

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 68-1995
December 12, 1995**

INQUIRY RE: A refusal by Islands Trust and the Saturna Island Local Trust Committee to grant access to legal opinions concerning section 992 of the *Municipal Act*

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 604-387-5629
Facsimile: 604-387-1696
Web Site: <http://www.cafe.net/gvc/foi>**

1. Introduction

As Information and Privacy Commissioner, I conducted a written inquiry on September 12, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by Jim Campbell (the applicant) seeking access to all legal opinions obtained by the Islands Trust concerning the interpretation of a section of the *Municipal Act*.

During the course of a public meeting of the Saturna Local Trust Committee (the Saturna LTC), on or about January 19, 1995, the applicant became aware that the policies of the local trust committee were, in part, being guided by legal opinions that it had obtained both directly and through Islands Trust.

On March 15, 1995 the applicant requested a copy of all such documents under the Act. In particular, he expressed an interest in the legal opinions provided by Donald Lidstone of Lidstone, Young, Anderson, Barristers and Solicitors of Vancouver. He requested "all legal opinions obtained by the Saturna LTC directly or by other action of staff or officials of your organization which in any way bear on the interpretation of Section 992 of the Municipal Act."

On May 10, 1995 the Islands Trust denied the applicant's request, stating that the information was excepted from disclosure under section 14 of the Act. On June 7, 1995 the Islands Trust wrote to the applicant to confirm the substance of a telephone conversation with him and again denied access to the documents.

On June 13, 1995 the Office of the Information and Privacy Commissioner received a request from the applicant to review the decision of the Islands Trust to deny access to the records.

2. Documentation of the inquiry process

The Office provided all parties involved in the inquiry with a one-page statement of facts (the Portfolio Officer's fact report) which was accepted by all parties as accurate for the purposes of conducting the inquiry. The applicant chose to represent himself. David Loukidelis of Lidstone, Young, Anderson represented the public body.

3. Issue under review at the inquiry and the burden of proof

The issue under review is the applicability of section 14 of the Act to the records in dispute. The relevant section reads as follows:

Legal advice

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

Under section 57(1) of the Act, the burden of proof at this inquiry is on the public body to prove that the applicant has no right of access to the records. Thus the Islands Trust has to demonstrate that the applicant has no right of access to the records in dispute.

4. The records in dispute

The records in dispute consist of five "legal opinions," a total of fifteen pages in length, prepared by Donald Lidstone of Lidstone, Young, Anderson, Barristers and Solicitors, for Islands Trust and the Saturna Local Trust Committee concerning, in whole or in part, section 992 of the *Municipal Act*. They were submitted between July 2, 1993 and January 9, 1995 and pertain to various aspects of a subdivision on Saturna Island.

5. Jim Campbell's case

The Islands Trust is a form of local government created under the *Islands Trust Act* for islands in the Strait of Georgia. Saturna has two elected trustees (the local trust committee), who join twelve other island units to comprise the Islands Trust Council. The local trust committee is required to confirm that subdivisions referred to it by the approving officer comply with its bylaws. (Submission of the Applicant, p. 1)

Section 992(1) of the *Municipal Act* requires an owner of land being subdivided to provide specific parkland to the local government or an equivalent amount in cash. Section 992(2), which applies to Saturna, provides that the local government itself may decide on whether it is to receive cash or land.

The applicant is concerned about how these two provisions of the *Municipal Act* are being interpreted and applied on Saturna by the local trust committee in a specific development, where the committee has apparently abandoned its discretion to the developer, acting, one of the trustees has stated, on the advice of its solicitors.

The applicant wants to see the legal opinions upon which the local trust committee evidently depended. He relies on sections 13(1), 13(2)(m), 14, and 57(1) of the Act. “I see the role of a solicitor hired by a very local government as that of a translator of sometimes difficult language for the benefit of all concerned.” (Submission of the Applicant, p. 5)

I discuss the applicant’s views on section 14 below.

6. The Islands Trust/Saturna Island Local Trust Committee’s case

I have used the details of this submission in my discussion below of section 14 of the Act.

7. Discussion

Other sections of the Act

The applicant has advanced arguments for disclosure under section 13 of the Act. I have not discussed them because it is my understanding that the Islands Trust acted solely upon section 14 of the Act in refusing to disclose the records. (pp. 5, 6)

Who is the head of the public body?

The applicant raised an interesting argument as to whether the head of the public body is (or should be) the executive director of the Islands Trust or the head of the local trust committee. (Submission of the Applicant, pp. 6, 7) The applicant favours the local elected officials. The Islands Trust states that its executive director/secretary has been designated as the head for purposes of the Act under section 66. (See Affidavit of Gordon McIntosh, paragraph 1) The applicant regards this as merely a matter of “administrative convenience,” but it is in fact permissible under the Act. Whether the chair of the local trust committee originally announced its policy on the application of section 992 of the *Municipal Act*, the control of a request for access to records under the Act, as in the present case, rests with the designated head of the public body (who so acted).

Section 14: Solicitor-client privilege

The records in dispute are clearly legal opinions, not least because each document from the law firm begins with the language that “you have requested our advice” Except for the last one directed to a Saturna Island Local Trustee, care of the Islands Trust, the others are written directly to senior planners with the Islands Trust. The contents overwhelmingly deal with analysis of the meaning of sections of the *Municipal Act*, relevant case law on the matter, and competing legal opinions about what sections mean, also involving the Capital Regional District. Four of the five opinions refer to the same file number for the Saturna Island--Sewell Subdivision; the other one, the fourth in the sequence, deals with “Parkland Dedication” in general terms.

The applicant acknowledges the historic reasons for the development of a concept of solicitor-client privilege but questions “the claim that a locally elected public body can invoke client-solicitor privilege in all matters involving the use of a solicitor’s advice when it chooses to, regardless of the need or lack of need to keep useful knowledge away from the public to which that body is accountable.” (Submission of the Applicant, p. 8) He proposes to add the following criteria for the purposes of the Act:

Where the protection of client/solicitor privilege is sought by a locally elected public body, the head must prove that the release of the communications would harm or injure the interests of the public which the local body represents or that it would be contrary to the protection of privacy provisions of the Act. (Submission of the Applicant, p. 8)

I must point out to the applicant that, under the Act, the threshold issue for the Islands Trust is not the one that he proposes but the one established under section 14. A related point is that “[c]onfidentiality is not a need of a local trust committee for a lawyer’s explanation of what a land use section of the Municipal Act may mean There is nothing to fear by this kind of public body from the release of these kinds of records.” (Reply Submission of the Applicant, pp. 3, 5) It might be desirable, in fact, for the Islands Trust/ Saturna Local Trust Committee to follow the applicant’s line of thinking, but it is not possible for me to force it to do so with respect to this discretionary exception. The Act does not allow me to impose a policy judgment on the public body that release of what are clearly legal opinions will not harm any of its interests.

The applicant is concerned that the application of section 14 would allow a public body “to arbitrarily classify any legal advice as confidential” (Submission of the Applicant, p. 8) I need to reassure him that one of my purposes in conducting a review like the present one is to ensure that this in fact has not occurred.

The applicant also has made the following argument:

Professional explanations of statutes sought by locally elected government cannot be seen to be confidential and do not deserve the protection of client solicitor privilege to be kept secret, even if a political body would rather not be challenged, frustrated or embarrassed. (Submission of the Applicant, p. 10)

Like any other part of elected government, a local trust committee that chooses not to reveal its confidential legal advice on a matter to local voters may incur their wrath during a subsequent election. That is the accountability scheme that the Legislature built into the Act, and one that I am not free to deviate from.

The public body has made a straightforward argument that the aspect of solicitor-client provision at issue in this inquiry deals with privilege over information related to the seeking or giving of legal advice. Its argument is that the records in dispute in this case meet all of the criteria set out in Order No. 38-1995, March 23, 1995, p. 4: a written or oral communication, of

a confidential nature, between a client (or his agent) and a legal advisor; and directly related to seeking, formulating, or giving legal advice. (Submission of the Public Body, paragraph 12, 13)

The public body further pointed out the sensitivity of releasing advice received by Islands Trust and the Saturna Local Trust Committee on section 992, because such issues arise on other islands:

Interpretation and application of s. 992 of the Municipal Act is a matter that may involve negotiation between a local government and a developer. Each side may have differing views on what the section means and how it is to be applied. For the Islands Trust to reveal the legal advice it has received on this provision could reasonably be expected to hamper its position in other cases involving the section. (Submission of the Public Body, paragraph 25; and also Affidavit of Donald Lidstone, paragraph 6, and Affidavit of Gordon McIntosh, paragraph 8)

I find this point to be rational and well within the discretion that the head of a public body can exercise under section 14.

On the basis of the affidavit evidence submitted to me by the public body and my own review of the records in dispute, I am persuaded that they fall under the category of solicitor-client privilege under section 14 of the Act. (See Submission of the Public Body, paragraphs 14-20)

The burden of proof

The applicant notes that the burden of proof under section 14 is on the Islands Trust: “It is up to the head of this public body to prove that it would be injurious to the public interest to release it. There needs to be a significant reason for it to be withheld.” (Submission of the Applicant, p. 5) The response of the Islands Trust/Saturna Local Trust Committee is that “[n]othing in the Act supports the contention that a public body must also prove that disclosure would harm the public interest. Once a discretionary exception such as s. 14 is found to apply, the head need only consider whether other factors favour disclosure.” (Submission of the Public Body, paragraph 11) I agree with the public body’s position on this point.

In its formal submission, however, the public body argues that it in fact considered the public interest in disclosure and essentially decided that it was not “in the public interest” to waive privilege. (Submission of the Public Body, paragraph 22; see also paragraph 26)

I am satisfied that the head of the public body adequately considered exercising the discretion entrusted to him under section 14, and there is no good reason to refer the matter back to him for reconsideration. (See also Reply Brief of the Public Body, paragraph 7)

The public’s right to know

As he has done on another occasion before me, the applicant waxes quite eloquently on the important topic of the public’s right to know. My problem, if such it can be called, is that

this right to know is qualified by a series of exceptions under the Act that were approved by a unanimous Legislature in 1992 and 1993.

8. Order

Under section 58(2)(b) of the Act, I find that the Islands Trust was authorized to refuse access to the records in dispute under section 14 of the Act. I therefore confirm the decision of the Islands Trust not to disclose the records in dispute to the applicant.

David H. Flaherty
Commissioner

December 12, 1995