

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 93-1996
March 19, 1996**

INQUIRY RE: A decision by the Office of the Public Trustee to withhold a legal opinion from an applicant

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1. Introduction

As Information and Privacy Commissioner, I conducted an inquiry on December 22, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by an applicant for review of a decision by the Office of the Public Trustee of British Columbia (the public body) to withhold a legal opinion under sections 13 and 14 of the Act. The applicant received a large number of records from the public body; a three-page legal opinion was the only record withheld. Dated November 15, 1989, it was written by a senior solicitor for the province to the then Deputy Attorney General. The current Deputy Minister of Attorney General has refused to waive solicitor-client privilege in this case.

2. Issue

The issue in this inquiry is whether the Office of the Public Trustee properly applied sections 13 and 14 of the Act to withhold the record in dispute. The relevant portions of sections 13 and 14 are as follows:

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

...

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

In this inquiry, section 57(1) of the Act requires the Office of the Public Trustee to prove that the applicant has no right of access to the legal opinion.

3. The applicant's case

The applicant did not make any further submissions to this office beyond her original request to the Office of the Public Trustee and her request for review. She states that she is doing research for a novel about a particular individual and has his permission to access information about him of any kind held by the Office of the Public Trustee. I am referring to him in this order as the third party.

4. The Office of the Public Trustee's case

The Office of the Public Trustee emphasizes that it has already disclosed a very large volume of material to the applicant. I have discussed its points about specific sections of the Act below.

5. Discussion

I regret that the applicant did not make a formal submission in this case, because, as public bodies have pointed out to me in recent inquiries, knowing why a person wants access and how he or she intends to use requested information, can often help a public body in fashioning creative solutions when they may be required to provide appropriate assistance.

The record in dispute

The legal opinion is actually in the form of a letter by a government solicitor reporting on a several hour meeting between him, the solicitor for the third party, and the third party himself. The solicitor spent almost all of the time alone with the third party. Most of the record is a factual recounting of what the third party said and what the solicitor had learned from other sources. The third party was pressing for a government investigation of how he had been treated by psychiatrists, a psychiatrist hospital, and perhaps the Office of the Public Trustee. He was also complaining about deficiencies in the *Mental Health Act* and the *Patients Property Act*. The letter also contains a discussion of the legal options available to the third party at various times in the previous several years.

I find little in the letter that would be clearly helpful to the applicant as a novelist, since it is primarily a recounting of what the solicitor thought of the situation in which the third party found himself. Since the third party is still alive, one assumes that the applicant has already heard his side of this story.

Section 13(1): The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

The Office of the Public Trustee describes the record in dispute as “outlining the circumstances and a series of projected actions that might be undertaken depending upon the circumstances, and includes assessment and evaluation of the options. The provision of access to this record would directly reveal that advice and those recommendations.” There are eight separate paragraphs in this letter. Paragraphs four to eight are “information that would reveal advice or recommendations developed by or for a public body or a minister.” The author gives

his impressions of what he heard and what he has read, presents some factual information about legal and statutory matters, and then poses questions and offers judgments. There is a substantial discussion of the legal options available to the third party.

I agree that paragraphs four to eight can be withheld in their entirety on the basis of section 13(1).

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

The Office of the Public Trustee relies on the following statements in the British Columbia Information and Privacy Office's *Freedom of Information and Protection of Privacy Act Policy and Procedures Manual* to argue that the letter in dispute meets all of these criteria:

Section 14 applies to information in a record created or obtained for the dominant purpose of obtaining legal advice for use in litigation or about contemplated litigation. (p. 2.2-26)

Information is subject to solicitor client privilege if communication is: confidential in nature; between a legal advisor and his or her client or agent; and directly related to seeking, formulating or giving legal advice. (p. 2.2-26)

The Office of the Public Trustee makes clear that the third party "had serious concerns about the declaration of incapacity that led to the Public Trustee being appointed his Committee of Estate by certificate. He had indicated that he was considering litigation against the Public Trustee, the Attorney General and possibly the Ministry of Health. As a result, the Deputy Minister sought legal advice in contemplation of this litigation, which was provided in the letter at issue." This "background" knowledge does not appear in the contents of the record in dispute, which in fact emphasize the options open to the Attorney General's Ministry to help the third party.

During the inquiry process, I asked the Office of the Public Trustee for an affidavit to establish the status of the record in dispute under section 14. The resulting explanation is that the third party had "expressed considerable unhappiness about the process by which he was declared incapable of managing his affairs." He and his lawyer met with a solicitor representing the Ministry of Attorney General, who then "reported to the Deputy Attorney General his summary of the meeting and gave legal advice to the Ministry concerning the issues raised at the meeting. A copy of this letter was made available to the Public Trustee." (Affidavit of Alan Gordon Lindsay) I accept that such legal advice can be withheld under section 14 of the Act.

6. Order

I find that the Office of the Public Trustee is authorized to refuse access to paragraphs four to eight of the record in dispute under section 13(1) of the Act and is authorized to refuse access to the entire record under section 14. Under section 58(2)(b),

I confirm the decision of the Office of the Public Trustee to refuse access to the record in dispute.

David H. Flaherty
Commissioner

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