



ORDER M-1114

Appeal M-9800028

Bruce Grey Catholic District School Board



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Bruce Grey Catholic District School Board (the Board). The request was for access to:

- 1) all of the Board's legal budget(s) for the Notre Dame School project;
- 2) evidence of the Board's actual legal expenditures to date on this project as shown by copies of all legal accounts paid by the Board to date; and
- 3) the Board's outstanding current and long-term liabilities for legal fees as shown by the outstanding legal accounts of the Board for the project.

The appellant indicated that he was only interested in the dollar amounts in legal invoices and not in detailed descriptions of legal services, which are considered privileged.

The Board responded to the request by advising the appellant that the request for access to responsive records was denied because the request is frivolous and vexatious, as contemplated by section 4(1)(b) of the Act. The Board also denied the appellant access to the responsive records on the basis of the following exemptions contained in the Act:

- economic and other interests - sections 11(c), (d) and (f)
- solicitor-client privilege - section 12

The appellant appealed the Board's decision.

After receiving representations from the Board and the appellant, Order M-1066 was issued which found the request not to be frivolous and vexatious and ordered the Board to provide the appellant with a decision letter.

That decision letter indicates that the Board has never had any legal budgets for the Notre Dame School Project. With respect to the other portions of the request, the Board denied the appellant access pursuant to sections 11(c), 11(d) and 12 of the Act.

The appellant appealed the decision of the Board as he is of the view that the Board has legal budgets for the Notre Dame School Project.

A Notice of Inquiry was sent to the Board and the appellant. Representations were received from the Board.

RECORDS:

The records at issue consist of legal accounts, total fees, disbursements and taxes. The detailed breakdown of the fees does not form part of the records.

PRELIMINARY MATTER:

The appellant indicated in a telephone call to the Appeals Officer assigned to this file that representations he had submitted in the form of correspondence in other appeal files address the issues in this appeal. He asked that I go through all of these previous appeal files to locate correspondence relevant to this appeal. The appellant stated to the Appeals Officer, "It's not for me [the appellant] to go through the correspondence and say which is relevant." The appellant indicated he wouldn't take the time to make representations because he feels he has sent all the representations he needs to, and he would not identify which correspondence I am to consider as he believes that is the role of this office.

In my view, no court or tribunal has a duty to make a party's case, and doing as the appellant has requested could amount to a breach of procedural fairness. Accordingly, I have not reviewed the contents of the appellant's previous appeal files to identify correspondence which might support his position in this appeal.

DISCUSSION:**REASONABLENESS OF SEARCH**

Where a requester provides sufficient details about the records which he is seeking and the Board indicates that further records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Board to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge it's obligations under the Act, the Board must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request.

The Board submits that the search included a review of the 1996 and 1997 Board budget, by the Freedom of Information Coordinator/Supervisor of Accounting. As a result of this review, a General Administration Legal Budget was identified. The Board then inquired of the Manager of Human Resources and the Superintendent of Business about the purpose of the General Administration Legal budget. It was stated that the miscellaneous legal budget is the total that the Board budgets for a wide variety of legal expenses pertaining to personnel, property and other miscellaneous and minor issues. The Board inquired of the Superintendent of Business about the existence of a legal budget for the Notre Dame School. The Board indicates that the clearly stated answer was that no legal budget for the Notre Dame School exists or ever did exist.

I accept the Board's position that it does not have a legal budget for the Notre Dame School project. I am satisfied that, in the circumstances, the search conducted by the Board was reasonable and I dismiss this aspect of this appeal.

ECONOMIC AND OTHER INTERESTS

The Board submits that sections 11(c) and (d) apply to the records. These sections state:

A head may refuse to disclose a record that contains,

- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution.

The Board submits that the records the appellant is requesting will indicate the legal costs being incurred by the Board in pursuing various claims against the appellant, and in resisting various claims asserted by the appellant against the Board. These claims are the subject of five consolidated actions before the Ontario Court (General Division). The Board submits that its economic and financial interests will clearly be prejudiced if the appellant is in a position to determine the extent to which his strategy has been effective in causing the Board to incur legal expenditures that are, as alleged by the appellant “excessive and inappropriate.” The essence of the Board’s submission is that, in the event that the Board was obliged to disclose the legal expenses that have been incurred to date, the appellant could determine the extent of the Board’s unexpended legal budget for this project. The Board claims that the appellant is attempting to identify how much more of the Board’s legal budget is available to contest the actions initiated by the appellant.

Although I consider the Board’s view of the appellant’s motivation for requesting this information to be reasonable in the particular circumstances, the difficulty with the Board’s argument is that the identified harm, in my view, does not fit within the specific category of harms sections 11(c) and (d) were designed to address. Additionally, the fact that the appellant represents a party who may be opposite in interest to the Board is not conclusive in establishing a claim for exemption under sections 11(c) or (d).

Having carefully reviewed all representations, I find that the Board has failed to establish that disclosure of the records could reasonably be expected to prejudice the economic interests or competitive position of the Board, or be injurious to the financial interests of the Board. On this basis, I find that the records do not qualify for exemption under sections 11(c) or (d) of the Act.

SOLICITOR-CLIENT PRIVILEGE

This section consists of two branches, which provide the Board with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1.
 - (a) there is a written or oral communication, **and**
 - (b) the communication must be of a confidential nature, **and**
 - (c) the communication must be between a client (or his agent) and a legal advisor, **and**
 - (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

The Board submits that lawyer's bills are subject to the common law solicitor-client privilege, or Branch 1 of the exemption. The Board claims that making lawyers' fees public would undermine the constitutional right to a fair trial because an accused person might be reluctant to seek legal advice for fear this would reveal personal financial information that could be used in court.

In Order 126, former Commissioner Sidney B. Linden found that, while the legal invoices and accounts did not contain legal advice, they reflected communications of a confidential nature directly related to the seeking, formulating or giving of legal advice, and were, therefore, exempt from disclosure. The implication of this decision is not that the solicitor client exemption will apply automatically to records of this nature, but rather that the adjudicator must determine, based on the contents of each legal account, whether the information contained in the document relates in a tangible and direct way to the seeking, formulating or

provision of legal advice. This approach requires a case by case analysis of accounts to ascertain if the section 12 exemption applies.

As indicated previously, the only information at issue in this appeal is a dollar figure. The record discloses neither the subject(s) which the law firm was asked to investigate, the strategy used to address these issues nor the result of this exercise. In short, this record has no direct connection with either "seeking, formulating or giving legal advice". It follows that the fourth part of the test for the application of the first part of Branch 1 of the section 12 exemption has not been met.

Having reviewed the records, I find that by their very nature they were not "created or obtained especially for the lawyer's brief for existing or contemplated litigation", and the second part of Branch 1 of the exemption is not applicable either. Accordingly, I find that section 12 of the Act does not apply.

ORDER:

1. I dismiss the aspect of the appeal related to the reasonableness of the Board's search for records.
2. I order the Board to disclose the dollar amounts in the legal invoices to the appellant by sending him a copy by **June 25, 1998**.
3. In order to verify compliance with this order, I reserve the right to require the Board to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
 Holly Big Canoe
 Adjudicator
 (formerly Inquiry Officer)

 June 4, 1998