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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 140-1996
December 19, 1996**

INQUIRY RE: A decision of the Association of British Columbia Professional Foresters (ABCPF) to withhold records relating to the investigation of complaints about three professional members

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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 on August 26, 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 the Association of British Columbia Professional Foresters' (ABCPF) decision to withhold records requested by several applicants, who are members of the association.

2. Documentation of the inquiry process

On December 21, 1995 three members of the Association requested a number of records identifying the membership, officers, and terms of reference of three Association committees, and records containing information about a disciplinary matter involving the three applicants. On February 19, 1996 the ABCPF disclosed six of the seven records covered by the request but refused access to the minutes of the Association's Council and Standing Investigation Committee (SIC) under sections 13(1), 14, and 15(1)(c) and (f) of the Act.

On March 6, 1996 the applicants submitted a request for review to the Office of the Information and Privacy Commissioner concerning the Association's refusal to disclose the minutes of the Council and Standing Investigation Committee. The applicants also claimed that the Association had not met its obligations under section 6 of the Act by failing to provide a list of all documents received in the discipline matter concerning the applicants. During the mediation process, the Association disclosed further records to the applicants. The current request for review was made in the names of the three original applicants. (Submission of the Applicants, paragraph 30)

At the request of the parties, the inquiry has been adjourned a number of times to permit both sides to make additional submissions and replies to submissions and to provide me with additional records in dispute.

3. Issues under review at the inquiry

This inquiry deals with the Association's decision to withhold the requested records under sections 13(1), 14, and 15(1)(a) and (c) of the Act, and the applicant's claim that the Association has not met its obligations under section 6 of the Act by failing to provide a list of documents received by the Association in the disciplinary matter involving the applicant and others. These sections read as follows:

Policy advice or recommendations

- 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.

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 law enforcement

- 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to:
- ...
 - (a) harm a law enforcement matter,
 - ...
 - (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
 -

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 of the record. In this case, the Association has to prove that, under sections 13(1), 14, and 15(1)(a) and (c), the applicants have no right of access to the records in dispute. Also, since the ABCPF is in a better position to show that its obligations under section 6 of the Act have been met, the burden of proof is on the Association on this issue.

4. The records in dispute

The records in dispute are the records of the meetings and proceedings of the Council and the Standing Investigation Committee in relation to a disciplinary matter involving the applicant and others from August 1992 to the date of the access request, and records identifying and listing all materials received from time to time by the Association from the applicant, other Association members, and the Ministry of Forests in relation to the disciplinary matter concerning the same persons.

5. The Association of British Columbia Professional Foresters' (ABCPF) case

The ABCPF is a self-governing professional organization overseeing the practice of professional forestry in this province under the *Foresters Act*, RSBC 1979, c. 141. There are at present about 3,500 members in good standing, who are known as Registered Professional Foresters (RPF's). The ABCPF is governed by a Council and a Standing Investigation Committee, appointed by Council, which determines whether a Discipline Panel should be convened to inquire into the professional conduct of RPF's. (Submission of ABCPF, pp. 1-3)

The main applicant is an RPF employed by the Ministry of Forests, whose conduct came under investigation in the Arrow Forest District of the Ministry. All proceedings against him were stayed by the Standing Investigation Committee of the ABCPF on March 15, 1996, but a co-worker may remain under investigation. According to the Association:

The issues involved in these disciplinary proceedings include concerns about the management and control of the approval process for pre-harvest silviculture prescriptions (PHSPs) and the issuance of cutting permits pertaining to these PHSPs, within the Arrow Forest District of Forests, which is centered in Castlegar. These are controversial issues which have attracted the attention of environmental groups and the news media. (Submission of ABCPF, p. 4)

The ABCPF is of the view that the records in dispute should be withheld from disclosure under sections 13, 14, and 15 of the Act. These specific sections are discussed further below.

6. The applicants' case

The applicants state that the ABCPF made several forays to Castlegar in 1993 asking for documentation about the Forest District's PHSP audits and the involvement of various Ministry of Forests' employees in monitoring relevant submissions and making, or not making, recommendations to the District Manager prior to harvesting of trees by forest companies in various areas. A specific investigation of the main applicant did not begin until September 1995. The three applicants then applied to the ABCPF for various records relating to them. Disclosures were made in some cases, leading to confusion

about the origins of some of the records. (Submission of the Applicants, paragraphs 1-22)

On November 6, 1995 the ABCPF became subject to the Act, leading the applicants to make the formal requests for access that are the subjects of this inquiry. Apparently the applicants had been trying to establish that no PHSP's for specific lots were ever in the custody of the Ministry of Forests. The Standing Investigation Committee established this point when it subsequently entered a stay of proceedings against the main applicant in February 1996. (Submission of the Applicants, paragraphs 23-29)

In addition to their submissions on specific sections of the Act, which I have addressed below, the applicants argue that the ABCPF has focused on the records in dispute in terms of the disclosure of minutes of meetings and deliberations and ignored the fact that motions and resolutions have also not been released. The ABCPF has also failed to reflect on the possibility of severing records under section 4(2) of the Act. (Submission of the Applicants, paragraphs 32, 33, 39, 41)

7. Discussion

The context for this inquiry

The context of this inquiry is set forth in stark terms in a letter prepared by the chair of a Standing Investigation Committee of the ABCPF and sent to its registrar dealing with alleged pre-harvest silviculture prescription irregularities. It specifically concerns the main applicant in this inquiry:

... we believe Mr. [name removed] may have failed to carry out his duties by not monitoring some PHSP submissions and by not making recommendations to the District Manager for approval or rejection of a number of Pre-harvest Silviculture Prescriptions prior to harvesting on several cutblocks in the Arrow Forest District, which failure led to a contravention of Section 129(3) of the *Forest Act*. (Submission of the Applicants, tab c)

This means that a forest company has to seek approval in advance from the Ministry of Forests for how it plans to restore and replant a specific area in which tree cutting will occur, including methods of reforestation, types of replacement trees, and handling difficult terrain. The applicant, an employee of the Ministry, was being accused of professional misconduct, negligence, and failure to manage his practice competently. (Submission of the Applicants, tabs G and O)

It is also evident from the submissions that an acrimonious relationship already existed between the main applicant and the ABCPF before the initial request for access to information occurred. Both were represented by counsel. This applicant felt that his requests for access to the charges and allegations against him were not being satisfied.

(Submission of the Applicants, tabs J and K) The ABCPF has reminded me that “this dispute regarding the Freedom of Information access request has arisen in the context of an ongoing and highly contentious litigation matter between the parties.” (Reply Submission of ABCPF, paragraph 1 and paragraphs 2-8 passim) Predictably, the main applicant denies this latter statement, emphasizing that there are no outstanding proceedings involving him, his fellow applicants, and the ABCPF (with one possible exception, which the courts settled in October 1996). (Reply Submission of the Applicants, paragraph 4; and letter from counsel for the applicants)

The ABCPF has a general concern that disclosure of the records in dispute concerning its handling of this specific disciplinary proceeding could have a negative impact on its image and relations with the Ministry of Forests or private industry RPF’s and make it more difficult to find members who would be willing to serve on disciplinary committees in future. (Submission of ABCPF, p. 4) While I sympathize with these potential problems, neither are statutory grounds to refuse access to information under the Act. The organization is on somewhat more solid ground with respect to its argument that disclosure in this inquiry might interfere with the conduct of future disciplinary inquiries and thus impact negatively on its obligation to uphold the public interest. (Submission of ABCPF, p. 7) A related argument is that members of Standing Investigation Committees believe that their deliberations are confidential. (Affidavit of Robert Kyle, paragraph 8) Again, the prevailing practice with respect to disclosure of available records has to be in compliance with the provisions of the Act, which I review below. (See the Submission of the Applicants, paragraph 47)

Section 13(1): Policy advice or recommendations

The Council of the ABCPF and its committees regularly engaged in policy discussions at their meetings: “Such discussions are routinely reflected in the minutes of SIC meetings.” This is the case for some of the records in dispute in this inquiry. The organization argues that if disclosure of this information occurs, “Council and SIC members will tend to feel constrained in expressing their opinions regarding policy issues.” Disclosure would also undermine the policy of speaking with one voice, since such members do not always agree with one another. (Submission of ABCPF, paragraph 16) I note simply that these are not relevant criteria under section 13(1) of the Act. There is also no obligation under the Act for minutes to reflect the position adopted by anyone present during debate on policy issues.

The applicants express themselves as “surprised” that the ABCPF would withhold information under this section, since it is aimed at “policy advice and recommendations” prepared for a public body, which is “very significantly qualified” in this case by sections 13(2)(a), (k), and (n), which read:

13(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,

- ...
- (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
- ...
- (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

The applicants argue that the Council of the ABCPF, prior to 1994, itself exercised powers of disciplinary investigation and inquiry:

These were and are investigative, not policy, mandates and functions, specifically directed at RPFs impugned or otherwise affected by identifiable disciplinary complaint(s) under the *Foresters Act*.

(Submission of the Applicants, paragraph 36)

Today, a Standing Investigation Committee has no mandate to provide policy advice or recommendations:

It therefore belies reality to suggest that when engaged in investigative deliberations or decision-making, the SIC (or previously the Council) were actually engaged in providing policy advice or recommendations.

(Submission of the Applicants, paragraph 37)

Moreover, the applicants argue, the Standing Investigation Committee, or previously the Council, is “exercising discretionary powers of decision which profoundly affect the rights of any individual RPF concerned. This is precisely the type of function that s. 13(2)(n) of the Act specifically, and with good reason, excludes from s. 13(1).” (Submission of the Applicants, paragraph 38) In my view, these are persuasive arguments.

Finally, the applicants argue that when a Standing Investigation Committee makes a report or recommendation to the Council, “they are reports or recommendations under paragraph (k) or decisions under paragraph (n) and the individuals whose rights are affected by the decisions, actions and opinions of the SIC and Council ought to be given access to them.” (Submission of the Applicants, paragraph 40)

In Order No. 116-1996, August 26, 1996, pp. 8-9, which concerned the College of Physicians and Surgeons, I expressed the view that section 13(1) is “intended to protect, in a limited way, advice or recommendations made ‘by or for’ a public body such as the College and intended to be acted upon or at least considered, by the body itself.”

Based on these arguments and a review of the records in dispute, I find that the ABCPF is not authorized to withhold the records in dispute under section 13(1).

Section 14: Solicitor client privilege

The ABCPF claims that the minutes associated with the records in dispute can be withheld on the basis of this section. Its Registrar is a lawyer and usually attends Council and Committee meetings to act as a resource when legal matters arise:

Although the current Registrar was not present at all of the Council and SIC meetings reflected in the Minutes which are in dispute in this case, the ABCPF has concerns regarding solicitor client privileged Minutes being revealed in future cases on the basis of an order in this case. (Submission of the ABCPF, p. 13 and pp. 13-15 passim)

It cites in this regard the decision of Mr. Justice Thackray in *Cypress Bowl* in a judicial review of Order No. 29-1994, November 30, 1994.

The applicants point out that it is up to the ABCPF to clarify any ambiguities associated with the possible presence at its meetings of its Registrar and lawyer. The issue is whether he was or is acting in a solicitor-client capacity.

The applicants say that there is nothing in the office of the Registrar suggesting that when the Registrar also happens to be a lawyer his or her presence will be in a solicitor client capacity. If anything, an opposite presumption should apply. (Submission of the Applicants, paragraph 58 and paragraphs 56-59 passim)

In fact, the affidavit of Jerome Marburg, paragraph 8 indicates that since April 1995, he has routinely attended Council and Committee meetings and supplied legal advice.

Finally, the applicants advance the following propositions with respect to the application of section 14:

... the *Cypress Bowl* case does not stand for the proposition that when minutes of a meeting are in issue under s. 14, they must be disclosed or protected in their entirety. In the applicants' submission this will turn on a case by case, document by document, application of the law of solicitor client privilege. In *Cypress Bowl*, the Court was persuaded by a document specific affidavit from the solicitor who was present at the meeting in question. That kind of evidence has not been adduced in this inquiry.

Furthermore, a claim of solicitor client privilege cannot apply to motions, resolutions and decisions. Those matters are actions which may flow from legal advice, but they are not in themselves solicitor client communications. (Submission of the Applicants, paragraphs 60, 61)

Based on my detailed review of the records in dispute, I find that there are a number of lines on various pages that can be excepted from disclosure on the basis of section 14.

Section 15(1)(a): The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

The ABCPF argues that its disciplinary proceedings under sections 28(1) and 30 of the *Foresters Act* are “law enforcement matters,” since these can lead to reprimands, suspension, expulsion, fines, and the imposition of costs. It cites in this regard Section C.4.6 of the Government of British Columbia’s *Freedom of Information and Protection of Privacy Act Policy and Procedures Manual* and Order No. 36-1995, March 31, 1995.

The ABCPF is of the view that disclosure of the records in dispute “could reasonably be expected to harm a ‘law enforcement matter,’ namely the professional discipline investigation and proceedings relating to Case 93-1 and the professional discipline investigation and proceedings of future cases.” Its argument is that the profession of forestry is a small, close-knit profession requiring considerable collegial interaction, including “extensive peer review in cases which often involve controversial and difficult professional issues (as does Case 93-1).” (Submission of ABCPF, pp. 9, 10; see the Reply Submission of the Applicants, paragraph 51)

I am not moved by the latter argument concerning a negative impact on peer relations, employers, and fellow professionals, since these factors affect all self-governing professions, and the ABCPF is a medium-sized organization in this regard, having 3,500 members. A “profession” that wishes to be self-governing, by law, needs to be exactly that, and this should occur on a professional basis, including accepting the risks of “frank and open discussion of professional disciplinary issues” (Submission of ABCPF, p. 12; see the Reply Submission of the Applicants, paragraph 51)

Equally, I am not concerned that the Ministry of Forests has expressed “concern about the conduct of Case 93-1 by the ABCPF and about the jurisdiction of the ABCPF to proceed with the matter.” (Submission of ABCPF, p. 11; see the Reply Submission of the Applicants, paragraphs 49, 50) Disclosure of the records in dispute, if it occurs, could indeed have potential detrimental effects on members of investigative committees: that goes with the territory in such cases. But it is not a consideration with respect to the application of this section of the Act about harming a law enforcement matter. As the applicants argue, this section “is not intended to protect investigators or investigative committees from the rigours or discomforts of their jobs, which may well include being negatively perceived by people they esteem for the way in which they have conducted or decided an investigative matter. Section 15(1)(a) aims at identifiable harm to a specific law enforcement matter, not the personal sensitivities or feelings of individuals charged with conducting an investigation.” (Submission of the Applicants, paragraph 44) (See Order No. 13-1994, June 22, 1994, p. 11) I agree with this submission.

Based on my detailed review of the records in dispute, I can find no grounds, at least in this case, for withholding any of the information on the basis of section 15(1)(a) of the Act.

Section 15(1)(c): harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,

The ABCPF makes a vague claim that disclosure of the records in dispute would reveal an investigative technique and procedure of its Standing Investigation Committee. (Submission of ABCPF, p. 12) It offers no evidence in support of this claim. In addition, the applicants have effectively rebutted any effort to rely on this subsection in the context of this inquiry. (See Submission of the Applicants, paragraphs 52-55; and Order No. 50-1995, September 13, 1995, pp. 7, 8)

I am of the view that this subsection has no application in the present inquiry.

Section 15(4): The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute

- (a) *to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or*
- (b) *to any other member of the public, if the fact of the investigation was made public.*

On the basis of the language of this section, the applicants argue that:

A lower level of access cannot possibly have been intended for decisions not to continue professional disciplinary investigations, than for decisions not to prosecute criminal or quasi-criminal matters. On that basis alone, the applicants are prima facie entitled to information in the Council or SIC minutes, motions or regulations which reveals the reasons for the decisions not to proceed against them in connection with the District PHSP investigation. The SIC investigation was the subject of public announcements by the ABCPF and the applicants were significantly interested in and affected by it. (Submission of the Applicants, paragraph 46)

I find this general argument both plausible and persuasive in the circumstances of this inquiry. On the basis of my review of the records in dispute, I am of the view that most of their contents, which are primarily factual and descriptive, should be disclosed to the applicants. I am also aware that the applicants have already received some of this information.

Section 6(1): The duty to assist applicants

This section reads as follows:

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.
- (2) Moreover, the head of a public body must create a record for an applicant if
 - (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
 - (b) creating the record would not unreasonably interfere with the operations of the public body.

The applicant is seeking a list of documents received from the Arrow Forest District. Such a list does not exist and could not be created from a machine readable record. Creating one manually would put a burden on limited office resources. The ABCPF is of the view that it has made reasonable efforts to assist the applicant and has offered to give him copies of the documents actually received (four accordion files). It correctly cites my Order No. 105-1996, May 27, 1996 to the effect that it is under no statutory obligation to create such a list where none exists. (Submission of ABCPF, pp. 5-7; and Submission of the Applicants, paragraph 62)

The applicants indicate that they asked for the list because they believed that it was in preparation anyway and in order to save time and trouble for everyone. (Submission of the Applicants, paragraphs 62-66)

With respect to the list at issue, I find that the ABCPF made a reasonable effort to assist the applicants.

8. Order

I find that the Association of British Columbia Professional Foresters has made a reasonable effort to assist the applicant within the meaning of section 6(1).

I find that the Association of British Columbia Professional Foresters is authorized under section 14 of the Act to refuse access to part of the records in dispute. Under section 58(2)(c), I confirm the decision of the head of the ABCPF to refuse access to those parts of the records that are subject to solicitor-client privilege.

I also find that the Association of British Columbia Professional Foresters is not authorized under sections 13(1) and 15(1) of the Act to refuse access to parts of the

records in dispute. Under section 58(2)(a), I require the head of the Association of British Columbia Professional Foresters to give the applicant access to those parts of the records that I have marked for release.

David H. Flaherty
Commissioner

December 19, 1996