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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 212-1998
January 16, 1998**

INQUIRY RE: A decision by the Ministry of Attorney General to withhold records from Tri-Way Seniors Mobile Home Park

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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 (the Office) on December 15, 1997 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 Tri-Way Seniors Mobile Home Park (the applicant) of a decision by the Ministry of Attorney General (the Ministry) to withhold records in the Residential Tenancy Branch of the Ministry under sections 13(1) and 14 of the Act.

2. Documentation of the inquiry process

On June 12, 1997 Tri-Way Seniors Mobile Home Park requested records concerning itself from the Ministry, including memos, correspondence, and handwritten notes of telephone calls held by the Residential Tenancy Branch of the Ministry. On July 11, 1997 the Ministry issued a fee estimate for search time, which the applicant agreed to pay on July 15, 1997.

On July 21, 1997 the Ministry informed the applicant that it was extending the 30-day response time by 30 days because of the large volume of records it had to search in order to respond to the request. The Ministry stated that it would respond by August 20, 1997. On September 4, 1997 the Ministry provided access to most of the requested records. However, it withheld one record and portions of other records under sections 13, 14, and 22 of the Act. The applicant requested a review of the Ministry's decision on September 8, 1997.

On November 19, 1997 the Ministry disclosed several records which it had previously withheld under section 13(1). The Ministry also told the applicant that it was

applying section 14 to other items, either as well as, or instead of, section 13(1). On November 21, 1997 the applicant informed my Office that it wished to proceed to an inquiry on the remaining items withheld under sections 13(1) and 14. My Office gave notice to the applicant and the Ministry of the written inquiry to be held on December 15, 1997.

On December 3, 1997 the Ministry informed my Office that it was withdrawing the application of section 14 to one of the records but retaining its application of section 13 to this record.

3. Issue under review and the burden of proof

The issue under review concerns the Ministry's application of sections 13(1) and 14 of the Act to records 1, 2, 4, 12, 19, and 22. Section 22 is not an issue in this inquiry.

The relevant portions of the Act read as follows:

Policy advice, recommendations or draft regulations

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.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under sections 13(1) and 14, 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.

4. The records in dispute

The records in dispute include e-mails, a memorandum, a letter, and a briefing note exchanged between Ministry staff. Some of these records have been severed under sections 13(1) and 14 of the Act, while others have been withheld entirely.

5. Tri-Way Seniors Mobile Home Park's case

I have reviewed the applicant's detailed submissions on the application of sections 13 and 14 of the Act to the records in dispute. The applicant specifically challenges the application of section 14 to the briefing note prepared for the Assistant Deputy Minister. According to the applicant, the briefing note does not meet the test for

solicitor-client privilege since there is no indication that the author of the briefing note was seeking or providing legal advice. Although the applicant appears to accept that the legal opinions furnished by the Ministry of Attorney General fall under section 14, it suggests that the privilege would have been waived if the opinions had been provided to, or discussed with, the tenants in the mobile home park.

The applicant also submits that it is not sufficient for a public body to simply label a document “advice or recommendations” but rather it must demonstrate that the information sought is, in substance, “advice or recommendations” under section 13.

6. The Ministry of Attorney General’s case

The Ministry submits that it has appropriately withheld the information in dispute on the basis of sections 13 and 14 of the Act. It submits that section 13 is intended to allow full and frank discussion of advice or recommendations within the public service, preventing the harm that would occur if the deliberative process of government decision and policymaking was subject to excessive scrutiny. The Ministry points out that there is no legal requirement to prove that harm may result if the severed information is disclosed. The Ministry submits that the severed information reflects advice and recommendations developed by it as to the content of a briefing note and letters drafted for a Minister and the Premier.

The Ministry submits that solicitor-client privilege attaches to communications under section 14 where there is a lawyer/client relationship, consultation of the lawyer in the capacity of legal advisor, or a confidential communication for the purpose of obtaining/giving legal advice. The Ministry points out that a lawyer/client relationship exists between the Attorney General (in practice, the lawyers employed in the Legal Services Branch) and Her Majesty the Queen in Right of the Province of British Columbia. The Ministry submits that two of the records withheld under section 14 are communications between solicitor and client for the purpose of obtaining/giving legal advice. While a third record is not a communication directly to or from a lawyer, it reflects confidential communications between solicitor and client made for the purpose of obtaining/giving legal advice. Finally, the Ministry submits that privilege is not waived when information is communicated to or between different parts of the government.

7. Discussion

Background Information

The Ministry has indicated that the applicant has filed a petition in the Supreme Court of this province seeking an order that section 18(1) of the *Residential Tenancy Act* does not apply to forty-nine arbitration applications filed by tenants of Tri-Way Mobile Home Park. The tenants, concerned about maintenance and repairs in the Tri-Way Seniors Mobile Home Park, are seeking a retroactive rent reduction related to an alleged failure to provide maintenance and repairs in the mobile home park. The

Supreme Court has ordered the arbitration stayed until the petition can be heard by the Court. (Submission of the Ministry, paragraph 1.03)

Section 13: Policy Advice, recommendations or draft regulations

I agree with the Ministry that this section “is intended to allow full and frank discussion of advice or recommendations within the public service, preventing the harm that would occur if the deliberative process of government decision and policy making was subject to excessive scrutiny.” (Submission of the Ministry, paragraph 5.02)

Having reviewed the records in dispute and the affidavit evidence filed by the Ministry, I accept that the severed information reflects advice and recommendations developed regarding the content of a briefing note and letters drafted for a Minister and the Premier. The information severed from an e-mail message was a recommendation from the Manager of the Residential Tenancy Branch, Vancouver Island to the Director of the Residential Tenancy Branch in relation to a draft briefing note. Similarly, the information severed from a fax sheet to a Policy/Issues Analyst with the Policy and Communications Branch of the Ministry of Attorney General, and an e-mail to the Director of the Residential Tenancy Branch, also reflected advice to the Attorney General on the contents of a Minister’s letter and a letter drafted for the Premier. (Submission of the Ministry, paragraph 5.05) Based on the evidence, I accept that the Ministry has discharged its burden of proving that it was authorized to refuse access to the severed information under section 13 of the Act.

Section 14: Legal Advice

The information withheld on the basis of this section reflects the fact that a lawyer/client relationship exists between the Attorney General’s lawyers in the Legal Services Branch and the government of the province. Two of the records are direct communications between solicitor and client for the purpose of obtaining or giving legal advice. A third reflects confidential communications between solicitor and client for the purpose of obtaining or giving legal advice. See Order No. 165-1997, May 20, 1997, p. 8; and Order No. 201-1997, November 28, 1997, p. 4. (Submission of the Ministry, paragraphs 5.12 to 5.14) These records fall squarely within section 14 of the Act.

Information has also been severed from a briefing note prepared for the Assistant Deputy Minister concerning the petition filed by the holding company. Although this document is not a direct communication between solicitor and client, the information severed would disclose instructions to legal counsel as well as the government’s position and strategy regarding the legal proceedings. I accept that the information severed from the briefing note reflects confidential communications between solicitor and client made for the purpose of obtaining/giving legal advice and was properly withheld under section 14 of the Act. (See Order No. 165-1997, May 20, 1997, pp. 8-9)

The applicant suggests that privilege is waived if any of the information was shared with individuals outside of government. The Ministry denies that privilege has been waived. As there is no evidence that legal advice was provided to or discussed with tenants or anyone else outside of government, I do not accept the argument that the privilege has been expressly or impliedly waived in the circumstances of this case.

8. Review of the records in dispute

The Ministry has provided the applicant and myself with a detailed description of each of the six records in dispute, with an indication of the amount of severing, and the specific exception applied under the Act. (Submission of the Ministry, paragraph 4.01)

I have reviewed each of the severances and find the information appropriately withheld under sections 13 and 14 of the Act. I find that the Ministry has met its burden of proof under the Act.

9. Order

I find that the Ministry of Attorney General was authorized under sections 13 and 14 of the Act to refuse access to the records severed or withheld from the applicant under those sections. Under section 58(2)(b), I confirm the decision of the Ministry of Attorney General to refuse access to the records withheld on the basis of sections 13 and 14.

David H. Flaherty
Commissioner

January 16, 1998