

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 94-1996
March 20, 1996**

INQUIRY RE: A decision by the Ministry of Social Services to withhold a series of letters

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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 21, 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 in which a husband and wife sought access to all records relating to their family's involvement with the Ministry of Social Services (the Ministry). Most of it concerns the circumstances surrounding the death of their adolescent daughter several years ago.

2. Documentation of the inquiry process

The applicants submitted a written request to the Ministry on July 25, 1995. The Ministry wrote to the applicants on September 29, 1995 and granted them access to most of the requested records. However, portions were severed or withheld under sections 13, 14, and 22 of the Act. The applicants then wrote to this Office on November 14, 1995 to request a review of the Ministry's decision. Prior to this written inquiry, the Ministry decided to grant access to the records that it had withheld under section 13. The Ministry also released some records it had withheld under section 14.

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

The issues under review in this inquiry are the application of sections 14 and 22 of the Act to the records that the Ministry withheld from the applicants. The relevant sections of the Act read 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.

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

...

Under section 57(1) of the Act, at an inquiry concerning a refusal to grant an applicant access to all or part of a record, the public body must prove that the applicant has no right of access. In this case, the Ministry has to prove that the applicants have no right of access to the information they are seeking under section 14.

However, under section 57(2), if the record or part to which the applicant is refused access contains personal information about a third party, it is up to the applicant to prove that disclosure of the personal information would not be an unreasonable invasion of the third party's personal privacy. In this case, the applicants must prove that the disclosure of the records in dispute will not unreasonably invade the privacy of any third party under section 22.

4. The records in dispute

There are portions of eleven records in dispute. They consist primarily of various letters among the Ministry of Social Services, its legal counsel, and its outside counsel. These nine letters contain advice and opinions about the applicants' dealings with the Ministry. Two other letters contain third party personal information.

5. The Ministry's case

The Ministry states that it has withheld personal information concerning a physician and another third party and information that is subject to solicitor-client privilege. But it has disclosed more than 1,000 pages of information, including all medical reports, court documents, running records, and physical and electronic correspondence. (Submission of the Ministry, paragraph 1.08) According to the Ministry, most of the withheld information in nine records is covered by solicitor-client privilege. There is also a small amount of personal information in two records that has been withheld under section 22.

6. Discussion

The applicants did not make any submissions to me. This means that they have not met the burden of proof imposed on them to show that the disclosure of personal information about third parties would not be an unreasonable invasion of their privacy under section 22 of the Act. Where an applicant who has the burden of proof does not make such an initial submission for an inquiry, that issue is considered to be abandoned. In order to activate my consideration of section 22, applicants must at least write a sentence stating why disclosure of the personal information about the third parties would not be an unreasonable invasion of their privacy. See Order No. 59-1995, October 25, 1995. Ideally, however, applicants will make a reasoned argument to meet their burden of proof on the section 22 issue.

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

This inquiry is only concerned with the branch of solicitor-client privilege that deals with legal professional privilege, that is, direct communications between clients and their solicitors. In addition to describing what it views as the essence of this branch of the privilege, the Ministry drew the following conclusion:

The records which have been withheld by the Public Body clearly meet the criteria of solicitor-client privilege. All of the records are confidential communications between solicitor and client, which entail the seeking or giving of legal advice. (Submission of the Ministry, paragraph 5.07)

The lawyers involved include a solicitor in private practice retained by the Ministry to act on behalf of the Superintendent of Family and Child Services in court hearings involving the daughter of the applicant. The second and third lawyers are in the Legal Services Branch of the Ministry of Attorney General and provide legal advice to the Ministry. (Submission of the Ministry, paragraphs 5.08 and 5.09) The Ministry has exercised its discretion not to waive solicitor-client privilege.

The records in dispute

I have carefully reviewed the nine records in dispute that the Ministry claims are subject to solicitor-client privilege. I confirm that they are letters among lawyers and clients concerning legal issues arising during the illness of the adolescent daughter of the applicants. As such, they are covered by solicitor-client privilege under section 14.

7. Order

I find that the Ministry of Social Services was authorized to refuse access to the records in dispute under section 14 of the Act.

Under section 58(2)(b) of the Act, I confirm the decision of the Ministry of Social Services to refuse access to the records withheld under section 14.

March 20, 1996

David H. Flaherty
Commissioner