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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 38-1995
March 31, 1995**

**INQUIRY RE: A Request for Access to Records Pertaining to Flora Island held by
the Ministry of Attorney General**

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1. Description of the review

As Information and Privacy Commissioner, I conducted an oral inquiry at the Office of the Information and Privacy Commissioner in Victoria on February 24, 1995 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 an applicant, Mr. Murray Stark.

The applicant is the owner of Flora Island, a 3.3 acre private island located off Helliwell Provincial Park on Hornby Island. In 1975, the Nature Conservancy of Canada identified Flora Island as a site with ecological merit. It tried to purchase the island in 1976 and in 1991. The applicant believes the purchase offers have been below market value and brought his concerns to the attention of the Ombudsman of British Columbia. Through the Ombudsman, negotiations for the purchase of Flora Island between the applicant and the Ministry of Environment, Lands and Parks continue.

The request for review concerned four records pertaining to Flora Island. In a letter dated June 8, 1994, the applicant made a request to the Ministry of Attorney General (the Ministry) for all information regarding his contact with government. The original request was not forwarded to its Information and Privacy program office until July 8, 1994.

The Ministry's search of its files for relevant information yielded 2,241 pages dating back sixteen years. The Ministry chose to waive a fee estimate of \$541.45 that it prepared and it released a package of material to the applicant on October 7, 1994. Information was withheld from this package pursuant to sections 13, 14, and 17(1)(e) of the Act.

On November 8, 1994, the applicant wrote to the Ministry seeking a review of the Ministry's decision to withhold information from him. My Office received this letter on November 15, 1994.

On January 17, 1995, my Office gave notice that an oral inquiry would be held on February 9, 1995. At the request of the applicant, it was rescheduled for February 24, 1995 at 2:00 p.m.

On February 20, 1995, the Ministry released all of the records previously withheld under sections 13 and 17(1)(e) and waived solicitor-client privilege on several other records under section 14.

2. Documentation of the inquiry process

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

Under sections 56(3) and (4) of the Act, the Office invited representations from the applicant and the Ministry. The Ministry was represented by Shauna Van Dongen, Legal Counsel. The applicant represented himself.

3. Issue under review at the inquiry

The issue under review is whether the remaining records in dispute are subject to solicitor-client privilege, pursuant to section 14 of the Act, which reads:

Solicitor Client Privilege

14 The head of a public body may refuse to disclose information 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 four records withheld from the applicant at the date of this oral inquiry were:

A. Record 7 is a four-page legal opinion prepared in 1992 by Gordon Houston, a solicitor to Brian Neal, then Assistant Deputy Attorney General, pertaining to Flora Island. It is divided into three sections: Facts, The Law, and Conclusion. The Ministry has released the Facts section of this document (except for one paragraph) and withheld the rest under section 14 of the Act.

B. Record 8 consists of one page of handwritten notes by Gordon Houston, a Solicitor with the Ministry of Attorney General, which he used in the preparation of record 7. The Ministry has released the factual material from the page and withheld the rest (a total of ten lines) under section 14 of the Act.

C. Record 10 is a memorandum from Brian Neal, Assistant Deputy Attorney General, to Jake Masselink, Assistant Deputy Minister, Parks Division, Ministry of Environment, Lands and Parks, dated October 7, 1992, from which only a handwritten marginal note by Gordon Houston has been severed.

D. Record 12 is a fax cover sheet from David Morris, Local Government Services, Ministry of Municipal Affairs to Gordon Houston. It is dated December 7, 1993. Attached to the fax cover sheet is a five-page legal opinion on Flora Island prepared at an earlier date for Islands Trust by an outside law firm. Subsequent to this hearing, the Ministry of Municipal Affairs waived privilege on this document and released it to the applicant on March 17, 1995. I therefore need not address the status of this record.

5. The applicant's case

The applicant believes that he has been badly treated by the Ministry and the government and that, as a consequence, he should have full access to all of the records that have been compiled about him. In support of his claims, the applicant submitted a forty-seven minute video tape that featured material about victims of crime, including presentations and testimony by the applicant about his experiences with the legal system, the police, and government. He also gave me two reports and correspondence from the Office of the Ombudsman about his case.

6. The Ministry's argument

The Ministry asserts that the remaining records in dispute, as described above, are covered by solicitor-client privilege under section 14 of the Act.

The Ministry's interpretation of the common law of solicitor-client privilege distinguishes solicitor-client communications (the first branch) from all papers and materials created or obtained for preparation of a lawyer's brief in connection with existing or contemplated litigation (the second branch). It claims that this inquiry only deals with the first branch of this test and that it is met with respect to records 7, 8, and 10. Their contents clearly reveal that the Ministry's Legal Services Branch provided legal advice to the Ministry of Environment, Lands and Parks concerning the Flora Island situation. It did so both orally and in written material prepared by Brian Neal and Gordon Houston of Legal Services Branch. (Outline of Argument, p. 6)

Additionally, record 8 is handwritten notes made by Gordon Houston while preparing record 7. Working papers used by a legal advisor to

formulate a legal opinion are covered under the s. 14 exception because the papers are directly related to giving legal advice. (Outline of Argument, p. 9)

Gordon Houston's affidavit supported this position. He also stated that his handwritten notes in record 10 were prepared for his continuing legal advice to Brian Neal. (Exhibit 1)

7. Discussion

I have reviewed and carefully considered all of the written and videotape material submitted to me by the applicant. Among other arguments he presented was an ingenious effort to claim that a taxpayer is a client of government and that he can thus choose to waive solicitor-client privilege about any records about himself held by government. The reality is that solicitor-client privilege is intended to protect legal opinions prepared by government for its own purposes, including its relations with taxpayers.

As noted above, there are two branches to the privilege; the first deals with legal advice and the second with materials created or obtained in contemplation of litigation. This case largely involves the first branch, where four criteria must be satisfied (Susan Hosiery Ltd. v. M.N.R., [1969] 69 Dominion Tax Cases 5278 (S.C.C.)):

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.

I also find 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.

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. Affidavit evidence is not 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.

I will now proceed to apply these rules to the three remaining documents at issue in this inquiry, which have been described more fully above.

Record 7: The Ministry has not released to the applicant the parts of a legal opinion by a Ministry lawyer about the law on a particular matter and its potential application to the applicant's experience with government bodies about Flora Island. The Legal Services lawyer drew a conclusion that would be directly relevant to potential litigation. This record has been appropriately severed under section 14 of the Act.

Record 8: This record consists of one page of handwritten notes used by the Legal Services lawyer in preparing the previous record. It is essentially an outline of what he wrote in record 7. This record has been appropriately withheld under section 14 of the Act.

Record 10: The same Legal Services lawyer appended a handwritten note on his copy of a memorandum by his superior to the Ministry of Environment, Lands and Parks. The Ministry of Attorney General has disclosed two sentences containing facts (the first and the third) and severed two other sentences (the second and the fourth). The second sentence is clearly an expression of a legal opinion and properly severed under section 14 of the Act. However, the fourth sentence is also simply a descriptive statement of fact and should also be disclosed, since the head of the Ministry is not authorized or required to refuse access to it.

8. Order

Under section 58(2)(b) of the Act, I find that, with the one exception below, the Ministry is authorized to refuse access to the information it did. I therefore confirm the decision of the Ministry of Attorney General not to disclose records 7, 8, and 10 (in part).

Under section 58(2)(a) of the Act, I find that the Ministry of Attorney General was not authorized or required to withhold the fourth sentence from the handwritten portion of record 10. I therefore order it to be disclosed to the applicant.

David H. Flaherty
Commissioner

March 31, 1995