Date: 19960925
Docket: 960275
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT,
R.S.B.C. 1979, c. 209 AND IN THE MATTER OF A
DECISION OF THE INFORMATION AND PRIVACY COMMISSIONER
(ORDER NO. 74-1995), DATED DECEMBER 22, 1995,
MADE UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF
PRIVACY ACT, S.B.C. 1992, c. 61

BETWEEN:

LEGAL SERVICES SOCIETY

PETITIONER

AND:

THE INFORMATION AND PRIVACY COMMISSIONER
OF THE PROVINCE OF BRITISH COLUMBIA
and BLAINE GAFFNEY

RESPONDENTS

AND:

ANTI-FEDERATED POVERTY GROUPS OF
BRITISH COLUMBIA, BRITISH COLUMBIA BRANCH OF THE
CANADIAN BAR ASSOCIATION, AND
THE LAW SOCIETY OF B.C.

INTERVENORS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE LOWRY

(IN CHAMBERS)

Counsel for the Petitioner:	Joseph J.M. Arvay, Q.C.
Counsel for the Respondent: The Information and Privacy Commissioner of the Province of British Columbia	Susan E. Ross
Counsel for the Respondent: Blaine Gaffney	Daniel W. Burnett
Counsel for the Intervenor: Anti-Federated Poverty Groups of B.C.	Katherine A. Hardie
Counsel for the Intervenor: B.C. Branch, Canadian Bar Association	Gordon Turriff
Counsel for the Intervenor: The Law Society of B.C.	Robert T.C. Johnston, Q.C.

Place and Date of Hearing: September 12 and 13, 1996
Victoria, B.C.

[1] Under the Freedom of Information and Protection of Privacy Act, S.B.C. 1992, c. 61, government agencies are required to facilitate public access to their records on request. They are not, however, obliged to disclose any information that is subject to solicitor-client privilege (s.14) or personal information the disclosure of which would constitute an unreasonable invasion of privacy (s.22). The Legal Services Society of British Columbia, the agency that funds legal aid, has raised both considerations in refusing the request of a television news reporter, Blaine Gaffney, for disclosure of the total of amounts paid by the Society to a particular lawyer for services rendered in two cases in which his clients were tried for murder. The matter was reviewed by the Information and Privacy Commissioner who, after conducting first a written and then an oral hearing, decided that neither consideration supported the Society's refusal. He required it to give Mr. Gaffney access to records that may reveal the costs of each case. The Society seeks judicial review of his decision.

[2] The question now is whether, bearing in mind the importance of determining and applying the appropriate standard of review to an administrative decision, the intervention of this court is warranted.

The Request

[3] Virtually all billing for legal aid criminal defence work is the subject of a published block billing tariff which is based primarily on court appearances. What are said to be non-court services are a very small portion of most lawyers' accounts in criminal matters. With access to the court record, it was possible for Mr. Gaffney to make a reasonable estimate of the fees the tariff prescribes for the work the lawyer did. But that was apparently not sufficient for the reporter's purposes. He requested the sum total of the actual amounts paid in accordance with the tariff as well as the disbursements incurred in each case.

[4] Mr. Gaffney first wrote to the Society to request what he seeks in September 1994. He explained that he had been told the Society's policy precluded disclosure of the amounts charged in individual cases but he thought the policy should be "scrutinized" under the Act. The legislation does not require that he give any reason for his request and he offered nothing more.

[5] The request assumes that the lawyer's clients made application to the Society and were able to show that they were in sufficient financial distress that they qualified for legal aid such that there was then a referral and the Society was billed for the services rendered. None of this is public knowledge. It is, however, information that would necessarily be disclosed if Mr. Gaffney is given access to any records the Society has which reveal the costs of the two cases. Having been consulted (by the Commissioner), both of the lawyer's clients wish to have any dealings they may have had with the Society kept confidential. The Society considers itself bound accordingly in this as in all instances where it is consulted by persons seeking legal aid. Indeed, s.11(1) of the Legal Services Act, R.S.B.C. 1979, c. 227 provides:

Information disclosed by a client or an applicant for legal services to a director, employee or agent of the society or funded agency is privileged and shall be kept confidential in the same manner and to the same extent as if it had been disclosed to a solicitor pursuant to a solicitor and client relationship.

The Commissioner's Decision

[6] The Commissioner's decision was issued in December 1995. He predicated his determination that the access sought was to be given on a consideration of what he characterized as "the public's right to know" about the costs of legal aid criminal defence work. He said:

... the Act has created a new form of accountability for the legal profession, that is to the public, when public funds, derived from a public body like the Legal Services Society, are being disbursed for particular purposes. It is my duty to take this broad goal of greater openness into account in making my decisions.

There is indeed a public right to learn about the general costs of defending criminal defendants. The public should know more about how its tax money is being spent on legal aid. The goal of public scrutiny is to exercise some control of the costs of lawyers in a

publicly-funded scheme. One issue is how much detailed information needs to be released to satisfy this public desire to know. ... I must balance this in interpreting the applicability of sections 14 and 22 in this case.

[7] He then proceeded to address the submissions made for Mr. Gaffney and for the Society as well as for the several intervenors who appeared at the hearing (only some of which appear now). He first concluded that no solicitor-client privilege would be offended by granting the access sought and, having done so, proceeded to decide that such would not constitute an unreasonable invasion of the lawyer's clients' personal privacy.

[8] The wording of the legislation which creates the public's right of access to the Society's records is found in s.4 of the Act:

(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

Under Division 2, s.14 reads as follows:

The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[9] In concluding that s.14 of the Act (and s.8 of the Legal Services Act) had no application, the Commissioner recognized that the access that was sought would, if the records exist, disclose the nature and the terms of the lawyer's retainers: the clients had applied, qualified, and received legal aid. But he discounted any privilege attaching to the existence of a legal aid relationship. He said that no information that the clients may have given to the Society in order to qualify for legal aid had been requested and he took the view that information of that kind was not "at issue". He said he believed he could require that the access sought be given without "challenging the fundamental integrity of solicitor-client privilege". He appears to me to have seen the issue before him only in terms of what Mr. Gaffney had in fact requested -- billing amounts -- and effectively determined that the records sought should be made available to the reporter because there was nothing privileged about what the Society may have been billed. He said the Society had failed to discharge its burden under the Act (s.57) of proving that "the information requested was subject to solicitor-client privilege".

[10] With respect to this part of his decision, the Society contends that the Commissioner erred in law and that the standard of review is one of correctness. It is supported by the intervention of the Federation of Anti-Poverty Groups of this province, the British Columbia Branch of the

Canadian Bar Association, and the Law Society. Mr. Gaffney maintains that the Commissioner was correct in his conclusion that s.14 of the Act has no application to the access that is sought and that, as a specialized tribunal, deference is to be afforded to his view of the applicability of the section in any event. The Commissioner properly limits his role at this stage to his counsel's helpful clarification of some aspects of the record and submissions on the standard of review.

[11] The Society challenges the Commissioner's decision on the basis that the nature and terms of a legal retainer are always privileged and any billing records that may exist will, if shown, disclose the terms of the clients' retainers with the lawyer as being legal aid. Mr. Gaffney defends the decision by asserting that all that he seeks is access to records that cannot of themselves be privileged because they are not communications between solicitor and client containing legal advice. He maintains that no information to be derived from billing records that may exist is information that is subject to solicitor-client privilege.

Discussion

[12] On the way in which the case has been argued, I assume, without deciding, that any records of billings the Society may have are, as Mr. Gaffney contends, not privileged. But that said, it is my view that the protection s.14 affords extends to all information in the hands of the Society, not just to information on the face of a record requested. It appears to me that the section ensures that the protection of a fundamental right is in no way impaired by the extent of access to public records the legislation otherwise affords. The question to be asked must be whether granting access to a record requested will disclose any information, directly or indirectly, that is the subject of solicitor-client privilege.

[13] It is, of course, communications that are the subject of the privilege. The following statement in Wigmore (8 Wigmore, Evidence, 2292, p. 554 (McNaughton Rev. 1961)) is frequently cited for the conditions precedent to the confidentially the privilege affords to a lawyer's client:

> Where legal advice of any kind 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 by the legal adviser, except the protection be waived.

The communications need not contain legal advice to attract the privilege. It is enough if they relate to obtaining a lawyer's advice and are made in confidence.

[14] In Descoteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590, the Supreme Court of Canada determined conclusively that information contained in an application for legal aid made to the administrator of a legal aid scheme, who stands in the position of an agent as between lawyer and client, is subject to solicitor-client privilege, although, in that
case it was held that the privilege was defeated by fraud. Writing for the court, Lamer J. (now C.J.C.) said in conclusion (p. 618):

In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

[15] A legal retainer is defined in Halsbury's Laws of England, 4th ed., 1995, p. 83 as follows:

99. Meaning of Retainer The act of authorising or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment, and the rights and liabilities of the parties under that contract will depend partly on any terms which they have expressly agreed, partly on the terms which the law will infer or imply in the particular circumstances with regard to matters of which nothing has been expressly agreed, and partly on such statutory provisions as are applicable to the particular contract. ...

[16] The nature and the terms of a legal aid retainer appear to me to be unquestionably a communication between lawyer, client, and the Society as agent that occurs for the purpose of obtaining legal advice where, generally, there exists an expectation of confidence. Either directly or through the Society, the client instructs the lawyer to undertake the defence on the basis that he will be paid for his services in accordance with the legal aid tariff and the lawyer, in turn, accepts the arrangement. It is a communication that occurs within the framework of the solicitor-client relationship and is accordingly privileged.

[17] In their text Solicitor-Client Privilege in Canadian Law (Vancouver: Butterworths, 1993), R.D. Manes and M.P. Silver state the point directly (p. 82):

6:03 Although the existence of the solicitor-client relationship is not privileged, the terms of the relationship are privileged, including but not limited to the financial arrangements between the solicitor and client.

[18] If they exist, the records of billings sought would disclose the financial arrangements for the lawyer's defence of his clients. They would reveal the nature and the terms of his retainers. They would then reveal information that is subject to solicitor-client privilege. That must be the end of the inquiry. Access to the billing records cannot be required.

[19] I have been referred to statements that are at odds with this

analysis made in two cases where the privilege attaching to legal accounts was considered: Russell & DuMoulin Re, (1986), 9 B.C.L.R. (2d) 265 and Rieger v. Burgess (1989), 34 C.P.C. (2d) 154.

[20] In Russell, this court decided that solicitors' records supporting their account for services to a company that later went into receivership were producible to the receiver-manager on a taxation of the account as they would have been to the company. A comment was made that "privilege attaches only to communications in which legal advice is either sought or offered" and that it was "difficult to imagine how billing records could be communications of that sort" (p. 269). The comment was, however, unnecessary to the decision and the context in which it was made without further explanation renders it of little assistance here. The case was not one in which disclosure of the nature and terms of a retainer was being considered.

[21] Rieger is a decision of the Saskatchewan Court of Queen's Bench. There a plaintiff, who was being examined in aid of execution by a defendant seeking to recover amounts paid on a judgment that had been set aside, was asked whether his solicitors were retained on a contingent fee agreement. The court refused to sustain the objection taken to the question on the ground that what was sought was not communications dealing with the prosecution of the action or advice given in respect thereof but rather whether any money was owed to the plaintiff by his solicitors: "I fail to see how disclosure of the financial arrangements between the plaintiff and his solicitors offends [the principle of solicitor-client privilege]" (p. 157). In my view, the case cannot be reconciled with the Supreme Court's decision in Descoteaux. It appears, with respect, to have been wrongly decided.

[22] In my view, the Commissioner erred in his interpretation of the applicability of s.14 of the Act. He failed to recognize that giving Mr. Gaffney access to billing records would disclose privileged information: the nature and terms of the lawyer's retainers.

[23] The interpretation of s.14 of the Act is not a matter that falls within the purview of the Commissioner's expertise. This is not a case where substantial deference might be afforded if the Commissioner could be said to have adopted a reasonable interpretation of the legislation: Fletcher Challenge Canada Ltd v. British Columbia (Information and Privacy Commissioner) (1996), 20 B.C.L.R. (3d) 280 (S.C.). It is rather a case where the standard of review is, as contended by the Society, one of correctness: British Columbia (Minister of the Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner) (1995), 16 B.C.L.R. (3d) 64 (S.C.). The decision cannot be permitted to stand.

[24] It appears to me the Commissioner may have fallen into error because of the basis on which he predicated his decision. His suggestion that the interpretation of s.14 is a function of assessing how much information needs to be released to satisfy the public's desire for knowledge about the costs of defending those charged with criminal offences is not one that I can accept. And his statement that the Act has created a new form of accountability for the legal profession such that a goal of openness should to some extent have governed his decision in this case is not, with respect, at all supportable on my reading of the legislation.

[25] Section 14 is paramount to the provisions of the statute that prescribe the access to records that government agencies and other public bodies must afford. It was enacted to ensure that what would at common law be the subject of solicitor-client privilege remain privileged. There is absolutely no room for compromise. Privilege has not been watered-down any more than the accountability of the legal profession has been broadened to serve some greater openness in terms of public access.

[26] Certainly the purpose of the Act as a whole is to afford greater public access to information and the Commissioner is required to interpret the provisions of the statute in a manner that is consistent with its objectives. However, the question of whether information is the subject of solicitor-client privilege, and whether access to a record in the hands of a government agency will serve to disclose it, requires the same answer now as it did before the legislation was enacted. The objective of s.14 is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly.

Conclusion

[27] I conclude that s.14 of the Act precludes the access the Commissioner required the Society give to Mr. Gaffney. The Commissioner erred in the applicability of s.14. His decision rests on an error of law and it must be set aside.

[28] This conclusion renders unnecessary any consideration of the Commissioner's decision that the access he required would not result in the disclosure of personal information constituting an unreasonable invasion of the clients' privacy (s.22).

Disposition

[29] The Commissioner's decision of 22 December 1995 requiring the Society to give Mr. Gaffney access to records which may reveal the costs of the two criminal matters in question will be quashed.

"Lowry J."