

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 92-1996
March 15, 1996**

INQUIRY RE: A refusal by BC Hydro to grant access to records on the basis of solicitor-client privilege

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria on February 7, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision of BC Hydro to refuse access to legal materials that BC Hydro relied upon in making a decision on a previous freedom of information request that the applicant made.

2. Documentation of the inquiry process

On March 3, 1994 the applicant requested from BC Hydro all records showing the total charges incurred by BC Hydro's Legal Department with respect to the applicant's Small Claims Court action against it. The applicant also requested a copy of the log of the time that BC Hydro's solicitors spent on the trial. BC Hydro withheld the records under section 14 of the Act. On April 24, 1995 the applicant resubmitted his request to BC Hydro. It advised the applicant that it believed that their records were still subject to solicitor-client privilege under section 14, but it then elected to waive its privilege in order to provide the applicant with these records.

On September 11, 1995 the applicant requested from BC Hydro copies of the legal material that it had relied upon in making its determination that the records already released were subject to solicitor-client privilege. BC Hydro wrote to the applicant on October 11, 1995 and advised him that it had decided to withhold the requested records under section 14 of the Act. The applicant then wrote to my Office on November 7, 1995 and requested a review of that decision.

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

The issue under review in this inquiry is whether the records in dispute should be withheld under section 14 of the Act. This 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.

Section 57 of the Act establishes the burden of proof. Under section 57(1), at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the public body to prove that the applicant has no right of access to the record or part thereof. In this case, BC Hydro has to prove that the applicant has no right of access to the records in dispute.

4. The records in dispute

The records in dispute are a binder of legal cases and legal treatise materials collected for BC Hydro in the course of developing its position on the access request of the applicant. These materials include decisions on freedom of information matters.

5. Discussion of BC Hydro's case

The context for this case is allegations by the applicant that BC Hydro deprived him of income in a contractual relationship to deliver services. He lost his case in Small Claims Court in British Columbia in 1994. Hydro claims that he is still threatening legal action against it. (Submission of BC Hydro, pp. 1, 2)

The applicant wants copies of the case law or legal references that BC Hydro relied on for a statement that it made in a letter to him on June 1, 1995. BC Hydro's position is that the material requested by the applicant is subject to solicitor-client privilege under section 14 of the Act. (Submission of BC Hydro, p. 5)

In BC Hydro's view, the records in dispute fall under both the solicitor-client and contemplated litigation parts of solicitor-client privilege. An articling student with BC Hydro reviewed relevant case law and selected those cases which supported BC Hydro's position on the application of privilege. The compilation of cases that she prepared "constitutes Hydro's legal brief on this issue and represents ... the working papers" of the articling student. (Submission of BC Hydro, p. 6)

I agree with BC Hydro's submission that "working papers used by a legal advisor to formulate a legal opinion are covered under section 14 [of the Act] because the papers are directly related to giving legal advice." In this case, the articling student "communicated findings regarding solicitor client privilege to her client, BC Hydro." (Submission of BC Hydro, p. 7)

BC Hydro also argues that the records in dispute are protected from disclosure under section 14 because it believes that the applicant is contemplating litigation against it. BC Hydro

estimates that the applicant “has written to Hydro in excess of 75 times since he first began to believe that Hydro breached the Contract. In many of these letters, [the applicant] has demanded compensation and has informed Hydro that he intends to pursue further action in all available forums.” (Submission of BC Hydro, p. 7) On the basis of the evidence presented to me, I agree with BC Hydro that it has reasonable grounds to rely on the contemplated litigation provisions of solicitor-client privilege. (See Submission of BC Hydro. pp. 7-12)

6. Discussion of the applicant’s case

The applicant first contests BC Hydro’s reliance on section 14, because the records in dispute were prepared by an articling student, who is by definition neither a solicitor nor a lawyer. (Final Submission of the Applicant, pp. 1-3) I find this argument without merit. An articling student is a person with a law degree who is in fact working under the supervision of a member of the Law Society of British Columbia, who is legally responsible for the work that the student performs. The distinction that the applicant seeks to rely on is not persuasive for purposes of the application of section 14 of the Act.

The applicant further argues that collecting case law does not constitute a legal brief. (Final Submission of the Applicant, pp. 3-6) I find that legal materials, such as case law or treatise material, used by a public body to develop a legal opinion on an issue are in fact protected against disclosure on the basis of solicitor-client privilege.

The applicant’s third point is that the records in dispute were not collected for possible litigation but to decide how to treat a request for access to records under the Act. (Final Submission of the Applicant, pp. 6-10) I find that even if the records were compiled solely for this claimed purpose, a public body can still choose to protect them under section 14 of the Act.

The applicant also advanced an argument to the effect that the records in dispute should be released “in the public interest” to “determine if B.C. Hydro has/will operate in ‘good faith’ in issues related to the FOI Act” (Final Submission of the Applicant, p. 13) I can find no public interest at work in this inquiry that would mandate disclosure under the Act.

8. Order

In respect of the information requested by the applicant, I find that BC Hydro was authorized to refuse access under section 14 of the Act. Under section 58(2)(b), I confirm the decision of the head of BC Hydro to refuse access.

David H. Flaherty
Commissioner

March 15, 1996