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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 29-1994
November 30, 1994

****** This Order has been subject to Judicial Review ******

INQUIRY RE: A Request for Access to Records about Cypress Bowl Recreation Ltd., held by the Ministry of Environment, Lands and Parks and the Ministry Responsible for Human Rights and Multiculturalism

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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, British Columbia on October 31, 1994 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 the applicant, Bobby Swain, Planning and Program Manager, on behalf of Cypress Bowl Recreation Ltd. ("Cypress Bowl").

On April 13, 1994 Cypress Bowl submitted a request to the Ministry of Environment, Lands and Parks and the Ministry Responsible for Human Rights and Multiculturalism (the Ministry). This request was for a detailed list of records held by the Ministry with respect to its Park Use Permit number 1506. On April 28, 1994 the Ministry notified the applicant of a fee estimate and extended the time limit to process the request by thirty days. The Ministry sent some documents to the applicant with a covering letter dated June 21, 1994.

On July 20, 1994 the applicant notified the Office of the Information and Privacy Commissioner (the Office) that he intended to request a review. The Office received the written request on August 2, 1994.

2. Documentation of the inquiry process

Under section 56(3) of the Act, the Office invited representations from the applicant and the Ministry. On October 13, 1994 both parties were notified that the initial

submissions were due on October 24, 1994 and would be exchanged the following day. Final replies and submissions were to be submitted by October 28, 1994.

Bobby Swain made the applicant's representations. In addition, Robert J. McDonnell, a Barrister and Solicitor with Farris, Vaughan, Wills and Murphy of Vancouver, prepared a one-page reply submission for the applicant. Shauna Van Dongen, Barrister and Solicitor with the Legal Services Branch, Ministry of Attorney General, represented the Ministry.

The Office provided both parties involved in the inquiry with a one-page statement of facts (the Portfolio Officer's fact report), which was accepted by the parties as accurate for purposes of conducting the inquiry.

3. Issue under review at the inquiry

This inquiry examined the extent to which the Ministry may use section 14 of the Act (solicitor-client privilege) to refuse to disclose information from the records in dispute. Section 14 reads:

> 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 in this inquiry is on the head of the public body to prove that the applicant has no right of access to all or part of these records.

4. The records in dispute

The records in dispute are in three separate parcels:

Document 254 is a record titled "Minutes of a meeting on Ski Resort Parks Use Permits Held at Vancouver District Office, June 19, 1990 at 10:00 a.m." and an attachment. The Ministry released the names of those in attendance, the agenda, some opening comments, a brief remark about toilets and building maintenance, a title "general discussion," and concluding remarks.

Document 311 is the "Report and Recommendations - Cypress Bowl Park Use Permit 1506," February 1991, by Spencer Manning, Barrister and Solicitor, Legal Services Branch, Ministry of Attorney General, submitted to the Deputy Minister of Parks. The Ministry released the title page and the author's signature on the final page.

Document 31 includes a Ministry memorandum of July 7, 1993 to Rosemary Maier, Permits Officer, South Coast Region/Parks, Ministry of Environment, Lands and Parks from Ann Wilson, Barrister and Solicitor, Legal Services Branch, Ministry of Attorney General; a Ministry memorandum of July 9, 1993 to Ann Wilson from Ray

Peterson, District Manager, Ministry of Environment, Lands and Parks; and a September 1, 1993 memorandum to Ray Peterson from Ann Wilson. The Ministry of Environment, Lands and Parks released portions of this package to the applicant. This included the "heading" material, a brief description of the subject matter of the correspondence, and concluding remarks.

5. The applicant's case

Document 254

With respect to Document 254, the applicant seeks "[a]ll statements of fact, questions, or other information brought forward in the meeting by B.C. Parks' staff relative to Cypress Bowl Recreations, Park Use Permit 1506, or any activities or procedures of Cypress Bowl Recreations. Any further information comparing the conditions of the administration of Park Use Permit 1506 with either of the two other Ski Resort agreements." Since Document 254 is "minutes of a meeting" prepared by an employee of the Ministry, the applicant argues that "[i]t was developed as a Ministry file document and not as a written communication between solicitor and client."

The applicant rejects the application of section 14 of the Act to this requested material because it is all "factual information or represented as factual 'opinion' concerning Cypress Bowl Recreations provided by B.C. Parks' staff to the Ministry of Attorney General, in their role as public trustees. Our assertion is that if the information is factual and it is relating to Cypress Bowl Recreations land tenure agreement then it is not confidential." The applicant further argues that the meeting in question was not convened for the purposes of the commencement or anticipation of litigation.

Document 311

With respect to Document 311 (the advice to the Deputy Minister of Parks), the applicant seeks "[a]ll statements of fact or factual information contained in the report section relative to Cypress Bowl Recreations and Park Use Permit 1506. Any additional information not related to the giving of legal advice." Again, the applicant's argument is that section 14 does not apply, or the Ministry should waive that privilege, because the information is factual in nature and can be severed from any legal advice. Furthermore, since Cypress Bowl's obligations to maintain the recreational value of Cypress Provincial Park extend to the year 2034, the Minister "has an obligation to Cypress Bowl Recreations and the public to ensure that this agreement is administered fairly to the benefit of the public." Cypress Bowl claims the need to review the information it has requested in order "to ensure that the public interest has been served by the operations of the public body in administering the land tenure agreement."

Although Cypress Bowl claims to appreciate the intent of section 14 of the Act, it argues that "this level of privacy should only be preserved if the actions of public servants in the provision of information to their solicitor, or other use of public resources, is at all times guided by principles of accuracy and fairness." Cypress Bowl asserts that the Ministry has administered the Park Use Permit in question "in an arbitrary manner

without due consideration of ministerial policy, contractual obligations or the original spirit and intent according to which the agreement was entered into by the parties."

Document 31

With respect to Document 31 (a series of inter-office memoranda), the applicant seeks "[a]ny reference to Park Use Permit 1506 Sections 12:12 or 12:13 in any of the documents. All statements of fact or opinions expressing factual information relative to Cypress Bowl Recreations or Park Use Permit 1506." The argument is that section 14 does not apply because of the company's requirement to ensure that the public interest has been served in these communications between solicitor and client, and because only factual information is requested.

Applicant's final reply

In its final representations to this inquiry, the applicant noted that the exception to disclosure in section 14 of the Act is permissive and not mandatory, suggesting that discretion should be exercised by the Ministry to promote the public accountability purposes of the Act.

Counsel for the applicant further argued that section 14 of the Act limits solicitor-client privilege at common law, especially for the facts contained in a written communication between a solicitor and client that can be severed:

> At common law, written solicitor/client communications are protected in their entirety as privileged. Under the Act, only those portions of the written communication that contain requests for or the obtaining of legal advice are privileged.

Counsel argued, more specifically, that it is implausible that all seventeen pages of Document 311 are requests for legal advice or disclose legal advice obtained. Moreover, Document 254 is the minutes of a meeting where a solicitor was present: "Statements of fact by either the client or the solicitor at the meeting recorded in the minute are not privileged and, accordingly, should be disclosed after severing, if necessary, any statements wherein legal advice is sought or obtained."

6. The Ministry's case

In the Ministry's view, two issues are at stake in this inquiry: 1) whether section 14 of the Act permits it to sever information that would reveal information subject to solicitor-client privilege; and 2) whether solicitor-client privilege applies to that part of a communication between a lawyer and client that sets out facts.

With respect to the test for solicitor-client privilege at common law, which the Ministry claims is codified in section 14 of the Act, the Ministry submits that this inquiry concerns only the first part of the test, that is, solicitor-client communications. The Ministry's position is that Canadian courts have recognized the important policy purposes

served by this privilege with respect to the due administration of justice. In 1982 Mr. Justice Lamer (as he then was) of the Supreme Court of Canada held that solicitor-client privilege is a rule of substantive law. In his formulation of this rule, he held that legislation which might appear to give authority to interfere with the confidentiality of privileged communications should be interpreted restrictively. (Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860 at 875.)

The Ministry argues, on the basis of this 1982 case, that for solicitor-client privilege to apply, there must be: 1) a lawyer-client relationship; 2) consultation of a lawyer in the capacity of legal adviser; and 3) a confidential communication for the purpose of obtaining legal advice. "The Ministry submits that all of these conditions are met in the present case." Both Spencer Manning and Ann Wilson were employed as solicitors at Legal Services Branch at the time of the communications in dispute; both submitted affidavits to that effect to this inquiry.

With respect to the issue of whether facts are covered under solicitor-client privilege, the Ministry's position is that "when those facts are set out in communications that meet the criteria for invocation of the first branch of solicitor client privilege, the entire communication is privileged." There is thus a claimed distinction between facts alone and facts in a privileged legal communication that courts in the United States and Canada have recognized. In a 1983 decision, the British Columbia Court of Appeal found that there was no exception to solicitor-client privilege to the effect that communications between solicitor and client are not privileged in so far as they deal with matters of fact. The court held that while facts were not privileged, the lawyer-client communication setting out those facts was. (Dusik v. Newton (1983), 1 D.L.R. (4th) 568 at 572.)

The Ministry also addressed the issue of the first version of the government's own *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual (1993) (the Manual), which was prepared by the Information and Privacy Branch in the Ministry of Government Services. According to the Ministry, the first version of section C.4.5 of the Manual made "reference to the fact that 'background' and 'factual material' in a legal opinion would not fall under the s. 14 exception. These statements are contrary to the state of the law on solicitor client communications." In a recent revision of the Manual, "[a]n example which presented the state of the common law inaccurately has been removed, as has the discussion about that example."

In the Ministry's view, "[t]he cases discussed above make it clear that communications between solicitor and client for the purpose of obtaining or giving legal advice are privileged in their entirety. Where policy and law conflict, law overrules policy."

The Ministry provided three affidavits from Ministry officials involved in this matter. Greg Koyl, Assistant Deputy Minister in the Ministry, explained the grounds upon which he exercised his discretion to withhold parts of the record. Ann Wilson,

Barrister and Solicitor, explained she had been consulted in her capacity as a lawyer to prepare the legal opinions of July 7 and September 1, 1993. Spencer Manning explained that he attended a meeting on June 19, 1990 in his capacity as a lawyer. He "provided legal advice on various issues" that the Ministry raised with him. Further, he states that he provided a legal opinion entitled "Report and Recommendations, Cypress Bowl Park Use Permit 1506" in response to a request for legal advice.

Ministry's final reply

In its reply to the applicant's submissions, the Ministry argued, with respect to Document 254, that the presence of Ministry staff from other areas of B.C. Parks at the meeting "has no bearing as to whether or not the information [legal advice] was provided in confidence." With respect to Document 311, the Ministry rejected the applicant's view that there is a "public interest" in disclosure of information to him, since Park Use Permit 1506 "is a contractual agreement between two parties, the Ministry and the applicant."

7. Discussion

Preliminary points

The materials submitted to me for this inquiry do not disclose the background of this dispute, ostensibly over access to records, between the applicant and the Ministry, nor is this relevant to this inquiry. I accept the Ministry's statement that my mandate is not that of a court in determining some type of negligence: "... the Commissioner's mandate is to adjudicate the rights of an applicant as they pertain to access to information. The fact that a particular ministry performed or did not perform a certain task as communicated in a legal opinion is not germane to the issue of whether or not an applicant should get access to that legal opinion."

The Ministry also asserts that facts in a legal communication may be relevant to a future court action: "It could seriously prejudice the government's position in any future court case involving the applicant if facts contained in the legal communications at issue in this inquiry are disclosed to the applicant through the FOI process." I agree, in principle, with the government's position on this point. I also reject the applicant's view that the public accountability provisions of the Act require me to disclose the facts that make up the government's position in the records in dispute.

Finally, the applicant made some arguments about the public interest in disclosure of the records in dispute in this case. I fully accept the Ministry's representation on this point in its reply brief. The applicant has simply misconstrued how the concept of public interest operates under this Act. The various allegations about Ministry behavior advanced by the applicant might be addressed more successfully in another venue than by means of an access request under this Act.

The meaning of solicitor-client privilege

The purpose of the Act is to ensure the openness and accountability of public bodies. Section 2(1) clearly outlines the two purposes of the legislation: "to make public bodies more accountable to the public and to protect personal privacy." The section continues that these purposes are met, in part, by "specifying limited exceptions to the rights of access."

The Attorney General, in his introduction of Bill 50 for Second Reading, stated:

> ...[T]he philosophy underlying the freedom-of-information provisions is that government is the public's business and the public has a right, with certain necessary exceptions, to have ready access to information in the hands of government or government agencies.
>
> ...
>
> What this bill seeks to do is empower citizens so that they can fully exercise their democratic rights. The reality is that if government has information which is denied to citizens, it becomes extremely difficult to make informed judgments about government policy or to endeavour to influence public policy. (B.C. Debates, Thursday, June 18, 1992 at p. 2737)

In my view, the Legislature did not intend to weaken this clear purpose of greater openness and accountability by means of an expansive interpretation of the section 14 exception. Thus my intention is to interpret this section narrowly in accordance with the basic intent of the legislation.

With respect to the application of solicitor-client privilege in a freedom of information environment, I am further moved by the conclusion of my distinguished federal colleague, John W. Grace, in his June 1994 Annual Report:

> Section 23: Solicitor-client privilege
> It has become obvious during the last 10 years that the application and interpretation of section 23 by the government (read: Justice department) is unsatisfactory. Most legal opinions, however stale, general or uncontroversial, are jealously kept secret. In the spirit of openness, the government's vast storehouse of legal opinions on every conceivable subject should be made available to interested members of the public.
>
> Tax dollars paid for these opinions and, unless an injury to the conduct of government affairs could reasonably be said to result from disclosure, legal opinions should be disclosed. These opinions are to lawyers what advance tax rulings are to accountants and should be equally accessible. Instead, the Justice department resists and even tries to find ways to make it difficult for the more enlightened government departments to waive

> solicitor-client privilege. (Annual Report: Information Commissioner 1993-1994 [Ottawa, 1994], p. 30)

However, I am aware of the significant public policy rationale behind solicitor-client privilege. It exists to maximize candid communications between a client and his or her legal advisers. The rationale was stated more that a century ago in Anderson v. Bank of British Columbia (1876), 2 Ch. 644 at 649:

> The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

More recently, the Exchequer Court of Canada, in a 1969 decision, summarized the legal principle at issue in this branch of solicitor-client privilege:

> [A]ll communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged; .... (Susan Hosiery Ltd. v. M.N.R. (1969), 69 Dominion Tax Cases 5278 at 5281).

The necessity for severing

It is worthwhile to consider the explanatory statements on section 14 in the Manual that accompanies the Act. Unless otherwise noted, the statements that follow appear in both the 1993 and 1994 versions of the Manual. The following statement is especially relevant to the present inquiry:

> Solicitor client privilege is available to protect a record from disclosure where there is a written or oral communication between a legal advisor and a client, the communication is confidential, and the communication is directly related to seeking, formulating or giving legal advice.

The Manual also contemplates satisfying an applicant's request under section 14 "by severing the record and by providing the applicant with as much information as is reasonably practicable."

As noted earlier, there have been modest changes in text between the two editions of the Manual that have specific implications for the present inquiry. A portion that sought to explain the possibility of severing a record does not appear in the later edition. I quote the original text:

> ***Example***
> An applicant requests a copy of a file concerning maintenance on a particular stretch of highway. Part of the file is a legal opinion that, as background, described the physical condition of the highway. The opinion outlines the government's potential liability if road repairs are not completed to a reasonable standard.
>
> In the above example, the section 14 exception applies to the information in the legal opinion. The head exercises discretion in deciding whether to release the record despite the applicability of the exception. If the head chooses to except that opinion from disclosure, the portion of the document containing legal advice would be severed from the factual material on the condition of the highway. The factual material would be released unless another exception applies. (Manual, section C.4.5, p. 5)

I continue to believe that this description is an accurate assessment of the severing that should occur under section 14 in comparable circumstances.

The Ministry argues that the Act incorporates the common law privilege, thus requiring the Ministry to examine an entire document and "characterize" the document as solicitor-client, if the document meets the tests it outlines. The applicant submits that section 14 limits the common law of solicitor-client privilege. In its view, only the portions containing requests for, or the obtaining of, legal advice can be severed.

I have carefully considered the applicant's argument, because section 14 refers to "*information* that is subject to solicitor client privilege," not a *record*. (emphasis added) However, in all of the exception sections in the Act (sections 12 to 22), the Legislature chose to use the word "information." This appears to be consistent with the requirement in section 4(2) that information in a record which falls within an exception should be severed, if reasonably possible, from information which does not. This requirement to sever is not, in my view, inconsistent with the application of common law solicitor-client privilege.

Section 4(2) states:

> The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

This section imposes an obligation on public bodies to identify the information in a record that falls within an exception under Division 2 that can reasonably be severed in order to provide access to the remainder of the record. As I have discussed in Order No. 20-1994, August 2, 1994, a public body normally must undertake a line-by-line analysis of an entire record to accomplish this task. Section 4(2) clearly applies to records containing section 14 information.

The obligation to do a line-by-line analysis is more than mechanically applying various tests (which I will outline below) to the information. There may indeed be information which, when read in isolation, does not appear to meet the test. However, when read within the context of the entire record, the information may meet the test.

Even where there may be a sufficient connection between the facts and the legal advice to extend the cover of solicitor-client privilege, section 14 is a discretionary exception. I have dealt with the issue of the exercise of discretion under section 14 in Order No. 5-1994, March 14, 1994. What I wrote is applicable here:

> [U]nder the Act, only the client has the discretion to waive solicitor-client privilege. In this case, the client is a public body with considerable obligations under the Act. In exercising its discretion under section 14, a public body must, in my view, take all relevant factors into consideration. [page 5--emphasis added]

In that case, I ordered ICBC, the public body, to reconsider the exercise of its discretion, taking into account relevant factors not originally considered.

If a written legal opinion in its entirety is a solicitor-client communication, the factual material in it need not be severed. However, because a client can be questioned on discovery about factual information, I think that public bodies should consider whether disclosure of factual material in a legal opinion would disclose legal advice or legal strategy. If it does not, public bodies should be encouraged to waive privilege over portions of the documents in order to disclose as much factual material as possible, notwithstanding the strict common law rule.

The test of solicitor-client privilege

For the purposes of this particular decision, I choose to apply the test of solicitor-client privilege as outlined in Ministry of Community and Social Services, Ontario Information and Privacy Commissioner Order 49, April 10, 1989, pp. 14-15 (Sidney B. Linden, Commissioner). There are two branches to the privilege; the first branch deals

with legal advice and the second with materials created or obtained in contemplation of litigation. This case involves the first branch, where four criteria must be satisfied according to the Ontario test (which is derived from the decision in Susan Hosiery):

1. There must be a written or oral communication;

2. The communication must be of a confidential nature;

3. The communication must be between a client (or his agent) and a legal advisor;

4. The communication must be directly related to seeking, formulating or giving legal advice.

The first three criteria are not difficult to apply. Under the fourth criterion, it is my view that the public body must consider whether the information, *when read in the context of the entire record,* would reveal information related to seeking legal advice (giving instructions), the subject matter related to the advice sought, the actual advice, or the legal strategy.

Since the Ontario test pertains to the giving, seeking, or formulating of legal advice, I find very helpful the following definition of "legal advice" prepared by Ontario Assistant Commissioner (as he then was) Tom A. Wright in Ministry of the Attorney General, Ontario Information and Privacy Commissioner Order 210, December 19, 1990, at page 16:

> In my view, the term is not so broad as to encompass all information given by counsel to an institution to his or her client. Generally speaking, legal advice will include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. It does not include information given about a matter with legal implications, where there is no recommended course of action, based on legal considerations, and where no legal opinion is expressed.

Thus in a line-by-line analysis of a record, there may be information which, when read in isolation, may not appear to meet all of the Ontario criteria. However, when read within the context of the entire record, the result may be different. I am sensitive to concerns that solicitor-client privilege should not be given an expansive interpretation under the Act. However, I am equally concerned not to overly scrutinize communications between lawyers and their clients in such a way as to second guess a general intention to obtain and communicate openly about legal advice. At the same time, it is necessary to distinguish policy advice from legal advice (which is protected).

In Order No. 23-1994, September 16, 1994, I concluded that at least some of the information at issue was subject to solicitor-client privilege. However, I did not agree that the privilege applied to all of the records, because the lawyer had not been retained to give legal advice in the normal sense. He had been retained as a special prosecutor to exercise delegated powers of the Attorney General in accordance with the provisions of the *Crown Counsel Act*. Thus I recognized the necessity to review information to determine whether it falls within the criteria outlined above.

Review of the records in dispute

In my view, I can only determine the ultimate appropriateness of a section 14 claim on the basis of an empirical review of the nature and contents of the documents in dispute. In addition, affidavit evidence is not finally determinative of a section 14 claim, unless my review of the actual contents lends appropriate support for the claims being made. (See Order No. 28-1994, November 8, 1994.) The entire matter ultimately is an issue of proof.

Document 31

This document comprises two 1993 letters from V. Ann Wilson, Legal Services Branch, Ministry of Attorney General to officials of B.C. Parks and a set of questions in response from one of the officials seeking clarification of the legal opinion from Wilson. In my judgment, these letters are clearly legal opinions about specific legal problem(s) and are thus subject to exception from disclosure under section 14 of the Act. There is no doubt in my mind, from a review of their contents, that counsel is construing and applying various pieces of legislation and specific contractual agreements. The request for clarification is essentially a continuation of the original request for legal advice. Thus I agree with the Ministry's decision not to release this information.

Document 254

This is five pages of minutes of a meeting on ski resort Park Use Permits held in Vancouver at the district office of B.C. Parks on June 19, 1990. Ten people were in attendance, including Spencer Manning from Legal Services Branch. The minutes are very detailed about what was discussed. Cypress Bowl is only one of several ski resorts that were under discussion.

In the afternoon, the meeting turned to a discussion of a specific Park Use Permit on an article-by-article basis. The purpose appeared to be to clarify the meaning of various articles. The minutes no longer specify who said what, except for one specific intervention by Manning. The Parks group was certainly discussing its general strategy in dealing with various Park Use Permit holders but, in my view, the content of the minutes do not allow the entire record to be construed as a discussion subject to solicitor-client privilege under section 14 of the Act.

In Document 254, I have noted eight times when the minutes identify

Mr. Manning as having made a specific point. He stated in his affidavit that he "provided legal advice on various issues," and I accept his point. However, I have no evidence that the entire meeting was solely for the purposes of providing legal advice or seeking instructions. While most of the information which refers to Mr. Manning (about 20 lines in 5 full pages of about 200 lines) appears to contain legal advice, sometimes counsel is simply venturing an opinion or giving advice on strategy in dealing with a problem, only some of which is legally related. Occasionally counsel is simply mentioned by name as agreeing to do something. On one of these occasions he merely asks a question.

On balance, I agree that the Ministry has a plausible argument to withhold those lines of information when Mr. Manning is specifically mentioned. In several of these cases, I would urge the Ministry to release those passing mentions that are not clearly related to obtaining legal advice. The important point is that the presence of a lawyer at a meeting is not enough to establish its entire minutes as being subject to section 14 of the Act, unless it can be determined that the main purpose of the meeting concerned the obtaining of legal advice. As Mr. Justice Lamer said in Descôteaux v. Mierzwinski,

> It is not sufficient to speak to a lawyer or one of his associates for everything to become confidential from that point on. The communication must be made to the lawyer or his assistants in their professional capacity; the relationship must be a professional one at the exact moment of the communication. ([1982] 1 S.C.R. 860 at 873.)

A lawyer would have to play a very central role in the recorded minutes of a meeting for section 14 to be fully activated in such circumstances.

A three-page document labeled "Discussion Paper: PUP 1505" lists a number of issues and questions to be answered under a series of articles of this agreement. I have no information as to who prepared this. It should perhaps be disclosed, since it appears to be an agenda for the meeting, but only to the extent that it deals with Cypress Bowl or makes comparative comments about it.

The minutes of the meeting discuss other ski resorts. The applicant wants information about its Park Use Permit 1506 and comments that compare its record with that of the other permit holders. I accept that the Ministry may choose to sever material irrelevant to the applicant's specific request. While I agree that at least portions of this record may be subject to solicitor-client privilege, the Ministry did not prove that the entire record falls under the exception in section 14.

Document 311

Document 311 is an eighteen-page "Report and Recommendations Cypress Bowl Park Use Permit 1506," prepared for Stephen R. Stackhouse, Deputy Minister of Parks, by Spencer M. Manning, a solicitor with Legal Services Branch, Ministry of Attorney General, dated February 1991. The contents of the record were entirely excepted from disclosure under section 14 of the Act.

The record outlines ten problem areas and has a preamble that describes Park Use Permit 1506 and the province's ability to change its terms. The problem areas are generally structured around a three-part presentation: *Present Situation, Proposed Scheme,* and *Requirements to Implement.*

I have evidence before me on the nature of this record. In Mr. Manning's sworn affidavit, he testifies that this record is "a legal opinion" written in his "capacity as a lawyer, and in response to a request for legal advice." However, it is my role as decision-maker and fact-finder to examine a record and characterize its actual contents with respect to the claim of solicitor-client privilege. Manning's own characterization of the record is an important factor to take into account. However, it appears to me to be contrary to my reading of the facts of the case based on my review of the document in dispute. As above, the Ministry did not prove that the entire record falls under the exception in section 14.

The application of section 14, at least when applied with a broad brush to Document 311, is problematic. The entire record is not directly related to seeking, formulating, or giving legal advice. The preamble to the record, as well as virtually all that appears under the *Present Situation* headings, is factual and descriptive information. A further example is the description of Cypress Bowl's toilet facilities.

A few of the "proposed schemes" and more of the "requirements to implement" suggest the addition of a clause to the Park Use Permit; if the Ministry chooses to claim section 14 protection for such legal material, I would be willing to accept it, but these portions are a relatively small part of the entire document.

I propose to send Document 311 back to the Ministry for appropriate severing in accordance with my suggestions above, including the material about other permit holders. The important severing principle is that relevant factual and descriptive information should be released to the applicant in this case, unless its release would clearly reveal information related to seeking, formulating, or giving legal advice.

As discussed earlier in this Order, public bodies should apply a line-by-line analysis to records to which solicitor-client privilege may apply. In this process, the public body should apply the four criteria discussed above. I have no evidence that the public body has engaged in such a review in the present case. While I conclude that the first three criteria might indeed be met here, the public body should have considered its application of the fourth criterion to the record on a line-by-line basis.

8. Order

Under section 58(2)(b) of the Act, I confirm the decision of the Ministry not to disclose Document 31.

Under section 58(2)(a), I order the Ministry to disclose parts of Documents 254 and 311, after severing information in accordance with the directions set out in these reasons.

Under section 58(4), in order to monitor compliance with this decision, I further order the Ministry to provide me with a copy of any records which are disclosed to the applicant, pursuant to the preceding provisions, within five days of such disclosure.

David H. Flaherty November 30, 1994
Commissioner