. The beneficiary of that privilege is the third party, not the Ministry. The importance of solicitor-client privilege, generally and specifically in relation to the disputed records, is relevant in considering whether s. 25(1)(b) requires disclosure.

[29] In my view, the generalized public interest in disclosure of information respecting expenditure of taxpayer funds is not, despite the public's interest in the tragic and high-profile criminal case against the third party, sufficient to trigger a clear public interest under s. 25(1)(b) in the disclosure of the privileged information at stake. Nor do I consider that the information in the disputed records contributes, in a substantive way, to the body of information that is already available to enable or facilitate effective use of various means of expressing public opinion, and making political choices. The immediate mandatory disclosure of this information is not clearly necessary in the interests of public debate and political participation.

[30] I find that s. 25(1)(b) does not require the Ministry to disclose information in the disputed records.

4.0 CONCLUSION

[31] For the reasons given above, under s. 58 of the Act, I confirm the Ministry's decision that s. 14 authorizes it to refuse to disclose the information it withheld under that section. Having found that s. 25(1)(b) does not require the Ministry to disclose information, no order is necessary respecting that provision.

July 15, 2003

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia