Order 01-09

VANCOUVER POLICE BOARD

David Loukidelis, Information and Privacy Commissioner
March 16, 2001

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Summary: Applicant is entitled to access to account for services rendered by a lawyer to the Board pursuant to an appointment to investigate and report under the Police (Discipline) Regulation.

Key Words: solicitor client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 14; Police (Discipline) Regulation, B.C. Reg. 330/75.

Authorities Considered: B.C.: Order No. 328-1999, [1999] B.C.I.P.C.D. No. 41; Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44.

Cases Considered: *R.* v. *Lee* (5 May 1994), Vancouver 65291 (B.C. Prov. Ct.); *R.* v. *Mudaliar* (30 May 2000) Vancouver CC990645 (B.C.S.C.); *Gower* v. *Tolko Manitoba Inc.* (1999), 141 Man. R. (2d) 245 (Q.B.), appeal dismissed, [2001] M.J. No. 39 (C.A.).

1.0 INTRODUCTION

[1] On April 26, 2000, the applicant made an access request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Vancouver Police Board ("Board") for access to records relating to the billings of Kenneth Ball ("KB") to the Board

"for his work in respect of my citizen's complaints under the *Police Act*". The applicant specified that he wished access to "records showing the time, description and cost of his services." KB is a practicing lawyer and partner in a Vancouver law firm. He responded on behalf of the Board in a letter dated May 15, 2000. The letter stated that KB had been retained

...from time to time to provide legal advice and related legal representation and legal services to the Vancouver Police Board, which advice, representation and services include some matters relating to complaints made by you under the *Police Act* of British Columbia.

[2] The Board declined to disclose any records - including those showing time spent or the description and cost of services - on the basis of solicitor client privilege under s. 14 of the Act. The Board also said that it does not "intend to waive solicitor/client privilege with respect to such records".

[3] Dissatisfied with this response, the applicant requested a review of the Board's decision by a letter dated May 26, 2000. Since the matter did not settle in mediation by this Office, I held a written inquiry under s. 56 of the Act.

2.0 ISSUE

[4] The only issue in this inquiry is whether the Board is authorized by s. 14 of the Act to refuse access to requested records. Under s. 57(1) of the Act, the Board bears the burden of establishing that s. 14 applies.

3.0 DISCUSSION

[5] **3.1 Applicant's Procedural Objections and Allegations** - The applicant made a procedural objection, *i.e.*, that the Board had failed to make its initial submission by the deadline set by this Office in the Notice of Written Inquiry issued to the parties. Without elaboration, much less supporting material, he asserted that the late submission "enormously prejudiced" him. The delay in filing the Board's initial submission was minimal and its mistake was innocent. Absent any indication to the contrary from the applicant, I fail to see how the slight delay had any impact on his ability to make his reply.

[6] Not for the first time, the applicant also made a number of serious allegations of impropriety against staff of this Office. He also levelled similar allegations against KB. None of the allegations is relevant to the issues before me. The applicant has not, in any case, provided the slightest substantiation for a single one of them.

[7] **3.2 Background to This Inquiry** - On June 2, 1996, the applicant made a complaint under the *Police Act* against the then Chief Constable of the Vancouver Police Department. In response to that complaint, the then Chair of the Board, the Mayor of the City of Vancouver, wrote to KB, on July 8, 1996, in the following terms:

Re: Complaint against the Chief Constable

Pursuant to s. 50(2)(b)(ii) of the *B.C. Police Act* and in my capacity as Chair of the

Vancouver Police Board, I wish to retain you as legal counsel to investigate a complaint against the Chief Constable of the Vancouver Police Department. The complaint was laid by ... [the applicant] on June 2, 1996, and a copy of the letter is attached for your reference.

I understand Terrance Bland, Corporation Counsel, has already spoken with you on this matter and that you have agreed to assist the Board, as provided for within Part 2 of the *Act*. I would appreciate you contacting Mr. Bland with regards to any financial issues and payment for services... .

[8] It is clear from other material before me that the statutory reference in the letter was intended to be to s. 50(2)(b)(ii) of the Police (Discipline) Regulation, B.C. Reg. 330/75, a regulation made under the *Police Act*. That regulation, although it was in force at the time of the events relevant to this inquiry, was repealed on July 1, 1998, when the *Police Act* was substantially amended.

[9] KB undertook his assignment and produced a four-page report, dated November 27, 1996. That report was written on letterhead of the law firm of which KB is a partner and was addressed to the attention of the Mayor, at the Board. It was provided by the Board to the applicant under cover of a letter from the Chair, also dated November 27, 1996, which stated that "after giving due consideration to the attached report from Kenneth Ball, Counsel to the Board, that pursuant to Section 50(2)(d) of the Police (Discipline) Regulation, no further action will be taken concerning your alleged complaint against the Chief Constable."

[10] KB's report began with a description of his assignment and the steps he took in order to carry it out:

The writer was engaged pursuant to the provisions of the Police (Discipline) Regulation, Section 50(2)(b)(ii) of the Regulation to investigate certain matters raised by ... [the applicant] which were alleged to involve the Chief Constable of the Vancouver Police Department in one or more discipline defaults pursuant to the *Discipline Code*. Initially, when the matters were raised, the correspondence from ... [the applicant], directed to the Chair of the Vancouver Police Board did not include sufficient or any particulars which would have allowed an investigation to proceed. In order to clarify the matters raised by ... [the applicant], the writer requested that ... [the applicant] provide further and better particulars of theses issues. On the 20th day of September 1996, at a meeting between the writer and ... [the applicant] in the writer's office, which meeting was recorded on tape, ... [the applicant] provided some information which permitted the writer to form an opinion contained in this letter. While we do not propose to undertake the additional expense of transcribing this tape, we will maintain the tape in our file.

... [The applicant] also provided the writer a document comprised of some 25 pages detailing the particulars which were requested. Following receipt of the particulars received from ... [the applicant], we also reviewed the transcript of the interview of ... [the applicant] conducted by Sgt. Barnard and Sgt. Mills on 1996.01.08 together with the large volume of applicable files of the Vancouver Police Department. The extent of the available statements and related documents was so vast and complete that in the opinion of the writer it was not

necessary nor advisable to conduct new or further interviews with the many police members referred to in the various aspects of the files.

[11] The report then set out an analysis of the meaning of the word "complaint", which stated in part:
...The particular matters raised by the ... [applicant] do not, in the writer's opinion, fall within the definition of the word **"complaint"** as defined in the *Police Act* and it is therefore the writer's opinion that no further proceeding should be taken with respect to the matters raised by ... [the applicant]. The reasons for that statement are as follows.

The conduct of the Chief Constable which ... [the applicant] raises is said by him to arise out of the conduct of other police officers. There is no allegation of direct conduct or contact between the Chief Constable of Vancouver and ... [the applicant]. ... [The applicant] confirmed in his meeting with the writer noted above, that he has never met or spoken to the Chief Constable. In order to find any police officer guilty of a breach of the Discipline Code, there must be both an act in violation of the Discipline [*sic*] and the mental element of intention to commit such act. The word "act" as used here also imports the elements of negligence contained in the Neglect of Duty provision of the Discipline Code.

[12] The report continued with an examination of each of the allegations the applicant had made against the Chief Constable. It concluded as follows on p. 4:
Based on all the foregoing, the writer is of the view that the material raised does not constitute a **"complaint"** as that term is defined within the *Police Act* or the regulations thereto and that further no disciplinary default attributable to Chief Constable Canuel is even disclosed to the extent that there could be further investigation of it. It is the writer's opinion and recommendation that no further step be taken with respect to these allegations insofar as they relate to Chief Constable Canuel, pursuant to Regulation 11(2) of the Police (Discipline) Regulation.

All of which is respectfully submitted at the City of Vancouver, this 27th day of November, 1996.

[13] As already noted, on the same date that KB's report was issued, the Mayor wrote to the applicant informing him that no further action would be taken concerning his "alleged" complaint against the Chief Constable.

[14] **3.3 Description of Responsive Record** - For the purposes of this inquiry, I required the Board to provide for my examination a copy of any record or records that responded to the applicant's access request. Under cover of a letter to the Office's Registrar of Inquiries dated January 25, 2001, KB produced a single responsive record. It is an account on letterhead of KB's law firm addressed to Mr. Bland at the City of Vancouver Legal Department and its caption refers to the Chief Constable. KB's letter to me of January 25, 2001 says the following:

...The enclosed account was rendered by a law firm and in accordance with a unique requirement of the provincial sales tax applied to accounts rendered by lawyers, provincial

sales tax was charged on the account. If the writer had not been acting as a lawyer, he would not have charged provincial sales tax.

[15] This is apparently a reference to the fact that the *Social Services Tax Act* requires provincial sales tax to be charged on "legal services" and to the fact that the Board was charged this kind of tax in relation to KB's services.

[16] **3.4 Relevance of Order No. 331-1999** - This is not the first time the status of KB's work under s. 50(2)(b)(ii) of the Police (Discipline) Regulation has come before me. In Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44, I found that the same report by KB could not be withheld by the Board under s. 14 of the Act. The same applicant, public body and complaint by the applicant against the Chief Constable were involved in that case. I am now asked to determine whether the KB's account for his work in preparing that report can be withheld by the Board under s. 14. In this light, it is useful for present purposes to quote at some length from my findings, concerning the KB report, in Order No. 331-1999:

The question here is whether pp. 50-60 of the initial responsive records package - records relating to the Board's engagement of a lawyer as an investigator under s. 50(2)(b)(ii) of the Regulation - are privileged as solicitor client communications and thus excepted from disclosure by s. 14 of the Act. The Board did not rely at any stage in this inquiry upon litigation privilege or on any of the Act's other exceptions, such as s. 15, in relation to these records.

Section 50(2)(b)(ii) is found in Part 2 of the Regulation, which deals with complaints against chief constables and deputy chief constables. (Complaints against other police officers are dealt with in Part 1 of the Regulation. Part 1 investigations are carried out by "investigating officers", who are police officers appointed under ss. 8 or 9 of the Regulation.) Section 50(2)(a) says that an alleged disciplinary default by a chief constable or a deputy chief constable "shall be reported to the chairman of the [police] board". Section 50(2)(b) reads as follows:

> (b) the chairman of the board shall appoint one of the following to investigate the matter:
>
> (i) a chief constable from another municipal force;
>
> (ii) a counsel;
>
> (iii) an investigator attached to or appointed by the Ministry of Attorney General.

Section 1 of the Regulation defines the term "counsel" as "a member in good standing with the Law Society of British Columbia".

Section 50(2)(c) says the investigation "shall be carried out in accordance with sections 10 and 11". Section 10 requires the investigator to obtain written statements from all witnesses and to give the police officer about whom the complaint was made an opportunity to give a written reply to the allegation. Section 11(1) says the investigator must make a completed

report on the investigation. The report must, under s. 11(2), make a recommendation on how the matter should be disposed of. In the case of Part 2 investigations, s. 50(2)(d) says the investigation report must be made to the chairman of the police board. Section 50(2)(f) provides that, if the decision is made to lay charges, "the case shall be presented by counsel or agent". The same section provides that the officer charged may "be represented by counsel".

In the absence of explanatory evidence from the Board as to the nature of the relationship between the Board and the investigator engaged by it, or as to the nature and purpose of the communications between them, I have had to determine - from the *Police Act* and the Regulation, from the records themselves and from other evidence before me - whether these records are privileged solicitor client communications.

Solicitor client privilege attaches only if certain conditions are met. To be privileged, a communication must be:

1. between a client and his or her lawyer;
2. confidential; and
3. for the purpose of obtaining or giving legal advice.

With respect to the first of these conditions, the records in issue confirm that they relate to the Board's retention of a lawyer as counsel, pursuant to s. 50(2)(b)(ii) of the Regulation, to investigate a complaint made by the applicant. The records are not marked confidential and suggest no relationship between the Board and the lawyer other than the engagement under s. 50(2)(b)(ii).

In my view, the fact that someone who is appointed as a statutory investigator also happens to be a lawyer is not sufficient to establish that solicitor client privilege attaches to communications between that person and those who appointed him or her. I have concluded, therefore, that the Board has failed to establish that it was in a solicitor-client relationship with the lawyer who was retained as an investigator under s. 50(2)(b)(ii) of the Regulation. On that ground alone, the Board's claim of solicitor client privilege for pp. 50 through 60 of the records fails.

Even if one assumes that the Board was in a solicitor-client relationship with the investigating lawyer, I find that the Board has not established that the records in question were confidential communications for the purpose of giving or seeking legal advice within such a relationship. The courts have, in a number of cases, held that, even if a solicitor and client relationship exists, the lawyer must be acting as a lawyer and must be providing legal advice before the communication in question can be privileged.

For example, in *Northwest Mettech Corp.* v. *Metcon Services Ltd.*, [1996] B.C.J. No. 1915, Master Joyce ruled that communications from a lawyer to his client were not privileged because the lawyer, who was also a patent agent, was acting as a patent agent rather than as a lawyer with respect to those communications. A solicitor-client relationship existed between the lawyer and his client, but that was not enough. Master Joyce cited both

Canadian and U.S. authorities for the proposition that communications between a lawyer and his or her client, in order to be privileged, must concern legal advice or representation. See, for example, the United States District Court decision in *Hercules Incorporated* v. *Exxon Corporation* (1977) 434 Fed. Supp. 136 (at p. 147):

If the primary purpose of a communication is to solicit or render advice on non-legal matters, the communication is not within the scope of the attorney-client privilege. Only if the attorney is 'acting as a lawyer' - giving advice with respect to the legal implications of a proposed course of conduct - may the privilege be properly invoked. In addition, if a communication is made primarily for the purpose of soliciting legal advice, an incidental request for business advice does not vitiate the attorney-client privilege.

It appears that an appeal from the decision of Master Joyce was dismissed by Smith J. of the British Columbia Supreme Court. (This is alluded to in the judgment of Thackray J., on another aspect of the same case, in *Northwest Mettech Corp.* v. *Metcon Services Ltd.*, [1997] B.C.J. No. 2734.)

It might be argued that *Northwest Mettech* involved a special case, namely individuals who are both lawyers and patent agents and are assisting a client in obtaining or in otherwise dealing with a patent. I do not agree. In my view, the reasoning and result in *Northwest Mettech* are simply consistent with other cases, such as *Descoteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), which require the disputed communication to be for the purpose of giving or seeking legal advice before it will be privileged.

...

Returning to the case at hand, s. 50(2)(b) of the Regulation contemplates the appointment of an investigator who may or may not be a lawyer. The mere fact that the investigator here happened to be a lawyer - and that the Regulation explicitly permitted the Board to choose a lawyer as investigator - does not mean the lawyer was acting as a lawyer when he conducted an investigation, created an investigation report as required by the Regulation, or delivered it to the Board. Even if a solicitor and client relationship had existed between the Board and the investigator, it is clear from the Regulation that the investigation report, and related communications, were not for the purpose of giving or seeking legal advice within that relationship. The Regulation stipulates what the investigator must do, in terms of fact-finding, and requires that the report include the investigator's findings and recommendations. Thus the components of an investigation and investigation report have a statutory aspect and function under the Regulation which are separate and distinct from legal advice provided by a lawyer, to his or her client, as to the legal implications of a proposed course of conduct or a state of affairs affecting the client's interests.

It also would be anomalous, I think, if the investigation report of a lawyer retained as an investigator under s. 50(2)(b)(ii) were privileged, but the investigation reports of investigators hired under either s. 50(2)(b)(i) or (iii) were not. Read as a whole, nothing in the Regulation, including Part 2, supports such a distinction. Nothing in the Regulation suggests that an investigation report generated by an investigation under Part 1 of the Regulation would be privileged in any sense. To my mind, s. 50(2)(b) of the Regulation permits a police board to choose, as an investigator, someone who also happens to be a practicing lawyer. But that does not mean that an investigation report prepared by such an

investigator meets the conditions for solicitor client privilege.

Finally, the evidence before me does not establish the necessary element of confidentiality respecting the investigator's report and the communications related to it. Nor do I think that the element of confidentiality is established by the Regulation itself. Section 50 of the Regulation does not stipulate whether such investigation reports are confidential, much less privileged. Section 50(2) says that the principles in Part 1 apply to investigations carried out under s. 50. Section 13(3), found in Part 1 of the Regulation, provides that an accused police officer is not entitled to a copy of an investigation report or recommendations. Sections 17(1), 39(3) and 42(1) of the Regulation provide that internal discipline hearings and internal member appeals from those hearings are not open the public. However, if an internal discipline matter is also the subject of a public complaint - as appears to be the case here - the police board (or the police commission) considers the matter in a broader sense and inquiries conducted for that purpose are open to the public (see ss. 61 and 65(5) of the Regulation).

My finding that solicitor client privilege under s. 14 of the Act does not apply to pp. 50 through 60 of the initial responsive records package can be summarized as follows:

1. the Board has not established that a solicitor-client relationship existed between it and the lawyer appointed as a statutory investigator under s. 50(2)(b)(ii) of the Regulation;
2. in any case, the investigator appointed under s. 50(2)(b)(ii) was not acting in his capacity as a lawyer providing legal advice; and
3. there is no basis for concluding that the disputed records were intended to be confidential.

[17] I should note at this point that, although the Board is represented by KB in this inquiry, it was represented by another lawyer in the inquiry for Order No. 331-1999. This may explain why the Board's now seeks to clarify its position on the status of KB's report: Clearly the counsel involved [in Order No. 331-1999] was unaware that the report of the investigation of the complaint referred to in those pages, that is pages 50-63, was provided in the first instance to this individual [the applicant] by letter from the chair of the Vancouver Police Board dated November 27, 1996. The present applicant acknowledges receipt of the report in his letter dated December 13, 1996. Clearly, given that the report was delivered to the applicant, no privilege whatsoever can be claimed with respect to the contents of the report. If privilege was claimed with respect to that document, it should not have been in the unique circumstances of this case. There are a number of decisions of the Provincial Courts and the Supreme Court of British Columbia where privilege has been claimed with respect to the contents of investigative reports in circumstances where those reports were not prepared by lawyers and notwithstanding that distinction, the reports were still found to be privileged. In particular, we attach hereto the cases of *R.* v. *Lee* and *R.* v. *Mudaliar*.

[18] The following submission concerning the disputed account flows from the passage just quoted:

Further, the suggestion that because a document prepared by a lawyer acting as legal

counsel may not be subject to privilege in no way provides authority for the proposition that bills or other records relating to that matter prepared by a client and which billings are prepared by a lawyer and delivered to a client will not remain the subject of long standing traditions of privilege. Every day in the practice of law documents are prepared by lawyers and delivered to other parties for a variety of reasons where there is no privilege attaching to the documents involved, however, the lawyer's retainer and the conditions of his employment as well as the details of the work performed which are revealed in accounts remain the subject of privilege ... .

[19] **3.5 Solicitor Client Privilege** - As I observed in Order No. 328-1999, [1999] B.C.I.P.C.D. No. 41, court decisions have established that the amount of a legal account is subject to solicitor client privilege and therefore may be withheld under s. 14 of the Act. The applicant argues, however, that it would be anomalous if KB's account in relation to his role under s. 50(2)(b)(ii) of the Police (Discipline) Regulation is privileged, when the investigation report itself is not, as I found in Order No. 331-1999.

[20] The Board in this inquiry argues that KB's report is a "legal opinion" and is therefore privileged under s. 14. The following passage appears on p. 2 of KB's January 25, 2001, letter to the Registrar of Inquiries:

This letter [the investigation report described in Order No. 331-1999] is a legal opinion to the effect that the necessary legal threshold to the conduct of an investigation had not been reached based only on the allegations made by ... [the applicant]. Beyond the determination, no "investigation" of a complaint was conducted beyond the determination [*sic*]. This legal opinion was rendered in the writer's capacity as legal counsel to the City of Vancouver, its Police Department and the Vancouver Police Board. The enclosed account [the record in issue here] was rendered by a law firm and in accordance with a unique requirement of provincial sales tax law applied to accounts rendered by lawyers, provincial sales tax was charged on the account. If the writer had not been acting as a lawyer, he would not have charged sales tax.

It is our clear submission that based on the facts of this particular case, and the applicable law, this legal account is the subject of solicitor and client privilege.

[21] I have carefully considered the Board's arguments and the contents of the disputed account and am not persuaded that the s. 14 claim is sustainable. The Board's arguments in this inquiry do not overcome my reasoning in Order No. 331-1999. Nor are its submissions otherwise persuasive on the s. 14 issue. The reasons for this conclusion follow.

[22] In Order No. 331-1999, I found that KB was engaged by the Board under s. 50(2)(b)(ii) of the Police (Discipline) Regulation to investigate the applicant's complaint against the Chief Constable and that solicitor client privilege did not apply to the resulting report or to other records in dispute in that case. The Board argues here that KB's report was a legal opinion and that the contents of the account for services rendered in relation to KB's work pursuant to his statutory appointment support this view.

[23] First, KB's report sets out the results of his inquiries as an investigator under s.

50(2)(b)(ii) of the Police (Discipline) Regulation. The fact that he used the word "opinion" in his report and recommended that the matter not proceed - for what the Board describes here as jurisdictional reasons - does not define or transform the nature of his assignment. It does not follow from those features of the report that it was a legal opinion or that KB's appointment as an investigator under s. 50(2)(b)(ii) of the Police (Discipline) Regulation created a confidential solicitor-client relationship. By analogy, if a practicing lawyer (or, for that matter, a sitting or retired judge) is appointed to conduct a commission of inquiry under the *Inquiry Act*, a confidential solicitor-client relationship is not created and the opinions or recommendations expressed by the commissioner in the resulting report are not legal advice.

[24] Nor do the contents of the disputed account for services alter this conclusion. The fact that KB's firm charged provincial sales tax at the time does not establish that the relationship between him and the Board was a solicitor-client relationship. That fact merely shows that KB's firm charged the Board a tax referable to the delivery of "legal services" under the *Social Services Tax Act*, without that meaning it was correct in doing so or proving that his conduct of the statutory investigation assignment constituted the provision of legal advice in relation to a confidential solicitor-client relationship. The other contents of the account itself, which are terse and to the point, do not displace my conclusion on this point.

[25] The Board also relies here on two British Columbia criminal cases that it says stand for the proposition that privilege attaches to an investigation report of this nature. It cites *R.* v. *Lee* (5 May 1994), Vancouver 65291 (B.C. Prov. Ct.) and *R.* v. *Mudaliar* (30 May 2000), Vancouver CC990645 (B.C.S.C.). The Board also distinguishes Order 00-08 and the Manitoba case of *Gower* v. *Tolko Manitoba Inc.* (1999), 141 Man. R. (2d) 245 (Q.B.), appeal dismissed, [2001] M.J. No. 39 (C.A.), on the basis that they involved "investigations, statutory or otherwise", conducted by lawyers. In distinguishing Order 00-08 and *Gower*, it says that, in this case,

... upon a review of the allegations made, a legal opinion was presented that no investigation should proceed in the absence of a "complaint" as defined by the *Police Act*. There was no investigation thereafter.

[26] The first criminal case relied on by the Board, *R.* v. *Lee*, is an oral ruling by Stromberg-Stein, Prov. Ct. J. (as she then was) on a pre-trial application in a criminal matter. The accused had been charged with dangerous driving. Certain documents in a police internal investigation file were in issue, namely statements by two police witnesses and the report of an internal investigating police officer. The judge found that the witness statements had to be produced, but that she would not, for the following reasons (at p. 2), order production of the investigation report:

... As the internal investigator he was a fact-finder. He obtained statements from witnesses. These he summarized in his 95 page report. Defence counsel has all but two of these witness statements. The two that he doesn't have are the statements which he seeks production of today. The balance of Sergeant Cooper's report, some six pages, details the officer's findings of fact and recommendations. *None of this is relevant to this proceeding.* Counsel for the City assures me that Defence Counsel has all the statements of witnesses referred to in Sergeant Cooper's report. *Sergeant Cooper's report is protected by privilege; the Police Act Regulation 13(3). The report of the investigating officer, that being Sergeant Cooper in this*

case, is a confidential document for the exclusive use of the Chief Constable. Not even the involved police members are entitled to its production. I would not order production of this report as I have said. [emphasis added]

[27] It is apparent from this passage that the reason the internal police investigation report was not ordered to be produced was its irrelevance. The judge's other remarks concerning privilege did not relate to any claim of solicitor client privilege. They clearly related to s. 13(3) of the Police (Discipline) Regulation, which at the time provided that an "accused member shall not be entitled to a copy of the report or the recommendations of the investigating officer." Even if this provision had been intended to create a bar against disclosure to individuals other than an "accused member" - which, in my view, is not suggested by the language used - the Police (Discipline) Regulation was repealed effective July 1, 1998. Moreover, under s. 79 of the Act, the rights of access under the Act in any case prevail over a conflicting statutory confidentiality provision, unless there is an explicit override of the Act in the other statute. No such override existed in respect of s. 13(3) of the Police (Discipline) Regulation. I have no hesitation in concluding that *R.* v. *Lee* does not resolve the matter before me.

[28] The decision in *R.* v. *Mudaliar* is also an oral ruling, by Kirkpatrick J., on a pre-trial application in a criminal matter. It was handed down in 2000, after I issued Order No. 331-1999. The accused in that case - who was charged with drug offences - sought disclosure of the details of an internal police investigation into a complaint against a police officer, including reports or other documents prepared by investigators. It was argued that the internal police investigation report was privileged or that, in any event, its disclosure should not be ordered because the accused had not established a factual nexus between the report and the charges he faced. Kirkpatrick J. concluded that the accused had failed to establish that the documents were relevant. She explicitly stated, at para. 16, that it was therefore not necessary to address the issue of privilege. She went on to make the following observations, in passing, at para. 17:

However, if I am wrong and the documents sought to be produced are relevant, I would find that they are not protected by privilege. I make this finding based on my reading of s. 57 of the *Police Act*, and in particular ss. 57(4) and (5), which make it plain that either the complainant or the respondent may apply for disclosure of all or part of the information severed under s. 57(1) from the summary of the investigation report. Those provisions clearly contemplate an open process which favours disclosure over privilege, except if disclosure would be, in the [Police Complaint] Commissioner's consideration, unnecessary or inappropriate. It is a decidedly different case than the previous regime considered by the court in *R.* v. *Lee*, [1994] B.C.J. No. 1590 and followed in *R.* v. *Thibeault*, [1997] B.C.J. No. 3080.

[29] *R.* v. *Mudaliar* does not advance the Board's position in this inquiry. In my view, the above passage from *Mudaliar* speaks to the orientation of the *Police Act* toward disclosure of such material - at least after the 1998 amendments referred to above - and actually undercuts the Board's s. 14 claim. It does so because it suggests there is no expectation of confidentiality with respect to investigation reports. This statutory orientation toward disclosure of such material is confirmed in this case by the fact that the Board, when it received KB's report, promptly provided it to the applicant.

[30] It seems to me that the Board's main argument boils down to the proposition that, even though the KB report was not privileged, it expressed legal advice and was generated within a confidential solicitor-client relationship. KB's work and the account relating to the report's generation are therefore subject to solicitor client privilege. Again, I do not agree. Solicitor client privilege does not exist in a vacuum. Each of the requirements for the privilege must be met. For privilege to apply, there must be a confidential communication between a client and his or her lawyer for the purpose of obtaining or giving legal advice. In my view, and for the same reasons I gave in Order No. 331-1999 concerning KB's report, the report and the account rendered by KB in relation to it were not generated within a confidential solicitor-client relationship. As I said above, even if one characterizes KB's findings and recommendations in his report as "opinions", that characterization does not define or transform the recommendations into legal advice relating to a confidential solicitor-client relationship.

[31] The Board also argues that the relationship between it and KB effectively changed when he concluded, after some investigation, that the applicant's grievance did not meet the parameters of a "complaint" under the *Police Act* and therefore warranted no further action by the Board. On this argument, KB's report was transformed into a legal opinion. This perspective is not, to my mind, supported by the evidence, which shows quite clearly that KB was appointed to investigate and report under s. 50(2)(b)(ii) of the Police (Discipline) Regulation and that he did so. As I said above, the fact that KB offered an "opinion" and made recommendations about the validity of, or jurisdiction for, the applicant's complaint against the Chief Constable does not define or transform his work as a statutory investigator into the rendering of legal advice in a confidential solicitor-client relationship with the Board.

[32] I find that the account in question in this inquiry is not excepted from disclosure by s. 14 of the Act.

4.0 CONCLUSION

[33] For the reasons given, subject to the condition imposed below respecting s. 22(1) of the Act, under s. 58(2)(a) of the Act, I require the Board to give the applicant access to the responsive account produced by the Board for my examination on January 25, 2001.

[34] The account just described contains the names of individuals whose identities may or may not be known to the applicant. As a condition under s. 58(4) of the Act, I require the Board, before disclosing the account, to review it and sever from it any third party personal information that the Board determines is protected from disclosure by s. 22(1) of the Act.

March 16, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

March 16, 2001
Information and Privacy Commissioner of British Columbia