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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 215-1998
February 23, 1998**

INQUIRY RE: A decision by the Ministry of Environment, Lands and Parks to sever information from a Draft Discussion Paper requested by Sierra Legal Defence Fund.

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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 November 27, 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 the Sierra Legal Defence Fund (the applicant) of a decision by the Ministry of Environment, Lands and Parks (the Ministry) to sever information from a copy of a draft Discussion Paper entitled "Protecting Wildlife, Fish and Their Habitats: The Need for Legislation." (the Discussion Paper)

2. Documentation of the inquiry process

On May 9, 1997 the applicant requested a draft copy of the *Fish, Wildlife and Endangered Species Act* that it says was prepared several years ago by Ministry officials, as well as copies of correspondence, e-mails, and studies related to the draft Act. A copy of the draft *Fish, Wildlife and Endangered Species Act* could not be located; however, on June 11, 1997 the applicant was provided with access to a draft copy of the Discussion Paper. Relying on sections 13, 16, and 17 of the Act, the Ministry severed some of the information from the record. On July 7, 1997 the applicant made a formal request to my Office for review of the decision to refuse access to the severed information.

Mediation by the Office of the Information and Privacy Commissioner resulted in a decision by the Ministry to withdraw the application of section 16 to the records and to disclose additional information withheld under sections 13 and 17. On November 12, 1997 the Ministry disclosed further records and advised that it was no

longer relying on section 17 of the Act. By consent of both parties the inquiry was rescheduled to November 27, 1997.

3. Issue under review and the burden of proof

The issue under review concerns the decision of the Ministry to sever information from the draft Discussion Paper on the basis that the withheld information constituted policy advice or recommendations within the meaning of section 13 of the Act. It reads in part:

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.
- (2) The head of a public body must not refuse to disclose under subsection (1)
 - ...
 - (f) an environmental impact statement or similar information,
 - ...
 - (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
 -

Section 57 of the Act establishes the burden of proof on parties in an inquiry. Under section 57(1), where access to information in all or part of a record has been refused under section 13(1), it is up to the public body, in this case the Ministry, to prove that the applicant has no right of access to the record or part of the record. Accordingly, in this case, the Ministry has to prove that, under section 13(1) of the Act, the applicant has no right of access to the withheld information.

4. The record in dispute

The record in dispute is the draft copy of the Discussion Paper, which is dated February 17, 1992. It is 71 pages in length. The Ministry has disclosed 31 out of 35 recommendations in the Discussion Paper and the analysis associated with them. The Ministry has refused to disclose information which would reveal, explicitly or implicitly, 4 specific recommendations addressed in the Discussion Paper. (Submission of the Ministry, paragraph 4.01) The applicant's response is that the Ministry has disclosed only

5 of 9 recommendations dealing with legislated protection for endangered species, which is the topic that interests the applicant. (Reply Submission of the Applicant, paragraph 2)

5. The Sierra Legal Defence Fund's case

The applicant notes that the subject of protecting endangered species is an environmental issue of great public concern and that any documents which relate to potential legislation on the matter are of great public interest. The applicant says that, as a consequence, it is in the public interest that these materials be freely and openly available to the public for debate. (Submission of the Applicant, paragraph 3) The Province has no legislation to protect endangered species, despite repeated promises to enact such laws. (Reply Submission of the Applicant, paragraph 4)

The applicant submits that the Ministry cannot rely on section 13 of the Act to justify its refusal to provide access to the withheld information in the record. I have discussed below the applicant's specific submissions on section 13.

6. The Ministry of Environment, Lands and Parks' case

I have discussed below the Ministry's detailed submissions on the application of section 13 of the Act.

7. Discussion

Section 13: policy advice, recommendations or draft regulations

The Ministry submits that the underlying intent of section 13 is "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) It further argues, based on previous Orders, that information can be withheld under section 13(1) if that information "would permit an individual to draw accurate inferences about advice or recommendations" either implicitly or explicitly: "The assessment of a proposed course of action constitutes advice and recommendations in that it essentially sets out the advantages of such an approach and provides the rationale for the recommendation." (Submission of the Ministry, paragraph 5.04)

The Ministry submits that under section 13(1) of the Act it is authorized to refuse access to most of the information in the record but that it exercised its discretion in favour of disclosing much of it: "In this case, the public body has carefully reviewed the Discussion Paper and has released most of it to the applicant despite the applicability of section 13(1). It is submitted that section 13(1) clearly authorizes the public body to refuse access to the small amount of information it continues to withhold." (Reply Submission of the Ministry, paragraph 5.05)

The applicant submits that the information in dispute should be disclosed on the basis of section 13(2)(f), because it is “clearly information of an environmental nature.” Section 13(2)(f) provides that the head of a public body cannot refuse to disclose “an environmental impact statement or similar information.” (Submission of the Applicant, paragraph 12) I have reviewed the information in dispute and find that it does not constitute “an environmental impact statement or similar information” within the meaning of section 13. I agree with the Ministry that it does not contain a technical assessment or similar information on the impact on the environment of specific projects or activities, such as buildings, highways, mining, or timber harvesting. (See also the Reply Submission of the Ministry, paragraph 3)

The applicant also argues that section 13(2)(1) is applicable, because the Ministry and the government have “rejected” plans for legislation on endangered species. (Reply Submission of the Ministry, paragraph 13) I do not agree with the applicant that the draft Discussion Paper constitutes a “plan or proposal to establish a new program or to change a program,” which the Ministry has approved or rejected. (Reply Submission of the Applicant, paragraphs 6 to 11) While the government has not enacted legislation to protect endangered species and has announced publicly it does not intend to do so, the Discussion Paper is not a plan or proposal for the introduction of such specific legislation, nor can the document be reasonably construed as a plan or proposal to create a “new program” or change an existing one. As the Ministry points out, the Discussion Paper makes very specific recommendations addressing all aspects of wildlife management and not just endangered species. (See also the Reply Submission of the Ministry, paragraph 4)

Further, I am not persuaded by the applicant’s arguments to the effect that the Discussion Paper does not constitute advice or recommendations, as required by section 13(1), but rather merely constitutes ideas for discussions, following which a recommended course of action would be formulated. (Reply Submission of the Applicant, paragraphs 3 and 4)

I agree with the following Submission of the Ministry:

A common step in the deliberative process of government decision making is the preparation of a discussion paper which lists and evaluates recommendations developed by the Public Body for change in policy or programs. This process requires full and frank discussion within the Public Body of the advice and recommendations which are developed. This is exactly the type of information which section 13 is intended to protect from disclosure. (Reply Submission of the Ministry, paragraph 5)

In Order No. 159-1997, April 17, 1997, p. 9, I accepted that, under section 13(1), public bodies have the right to operate in a zone of confidentiality as they develop policies and recommendations. In the present case, the Discussion Paper was being developed for consideration and discussion within the Ministry.

8. Review of the record in dispute

I have reviewed each of the severances made by the Ministry to the record in dispute. In each instance, I find that the severed information is appropriately withheld from disclosure under section 13(1) of the Act.

Because there would appear to be some confusion about what the Ministry has in fact disclosed to the applicant, I am specifically agreeing with the Ministry's severances on pages 11 to 17, 19 and 20, 55, 64, 65, and 68 to 70 of the draft Discussion Paper. In each case, the Ministry may refuse to disclose the severed information under section 13(1) of the Act.

9. Order

I find that the head of the Ministry of Environment, Lands and Parks was authorized to refuse access to the withheld information in the draft Discussion Paper under section 13(1) of the Act. Under section 58(2)(b), I confirm the decision of the head of the Ministry of Environment, Lands and Parks to refuse access to that information.

David H. Flaherty
Commissioner

February 23, 1998