



REVIEW REPORT 003-2017

Good Spirit School Division

March 16, 2017

Summary: The Applicant submitted an access to information request to the Good Spirit School Division (Good Spirit). Good Spirit withheld all the responsive records pursuant to subsection 21(a) of LA FOIP. The Applicant appealed to the Office of the Information and Privacy Commissioner (IPC). The IPC found that subsection 21(a) of LA FOIP does not apply. The IPC recommended that Good Spirit release the records to the Applicant.

I BACKGROUND

[1] On October 20, 2016, Good Spirit School Division (Good Spirit) received the following access to information request:

Amount of money [Good Spirit] spent on Theodore court case; who paid for the lawyers; from what company the lawyers came; how much the lawyers were paid;

[2] On November 18, 2016, Good Spirit responded to the Applicant. It said that it was unable to provide a response because the information that was being requested is subject to solicitor-client privilege.

[3] On December 8, 2016, the Applicant requested a review by my office. My office undertook early resolution efforts to resolve matters but was unsuccessful. Therefore, on January 12, 2017, my office notified both Good Spirit and the Applicant that it would be undertaking a formal review.

II RECORDS AT ISSUE

- [4] Good Spirit identified 25 pages of responsive records, all of which were withheld in full under subsection 21(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [5] Page 1 is Good Spirit's accounts payable invoice history report (the report). This report is a chart with rows and columns. The columns are entitled Vendor, Vendor Name, Invoice #, Purchase Order #, Expense Amount, Due Date, Voucher #, and "Bnk/Typ". At the bottom of the report is the total expense amount paid to the vendor (the law firm).
- [6] Page 2 is a summary of the levy paid by public school divisions for litigation purposes.
- [7] Pages 3 to 25 are the board member indemnity and expense forms.

III DISCUSSION OF THE ISSUES

- [8] Good Spirit qualifies as a local authority pursuant to subsection 2(f)(viii) of LA FOIP.

1. Does subsection 21(a) of LA FOIP apply to the record?

- [9] Subsection 21(a) of LA FOIP provides:

21 A head may refuse to give access to a record that:

- (a) contains information that is subject to solicitor-client privilege;

- [10] In order for subsection 21(a) of LA FOIP to apply, the following three-part test must be met:
1. The record must be a communication between solicitor and client,
 2. The communication must entail the seeking or giving of legal advice,
 3. The communication must be intended to be confidential.

- [11] In its submission, Good Spirit cited page 59 of my office's *IPC Guide to Exemptions* as its argument why subsection 21(a) of LA FOIP applies to the records. It says:

The record being requested ask for how much the lawyers were paid. As indicated in the IPC Guide to Exemptions for FOIP and LA FOIP, on page 59, Solicitor-client [sic] privilege may apply to a lawyer's bill of accounts including the detail. It goes on further to indicate however, the total amount of the bill and the letterhead of the law firm may not be.

[12] As noted above, there are three different types of records at issue. The analysis below will examine each type of record separately to determine if subsection 21(a) of LA FOIP applies.

Page 1 – Good Spirit's accounts payable invoice history report

[13] Page 1 is Good Spirit's accounts payable invoice history report. A description of this report appears in the "Records at Issue" section.

[14] My office considered invoices issued by law firms to their clients in Review Reports 052-2013 and 280-2016 & 281-2016. Those Review Reports cited the Supreme Court of Canada's decision *Maranda v. Richer*, [2003] 3 S.C.R. 193, 2003 SCC 67 that asserted that there is a presumption of privilege for lawyers' bills of account. This presumption, though, can be rebutted. In *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427, the Supreme Court of British Columbia provides a two-step process for the British Columbia's Commissioner in reviewing the presumption of privilege at paragraph [126]:

He should have started from the presumption that privilege did apply, and examined the documents and information to determine if it might be possible for an assiduous inquirer to use the information provided to draw possible inferences.... Once raised, the presumption should have remained in place until the Acting Commissioner was satisfied it was rebutted.

[15] However, even when a public body raises privilege over lawyers' bills of account, the Supreme Court of British Columbia asserts that the adjudicator in the matter must be satisfied that the billing information relate to litigation expenditures based on the context of the information or a review of the records at paragraph [122]:

While the presumption will not create an evidentiary burden in every case, it may do so **where either the context of the information or a review of the records satisfies the adjudicator that the document does contain billing information relating to litigation expenditures**. Where that is the case, the presumption of privilege will prevail unless it is rebutted by evidence or argument that is sufficient to satisfy the adjudicator that there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege and that an assiduous inquirer, aware of background information, could not use the information requested to deduce or otherwise acquire privileged communications.

[emphasis added]

- [16] When determining whether the presumption of privilege prevails or is rebutted, my office can consider arguments from applicants. Applicants, though, are at a disadvantage when having to make arguments for why privilege does not exist to information they cannot see in their efforts to rebut the presumption. The Alberta Office of the Information and Privacy Commissioner (AB IPC) acknowledges this disadvantage. In Order F2010-007, the AB IPC reviewed the lawyer's bills of account to determine whether or not the information requested by the Applicant is protected by privilege or if it is neutral information.
- [17] In this case, the Applicant has not provided my office with any argument to rebut the presumption of privilege. Therefore, borrowing the two-step process set out by the Supreme Court of British Columbia, my office must examine the record and determine if the information on page 1 could lead an assiduous inquirer to use the information provided to draw possible inferences regarding legal advice sought or given between a solicitor and Good Spirit.
- [18] Page 1, in this case, is not a lawyer's bill of account. It is a report, generated by Good Spirit, that contains the following columns:
1. Vendor,
 2. Vendor Name,
 3. Invoice #,
 4. Purchase Order #,
 5. Expense Amount,
 6. Due Date,
 7. Voucher #, and
 8. "Bnk/Typ".

[19] First, I need to decipher which of the above information would be contained with a lawyer's bill of account. Then, I need to determine which of the information qualify as communication between solicitor and client that is protected by privilege.

[20] The vendor, purchase order #, voucher # and "Bnk/Typ" appear to be information that is specific to Good Spirit's accounting system. Such information would not be information contained within a lawyer's bill of account. Since it would not be in a bill of account, then it would not be a communication between a solicitor and client. Therefore, I find that such information is not subject to solicitor-client privilege.

[21] The Vendor Name column contains the name of the law firm Good Spirit made payments to. The Applicant requested "from what company the lawyers came". In this case, revealing the name of the law firm does not reveal the nature of the advice being sought or given. As such, I find that the name of the law firm is not subject to solicitor-client privilege. Furthermore, the names of the lawyers that acted on behalf of Good Spirit is published in the following court decisions: *Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212*, 2016 SKQB 148, *Good Spirit School Division no 212*, 2012 SKQB 343, *Christ the Teacher Roman Catholic Separate School Division No. 212 v Good Spirit School Division No 204*, 2012 SKCA 99. Determining which "company the lawyers came" is not difficult to determine using publicly available information when the names of the lawyers are already known. I find that such information would not reveal privileged information.

[22] The Invoice # column contains invoice numbers of the many invoices issued by the law firm. The invoice number itself does not reveal the nature of advice sought or given. I find that such information would not reveal privileged information.

[23] The Expense Amount column contains the amount paid by Good Spirit for each invoice. In Order PO-2484, the Ontario Office of the Information and Privacy Commissioner (ON IPC) set out two questions to assist in determining if the amount in fees paid could reveal privileged information:

Accordingly, in determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that

disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.

[24] Based on a review of the invoices itemized on page 1, the fees appear to be invoice totals. There is no description for what the fees are for. Based on the invoice totals themselves, I find that there is not any reasonable possibility that disclosure of the amount of the fees paid would reveal any communication protected by privilege.

[25] Finally, the Due Date column contains the due date for each invoice. The due date is merely a date in which the law firm expects payment for the invoice. It does not reveal the date in which legal advice was sought or given. I find there is no reasonable possibility that disclosing the due date of an invoice would reveal privileged information.

[26] In summary, I find that subsection 21(a) of LA FOIP does not apply to any portion of page 1.

Page 2 – Litigation Levy Summary

[27] Page 2 is a summary of the levy paid by public school divisions for litigation purposes. In its submission, Good Spirit described page 2 as follows:

Our records would include the amount that GSSD paid as part of a levy collected for the litigation by the Public Section as a whole.

[28] Good Spirit explains that Public Section is an organization that represents 16 school divisions in Saskatchewan. Public Section engaged a solicitor to represent the school divisions in the Theodore court case.

[29] When I consider the test to determine if subsection 21(a) of LA FOIP applies, I note that page 2 is not a record between a solicitor and client. It is a record of the levy paid by school divisions to Public Section. Such information is different from information that is presented on page 1. Page 1 is information that would appear on an invoice issued by a law firm to its client. Page 2, however, details the amount of money each school division

paid to Public Section. Order PO-2435 by the Ontario Office of the Information and Privacy Commissioner provides that the role of access to information legislation is to promote government accountability and transparency, including information about the expenditures of taxpayer money:

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money. This was most recently emphasized by the Commissioner, Dr. Ann Cavoukian, in Order MO-1947. In that order, Dr. Cavoukian ordered the City of Toronto to disclose information relating to the number of legal claims made against the city over a specific period of time, and the amount of money paid in relationship to those claims. In ordering disclosure, the Commissioner stated the following:

It is important, however, to point out that citizens cannot participate meaningfully in the democratic process, and hold politicians and bureaucrats accountable, unless they have access to information held by the government, subject only to necessary exemptions that are limited and specific. Ultimately, taxpayers are responsible for footing the bill for any lawsuits that the City settles with litigants or loses in the courts.

[30] Further, page 2 is not a communication that entails the seeking or giving of legal advice. Therefore, I find that subsection 21(a) of LA FOIP does not apply.

Pages 3 to 25 – Board Member Indemnity and Expense Claim forms

[31] Pages 3 to 25 are Indemnity and Expense Claim forms filled out by board members of Good Spirit. In its submission, Good Spirit explained these forms as follows:

...there are payments of indemnity and expenses paid to Good Spirit School Division trustees in carrying out their role as trustees of a board that is a member of the Public Section with regards to the litigation.

[32] When I consider the test to determine if subsection 21(a) of LA FOIP applies, I note that pages 3 to 25 are not records between a solicitor and client. Furthermore, the information on these pages do not entail the seeking or giving of legal advice. Therefore, I find that subsection 21(a) of LA FOIP does not apply to pages 3 to 25.

[33] In the course of this review, my office recommended that Good Spirit release pages 1 to 25 in their entirety. GSSD responded that it would release the following information within the records:

- 1) Good Spirit's contribution to the Public Section for litigation fees,
- 2) the name of the lawyer paid by Good Spirit on behalf of Public Section, and
- 3) the board member indemnity and expense forms.

[34] It said it will not, at this time, release the following documents:

- 1) The Accounts Payable history which identifies the total amount paid to the lawyer on behalf of the Public Section,
- 2) the listing of the member boards and the contribution of each to the litigation fund of the Public Section.

[35] Good Spirit summarized its position that it would release information that pertains to its responsibilities and litigation expenditures. It said that requests for information regarding other Public Section "member boards" should be addressed to each of the member boards.

[36] My offices' recommendation that Good Spirit release pages 1 to 25 in their entirety still stands. This is because section 5 of LA FOIP gives every person a right to access records that are in the possession or under the control of a local authority. While some of the information within pages 1 to 25 is about member boards other than Good Spirit, the records are in the possession of Good Spirit. Therefore, the Applicant has a right to the records. While this right is subject to limited and specific exemptions, I find that none of the exemptions listed in Part III of LA FOIP applies.

IV FINDINGS

[37] I find that subsection 21(a) of LA FOIP does not apply to page 1.

[38] I find that subsection 21(a) of LA FOIP does not apply to page 2.

[39] I find that subsection 21(a) of LA FOIP does not apply to pages 3 to 25.

V RECOMMENDATIONS

[40] I recommend that Good Spirit release the information described in paragraph [33].

[41] I recommend that Good Spirit reconsider its position and release pages 1 to 25 in their entirety.

Dated at Regina, in the Province of Saskatchewan, this 16th of March, 2017.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy
Commissioner