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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 165-1997
May 20, 1997

INQUIRY RE: A decision by the Ministry of Attorney General to deny access to records relating to amendments to the *Human Rights Act,* S.B.C. 1984, c. 22 pertaining to discriminatory publication

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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 April 8, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a decision by the Ministry of Attorney General (the Ministry) to withhold from an applicant records revealing policy options and legislative objectives relating to amendments to section 2 of the *Human Rights Act*, S.B.C. 1984, c. 22. The amendments were contained in Bill 33, which passed in June 1993 as the *Human Rights Amendment Act, 1993*. The subject matter is the prohibition of discriminatory publications that might incite hate propaganda and activity; these are sometimes referred to as hate laws.

2. Documentation of the inquiry process

On July 23, 1996 the applicant submitted a request for records under the Act to the Ministry. On October 15, 1996 it responded to the applicant's request by releasing certain records and by severing and withholding other records under sections 12, 13, and 14 of the Act.

On November 25, 1996 the applicant submitted a request for review of the Ministry's decision to my Office. The grounds for review put forward by the applicant were "that the public body improperly applied the provisions of ss. 12, 13, and 14 and failed to apply s. 25 of the Freedom of Information and Protection of Privacy Act."

On March 6, 1997 the Ministry released a second package of records to the applicant disclosing some of the information previously severed under sections 12 and 13 of the Act.

3. Issues under review at the inquiry

The issues before me in this inquiry are whether the Ministry properly applied sections 12, 13, and 14 of the Act, and whether it failed in a duty to apply section 25 of the Act.

The relevant sections of the Act are the following:

Cabinet confidences

12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

(2) Subsection (1) does not apply to

...

(c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if

(i) the decision has been made public,
(ii) the decision has been implemented, or
(iii) 5 or more years have passed since the decision was made or considered.

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.

Information must be disclosed if in the public interest

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

Section 57 of the Act establishes the burden of proof on the parties in an inquiry. Under section 57(1), where access to information in a record has been refused, it is up to the public body, in this case the Ministry of Attorney General, to prove that the applicant has no right of access to the records withheld or severed under sections 12, 13, and 14.

Section 57 is silent with respect to a request for review on the failure of a public body to apply section 25 of the Act to disclose records in the public interest. As I noted in Order No. 162-1997, May 9, 1997, I am of the view that the burden of proof is on the applicant with respect to the application of section 25.

4. The records in dispute

The records in dispute consist of correspondence and memoranda between the Ministry of Education, the B.C. Council of Human Rights, and the government's lawyers in the Legal Services Branch of the Ministry of Attorney General. The records date from 1992 and 1993.

5. The applicant's case

The applicant submits that he is entitled "to disclosure of vital government information relating to the constitutionality of recent legislation which infringes the free speech rights which are guaranteed by section 2(b) of the Canadian *Charter of Rights and Freedoms*." (Submission of the Applicant, paragraph 1) This should occur on the basis of section 25 of the Act; alternatively, the applicant submits that the Ministry has improperly relied on exceptions contained in sections 12, 13, and 14. I have presented below the detailed arguments of the applicant on these sections.

The applicant views Bill 33 as "the most significant legislative infringement of press freedom in the recent history of British Columbia." (Submission of the Applicant, paragraph 9) I have discussed below the applicant's views on the constitutional implications of the records in dispute.

The applicant wishes me to order disclosure of the records in dispute on the basis of section 25(1)(b) of the Act or on the basis of the misapplication of sections 12, 13, and 14.

6. The Ministry's case

The Ministry states that most of the records in dispute are correspondence among the Ministry of Education and Ministry Responsible for Human Rights and Multiculturalism, the B.C. Council of Human Rights, and the government's lawyers in the Legal Services Branch of the Ministry of Attorney General (which now has responsibility for human rights and multiculturalism and thus has custody and control of various relevant records). (Submission of the Ministry, p. 4)

I have presented below the Ministry's submissions on specific sections of the Act.

7. Discussion

The constitutional implications of Bill 33

One of the applicant's fundamental issues is the difference between section 2 of the *Human Rights Act* before and after the enactment of Bill 33:

> Bill 33 removed the explicit statutory protection in the former statute for the expression of opinion, expanded the scope of the prohibition against discriminatory publications to include news stories and editorials in newspapers, and added a new prohibition against exposing a person to hatred or contempt. Bill 33 is much broader in scope and application than any other counterpart provision in provincial or federal human rights legislation. (Submission of the Applicant, paragraph 11)

In essence, the applicant submits that the infringement on freedom of expression in Bill 33 reinforces the need for full disclosure of relevant records to the public:

> It is crucial, therefore, for the applicant to have full disclosure of the legal advice received by the government in order to assess its scope in quality and to determine whether the government received sufficient information about other 'human rights' instruments before passing Bill 33 into law. (Submission of the Applicant, paragraph 14)

By severing the records released to the applicant to date, the applicant asserts that the Ministry has deprived the public of appropriate knowledge of various aspects of the lawmaking process. (Submission of the Applicant, paragraphs 15, 16, 17)

The applicant has further explained the standards established by the Supreme Court of Canada for a *Charter* challenge. He has also informed me that the constitutionality of Bill 33 has been challenged by a B.C. newspaper, a newspaper columnist, and the B.C. Press Council. (Submission of the Applicant, paragraphs 18-38) While I fully agree with the applicant that it "is important that all relevant government documents be subjected to full public scrutiny at the earliest possible date," there is a judicial process underway which should permit the appropriate documentation to be produced for a complaint proceeding before the B.C. Human Rights Tribunal and before the courts of the land. (Submission of the Applicant, paragraph 24; see also paragraph 38) While the applicant has the right to ask for these records in dispute under the Act, he may not have a right of access under the Act, whereas a right of access for quasi-judicial or judicial proceedings may be more expansive. I agree with the Ministry that the "present inquiry is not a Charter case; it is an inquiry under the Act." (Reply Submission of the Ministry, paragraph 3.11; see also paragraphs 3.12-3.14) I must act within my statutory mandate.

The applicant's reply submission raises many interesting questions about the rationale and logic behind the enactment of Bill 33. (Reply Submission of the Applicant, pp. 1-10) However, with the possible exception of section 25 of the Act, there is no provision in it that authorizes me to overturn the Ministry's proper application of sections 12, 13, and 14 of the Act on these grounds, unless my review of the records in dispute (see below) reveals an inappropriate reliance on them.

The applicant further states that he wishes to have access to these records for purposes of preparing a detailed article concerning the origins, purpose, and constitutional validity of Bill 33. (Submission of the Applicant, paragraph 24) Again, his right of access, for whatever reasons, needs to be tested against the exceptions in the Act.

The Ministry's alleged arbitrary and capricious exercise of its discretion

The first half of the applicant's reply submission is largely taken up with assertions that the Ministry acted in an arbitrary and capricious manner in the exercise of its discretion conferred by sections 13 and 14 of the Act, because it did not offer detailed and convincing explanations for what it has done. (Reply Submission of the Applicant, p. 1-6) I do not accept this line of reasoning. The task of a public body under these particular sections is to indicate which sections of which part of the Act it has applied to the records in dispute; my role is then to determine whether the records fall properly under that category of exception. In this connection, I do not require "precise criticism and illumination by the Applicant" in order to carry out my responsibilities. (Reply Submission of the Applicant, p. 7)

Section 12: Cabinet confidences

The Ministry states that it has applied this section to some of the information in some of the records in dispute in order to protect the confidences of the Cabinet and its

committees, including comments made on draft legislation and records submitted, or prepared for submission, to Cabinet. (Submission of the Ministry, paragraphs 3.01-3.06)

On the basis of Order No. 8-1994, May 26, 1994, the applicant submits that disclosure of the records in dispute would not reveal the "substance of deliberations" of Cabinet or its committees. (Submission of the Applicant, paragraph 41) It is also likely, he argues on the basis of Order No. 48-1995, July 7, 1995, that the "information is in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision, and the decision has been implemented within the meaning of section 12(ii)." (Submission of the Applicant, paragraph 41) The Ministry's view is that sections 12(2)(a) through (c) do not apply to exclude the application of section 12(1) in this case. (Submission of the Ministry, paragraph 3.06)

Section 13: Policy advice, recommendations, or draft regulations

The Ministry states that it has severed and withheld some information from some of the records in dispute under this section, because it reveals advice or recommendations to a public body, either explicitly or implicitly. (Submission of the Ministry, paragraphs 2.01-2.05)

The applicant argues that the section 13 exception is not applicable because the Ministry "failed to consider the important public interest in the disclosure of the records having regard to the constitutional implications." (Submission of the Applicant, paragraph 42) The applicant further submits that the records in dispute fall under the categories of information listed in sections 13(2)(b), (c), (g), (j), (k), (l), and (m). The Ministry states that this is not the case. (Submission of the Ministry, paragraph 2.06)

Section 14: Solicitor-client privilege

The Ministry has relied on this section to withhold entire records and to sever others on the basis of its understanding of the meaning of solicitor-client privilege. (Submission of the Ministry, paragraphs 1.01-1.12.) Two specific lawyers, who provided me with affidavits, functioned as legal advisers for Bill 33, including comments on draft legislation.

The applicant submits that either the records in dispute are not subject to solicitor-client privilege, or that it was waived. In addition, the applicant alleges that the Ministry failed to consider the important constitutional implications of the records. (Submission of the Applicant, paragraph 43) Finally, the applicant claims that disclosure of these records of legal advice would work to the distinct advantage of the public in perhaps remedying deficiencies in explanations not previously offered in defense of Bill 33. My view is that there is no provision in the Act that would require me to overturn a public body's reliance on section 14 of the Act to protect legal advice, because of the need to

better inform public debate. (Reply Submission of the Applicant, pp. 8, 9 and Appendix A)

Section 25: Disclosure in the public interest

The applicant, represented by counsel, has made an aggressive argument about the relevance of section 25 in this inquiry. His view is that disclosure is clearly in the public interest, that the Ministry has failed to comply with the duty imposed by this section, and that I should order it to perform this duty. (Submission of the Applicant, paragraphs 3, 4, 6; see also paragraphs 44, 48-54) Moreover, this application for review will test the efficacy of the Act "as a mechanism for scrutinizing government initiatives which infringe constitutional rights." (Submission of the Applicant, paragraph 16)

The applicant disagrees with my previous assertions that only a public body can exercise section 25. He argues that sections 42(1)(b) and 42(2)(a) authorize me "to determine whether the public body had complied with the requirements of section 25(1)(b)." (Submission of the Applicant, paragraph 54)

The Ministry's view of section 25 is that it is "an exceptional provision" applying only in the clearest and most serious of situations; "the public interest in disclosure must be of an urgent and compelling nature before section 25 will come into play." It anticipates that such a situation will be "extremely rare." (Submission of the Ministry, paragraph 4.02)

> The Public Body submits that disclosure of the information it has withheld under sections 12, 13, and 14 is not clearly in the public interest. Further, with respect to the information withheld under sections 12 and 14, the Public Body submits that there is a clear public interest in *not* disclosing that information. (Submission of the Ministry, paragraph 4.04; see also paragraphs 4.05-4.07)

The Ministry also submits that I am not authorized to review its determination that section 25 does not apply in the circumstances of this inquiry. With respect, I disagree with this latter claim. Section 42(2)(a) of the Act gives me the power to investigate whether a public body has performed a duty imposed by the Act or the Regulation. Section 42(2)(a) states:

> 42(2) Without limiting subsection (1), the commissioner may investigate and attempt to resolve complaints that
>
> (a) a duty imposed by this Act or the regulations has not been performed,
>
> ....

In my opinion, section 25 creates a duty for public bodies to disclose information in the public interest, if the information falls within the scope of either or both sections 25(1)(a) or 25(1)(b). In its submission, the Ministry agrees that section 25 imposes a duty on public bodies under the Act (paragraph 4.02). I therefore find that I have jurisdiction to investigate a public body's decision in relation to its duty under section 25. However, I find below that section 25 does not apply to the records under review in this inquiry.

It is not surprising to learn that the Ministry holds the view that disclosure of the records in dispute is not clearly in the public interest and "there is no urgency of circumstances to require disclosure under section 25." (Reply Submission of the Ministry, paragraphs 3.01-3.07) A decision on that point requires me to review the records in dispute, as I do below. However, I do agree with the Ministry's position that there is no reason under this section to disclose records in dispute so as to facilitate analysis of the constitutionality of legislation by courts or to promote freedom of expression, or to understand the complete role of the B.C. Human Rights Council in connection with Bill 33. (Reply Submission of the Ministry, paragraphs 3.08-3.10)

I further agree with the Ministry's submission, in the context of this inquiry, that the duty under section 25

> only exists in the clearest and most serious of situations. A disclosure must be, not just arguably in the public interest, but *clearly* (i.e., unmistakably) in the public interest. The duty to disclose must be performed *without delay*, which also strongly indicates that the public interest in disclosure must be of an urgent and compelling nature before section 25 will come into play. (Submission of the Ministry, paragraph 4.02; italics in original)

The Ministry's reply submission correctly notes the non-applicability of section 25 to the records under review: "The Public Body submits that it has not failed to comply with the duty imposed by section 25 of the Act because it has no such duty in this situation. It has no such duty because disclosure of the information is not clearly in the public interest within the meaning of section 25." (Reply Submission of the Ministry, paragraph 3.02)

Review of the records in dispute

The Ministry emphasizes that it has withheld only a relatively small amount of the total information requested by the applicant, including a very minimal amount under sections 12 and 13. (Reply Submission of the Ministry, p. 16) It also disclosed portions of legal opinions because they had previously been disclosed to an applicant in 1994. The Ministry now believes that it was an error to do so. (Reply Submission of the Ministry, paragraph 4.04)

I reviewed eight records that were withheld from the applicant under sections 12 and 13 of the Act. The first record had in fact been released in full to the applicant. For the remainder of these records, I find that the severances were appropriately made under

sections 12 and 13 of the Act. With respect to this particular set of records, I find nothing that might have required the Ministry to release information on the basis of section 25. The records largely concern the process of interactive advice-giving that occurs in the normal context of law reform. The Ministry has disclosed what it submits that it can do lawfully under the Act.

I have reviewed all the records to which the Ministry has applied section 14. In my opinion, all of these records fall within the scope of common-law solicitor-client privilege, thus entitling the Ministry to withhold the records.

The Ministry's initial submission notes that one of the records in dispute is not a communication to or from a lawyer, but is a paper prepared by the Director of Legislation of the Ministry of Education. The paper presents the advice received from the Legal Services Branch of the Ministry of Attorney General regarding amendment options. According to the Ministry, "as the purpose of this paper was to set out the advice and to convey it to the Minister of Education, the Public Body submits that this paper is subject to the solicitor client privilege." (paragraph 1.09). Based on my review of the record, I agree that the record contains information subject to solicitor-client privilege, because it reflects advice received from the Legal Services Branch of the Ministry.

8. Order

I find that the Ministry of Attorney General has properly applied sections 12, 13, and 14 of the Act and is required or authorized to withhold the records in dispute. In respect of records withheld under section 12, under section 58(2)(c) of the Act, I require the head of the Ministry to refuse access to the records. In respect of the records withheld under sections 13 and 14, under section 58(2)(b) of the Act I confirm the decision of the head of the Ministry to refuse access to the records.

I also find that the Ministry of Attorney General has acted properly in refusing to apply section 25 of the Act pursuant to the applicant's request. I make no order in this respect other than to note that the applicant has not satisfied me that the application of section 25 to the records in issue is warranted under the Act.

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David H. Flaherty
Commissioner

May 20, 1997