OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-25

INQUIRY REGARDING TOWNSHIP OF LANGLEY RECORDS

David Loukidelis, Information and Privacy Commissioner
July 21, 2000

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Summary: Applicant sought copies of legal invoices and correspondence between Township employee and Township regarding Township's payment of employee's legal fees and requests for payment of such fees. Requested information subject to solicitor client privilege, which had not been waived by client employee. Personal information appropriately withheld from two records.

Key Words: Solicitor client privilege – waiver.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14 and 22.

Authorities Considered: B.C.: Order No. 328-1999.

Cases Considered: *Corporation of the District of North Vancouver* 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 (B.C.S.C.); *Stevens* v. *Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85 (Fed. C.A.).

1.0 INTRODUCTION

Early last year, the applicant in this inquiry made a request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Township of Langley ("Langley") for:

> ... copies of all records pertaining to legal expenses incurred by the Township in 1997 and 1998 on behalf of any elected official or employee pursuant to the Township's Indemnification Bylaw or Staff Support Policy.

As part of her request, the applicant sought records that include reference to the following:

> ... the name of the elected official or employee for whom the legal expense was incurred; the dates and amounts of each of the invoices for the legal expenses; the name of the law firm and the lawyer who provided the legal services; the nature of the claim being made against or by the employee or elected official; the name of any party making a claim against an employee or elected official; the court registry location and number along with the style of cause of any court proceedings related to any claim; the specific Township bylaw or policy relied upon to authorize the payment of legal fees by the Township at the time the request for indemnification or financial assistance for legal fees was received; correspondence pertaining to the request by the elected official or employee to be reimbursed for legal expenses pursuant to the Township's Indemnification Bylaw or Staff Support Policy.

In response, on February 15, 1999, Langley provided the applicant with copies of reports to Langley's Council which identified legal expenses "paid under the Township's Indemnification Policy for Staff and Council". Langley also provided copies of a relevant bylaw and relevant portions of Langley's policy manual regarding its Staff Support Policy. It withheld the dates and amounts of invoices from law firms, the names of potential litigants (in cases where a court action had not been commenced) and "copies of correspondence pertaining to your request", all under s. 14 of the Act.

The applicant then sought a review, under s. 52 of the Act, of Langley's decision. As a result of mediation by this Office, in a letter dated September 23, 1999, Langley disclosed further material to the applicant, namely portions of various letters and other communications "pertaining to requests [by Township employees] for indemnity" under Langley's indemnification bylaw and policy. Three letters and one e-mail were disclosed in part. These communications were severed under ss. 14 and 22 of the Act, "so as not to identify the person seeking the services". Langley also disclosed the dates and amounts of 24 law firm invoices. Since the applicant's request for review was not completely settled in mediation, I held a written inquiry under s. 56 of the Act.

2.0 ISSUES

The issues to be considered here are as follows:

1. Was Langley authorized by s. 14 of the Act to refuse to disclose information to the applicant?

2. Was Langley required by s. 22 of the Act to refuse to disclose personal information to the applicant?

Under s. 57(1) of the Act, Langley bears the burden of proof on the s. 14 issue, while the applicant bears the burden of proof on the s. 22(1) issue by virtue of s. 57(2) of the Act.

3.0 DISCUSSION

3.1 Procedural Issues – Before dealing with the merits of this case, I will address two procedural issues raised by Langley.

Scope of the Inquiry

The Notice of Written Inquiry issued by this Office said that this inquiry would consider

> … the application by the Township of Langley of sections 14 and 22 of the Act to records relating to the legal expenses incurred by the Township of Langley in 1997 and 1998 on behalf of the Township's … [a specific employee, named by position (hereinafter "employee")] pursuant to the Township's Indemnification Bylaw or Staff Support Policy.

The Notice also said the following:

> The records in dispute include legal invoices and correspondence between the … [employee] and the Township's Municipal Clerk concerning the … [employee's] request for coverage under the aforementioned policy.

Langley says the applicant has attempted, in her initial submission in this inquiry, to expand the scope of the inquiry beyond the question of payment of the employee's legal expenses and records associated with that. It says the applicant has tried to address payment of legal expenses for other individuals, which is outside the scope of the inquiry as set out above. Langley says that if the inquiry is to be expanded, it should be given a further opportunity to make submissions, as should the individuals whose interests would be engaged.

It is true the applicant's request for review, as set out in her letters to this Office dated February 5 and October 4, 1999, was initially not limited to the employee's receipt of assistance with his legal expenses. The Notice of Written Inquiry, however, clearly restricts the scope of the inquiry to Langley's decision in respect of the employee only. It is clear from the Portfolio Officer's Fact Report that the restricted scope of the inquiry stems from the applicant's agreement to so limit her request for review. The applicant's initial submission also alludes to this. Despite the applicant's attempt here to address other records, the scope of this inquiry is as set out in the Notice of Written Inquiry, *i.e.*, it deals with records relating to legal expenses incurred by Langley on behalf of the employee only and not others.

Applicant's Alleged Failure To Make Submissions

Counsel for Langley argues that the applicant's request for review respecting Langley's refusal to disclose records of legal expenses incurred on behalf of the employee should be "dismissed as abandoned" because the applicant "made no submissions" on that point in her initial submission in this inquiry. Langley argues, in the alternative, that because the applicant failed to address this issue in her initial submission, she should not be permitted

to do so in her reply submission. Langley says that if the applicant is permitted to address the issue in her reply, the result would be procedural unfairness to Langley, since it would be denied "an opportunity to respond to the Applicant's case".

While it is true the applicant's initial submission addresses records involving individuals other than Langley's employee, she does mention records pertaining to Langley's employee, which she notes is "now the focus of the request for a review". Further, paragraphs 7 and 8 of the applicant's initial submission address the substantive issues generally, albeit in relation to unspecified records. The applicant's reply submission in substance only addresses the allegation, made in Langley's initial submission, that the applicant is motivated by a long-standing adversarial relationship between the applicant and Langley's employee.

I do not agree that the applicant should be taken as having abandoned her request for review as it relates to records about payment of the employee's legal expenses. That issue is addressed sufficiently in the applicant's initial submission and – bearing in mind that the scope of the request for review as set out in the Notice of Written Inquiry relates to the employee – I am not prepared to find that the applicant has implicitly (or otherwise) abandoned that issue. Moreover, I see no procedural unfairness to Langley in the circumstances. Langley has, in my view, had a reasonable opportunity to be heard on the relevant issues, including in response to the various points raised by the applicant.

3.2 Are the Records Covered by Solicitor Client Privilege? – In response to the applicant's requests, Langley ultimately disclosed the date and total amount of each law firm invoice that it paid under its indemnification bylaw and policy during 1997 and 1998. In order to preserve solicitor client privilege, however, Langley did not identify any lawyer or firm who rendered an invoice or any Langley employee on whose behalf legal services had been rendered under the invoice.

Langley says all of these records are protected by solicitor client privilege under s. 14 of the Act. That section authorizes a public body such as Langley to refuse to disclose to an applicant "information that is subject to solicitor client privilege". There is no doubt that s. 14 incorporates the common law rules on solicitor client privilege into the Act. This inquiry is concerned with the first kind of privilege, which protects confidential communications between a lawyer and client for the purpose of giving or receiving legal advice.

It is clear from British Columbia court decisions dealing with s. 14 of the Act that invoices, or accounts, rendered by a lawyer to his or her client are privileged and need not be disclosed in response to an access request under the Act unless the client has waived the privilege. As I acknowledged in Order No. 328-1999, the courts have made this abundantly clear on a number of occasions. See, for example, *Corporation of the District of North Vancouver* v. *British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134 (B.C.S.C.) and *Legal Services Society* v. *British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.). See, also, *Stevens* v. *Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85 (Fed. C.A.).

Langley says its employee was the client of lawyers who represented or advised him personally in various matters, albeit at Langley's expense. Submissions by the employee's counsel in this inquiry support this contention and the disputed records themselves provide support for it. I find that the employee personally was the client in a solicitor client relationship to which the disputed law firm invoices and communications relate. In the absence of waiver by Langley's employee of solicitor client privilege over the disputed records – an issue I address below – there is no doubt, in light of the above authorities, that information in these records is privileged and may be withheld by Langley under s. 14. The cases referred to above permit no other conclusion.

The applicant has argued that the public interest favours disclosure of the privileged information despite the application of s. 14. Once solicitor client privilege has been established for the purposes of s. 14, circumstances favouring disclosure in the public interest cannot dictate a different result unless the public interest override in s. 25(1) of the Act is triggered. The applicant has not argued that s. 25(1) operates here and, in any case, I would be inclined to find it does not apply here.

The applicant also argues that the employee has waived privilege by providing copies of the various invoices to Langley. Langley counters this by saying there is no evidence the employee has, knowing of the existence of the privilege, demonstrated a clear intention to waive it. Langley says both these elements must be established before a waiver will be found to have occurred. To the contrary, Langley argues, the employee had no choice but to deliver these invoices to Langley. Both s. 5(a) of Langley's *Indemnification Against Proceedings Bylaw* and s. 4.4 of its Staff Support Policy 03-202 *require* Langley employees to submit their legal accounts for review by Langley, as a condition of approval for payment of those accounts.

In these circumstances, Langley says, it is not possible to conclude – based on the necessary objective consideration of the client's conduct – that the employee intended to waive solicitor client privilege. I have no hesitation in concluding, in the circumstances, that there is no evidence of an intention on the part of the employee to waive solicitor client privilege. The employee's actions cannot be characterized as demonstrating, on an objective basis, an intention to waive privilege.

Given my finding on the waiver issue, I need not deal with Langley's alternative submission that the employee and Langley share the privilege. Given Langley's position on disclosure under s. 14 in this case, I also need not consider here the relationship – in cases where a public body has custody of records that remain privileged at the instance of a third party who is the client – between that client's common law right not to waive privilege and the apparently discretionary nature of s. 14.

3.3 Personal Privacy – Section 22(1) requires a public body to refuse to disclose personal information if disclosure would unreasonably invade the personal privacy of an individual. Some personal information in one of the disputed records, a September 2, 1998 e-mail, was withheld by Langley under s. 22.

Langley now says the s. 22 issue – including the s. 22(4)(j) issue raised by the applicant – is moot as it relates to the employee. It says this is so because the applicant "knows which of the redacted records pertain" to the employee, as is demonstrated, Langley says, by paragraph 4 of her initial submission. Langley says the applicant has deduced that information from a comparison of information Langley disclosed in its February 15 and September 23, 1999 letters.

I do not agree that the s. 22 issue is moot as regards the September 2, 1998 e-mail. Part of that e-mail, in which the employee requested financial assistance for legal expenses, was disclosed by Langley. Langley withheld several paragraphs from that e-mail on the basis of s. 22(3) of the Act. Having reviewed the record, and the circumstances here, I am satisfied that the information severed from that record was appropriately withheld by Langley under s. 22(1) of the Act. I also conclude that the portions of Langley's September 3, 1998 letter to the employee's lawyer severed by Langley are appropriately withheld under s. 22(1) of the Act.

4.0 CONCLUSION

For the reasons given above, under s. 58(2)(b) of the Act I confirm Langley's decision to refuse to disclose to the applicant information it withheld under s. 14. For the reasons given above, under s. 58(2)(c) of the Act I require Langley to refuse access to the information it severed from the September 2, 1998 e-mail and September 3, 1998 letter described above.

July 21, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia