OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-12

INQUIRY REGARDING ISLANDS TRUST RECORDS

David Loukidelis, Information and Privacy Commissioner
May 15, 2000

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Summary: Applicant sought access to communications between public body and its lawyers regarding land use bylaws for Galiano Island. Public body refused access under s. 14 (solicitor client privilege). Applicant argued that solicitor client privilege did not apply, since lawyers were acting outside normal lawyer role, and that public interest favoured disclosure. Solicitor client privilege held to apply. Fact that lawyers were dealing with planning matters as part of their legal work did not affect this conclusion. Public interest did not require disclosure despite s. 14.

Key Words: Solicitor client privilege – public interest.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14 and 25.

Authorities Considered: B.C.: Orders No. 182-1997; Order No. 283-1998.

Cases Considered: *Municipal Insurance Association of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (1996), 31 B.C.L.R. (3d) 203; *Legal Services Society of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372; *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64.

1.0 INTRODUCTION

This order results from the inquiry conducted by the Executive Director of the Office of the Information and Privacy Commissioner ("Executive Director") concerning a request for review of a decision of the Islands Trust to withhold records related to that public body's communications with its lawyers. Those communications related to land use bylaws, including the Galiano Island Official Community Plan ("OCP").

2.0 DISCUSSION

I disqualified myself from this inquiry because of a personal interest. On August 16, 1999, I delegated the authority to conduct inquiries to the Executive Director pursuant to s. 49 of the *Freedom of Information and Protection of Privacy Act* ("Act"). Although s. 49 authorizes delegation of authority to conduct inquiries under s. 56 of the Act, it does not authorize delegation of my authority to make orders under s. 58.

On November 24, 1999, the Executive Director informed the applicant and the public body of the process to be followed:

> As permitted by s. 49 of the *Freedom of Information and Protection of Privacy Act*, the Commissioner has delegated to me the power, duties and functions necessary to deal with this inquiry (other than the power to make an order under s. 58 of the Act). This is because the Commissioner considers that he cannot act in this matter. He will be executing the order I recommend as a result of the inquiry because s. 49(1)(c) of the Act prohibits the Commissioner from delegating the authority to make orders under s.58 of the Act.

No objections were raised to the process outlined in the letter.

The Executive Director conducted the inquiry in this matter. I took no part in the inquiry. The Executive Director prepared a report respecting the inquiry, a copy of which is appended to this order. After receiving the Executive Director's report, I reviewed the filed material and the records in dispute. I have adopted the Executive Director's recommendations, without variation, in this order and this order executes those findings and recommendations.

3.0 CONCLUSION

For the reasons given in the Executive Director's report, under s. 58(2)(b) of the Act, I confirm the public body's decision to refuse access to the disputed records under s. 14 of the Act.

May 15, 2000

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David Loukidelis
Information and Privacy Commissioner
for British Columbia

APPENDIX TO ORDER 00-12

INQUIRY REGARDING ISLANDS TRUST RECORDS

REPORT OF THE EXECUTIVE DIRECTOR OF THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

1.0 INTRODUCTION

Using the authority delegated to me by the Information and Privacy Commissioner under s. 49 of the *Freedom of Information and Protection of Privacy Act* ("Act"), I conducted an inquiry under s. 56 of the Act on October 4, 1999. The inquiry was in respect of a decision by the Islands Trust ("Trust"), a public body under the Act, to refuse access to certain records. The inquiry stemmed from an access request, made on June 1, 1999, which sought:

> 1. A copy of all written directions, including scopes of services, provided to any legal firm or other party who has been consulted with respect to, or who has been involved in, the writing of proposed or draft revisions to the Galiano Island OCP and/or land use bylaws between December 1, 1996 and the present.
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> 2. A record of the dates, times and attendees for all meetings which have taken place between December 1, 1996 and the present, involving the Trust and any legal firm and/or other party who has been consulted with respect to, or who has been involved in, the writing of proposed or draft revisions to the Galiano Island OCP and/or land use bylaws, and
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> 3. All financial records, *e.g.*, invoices, charges, etc., for services procured by the Trust for the purposes of planning or preparing proposed draft revisions to the Galiano Island OCP and/or land use bylaws between December 1, 1996 and the present.

The Trust responded on June 25, 1999 and stated it was responding to items 1 and 3 of the request. In total, the Trust identified 99 records. It withheld 60 records that were, in its view, subject to solicitor-client privilege. Section 14 of the Act states:

> 14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

The Trust disclosed 38 records that did not disclose legal advice or direction, and one with privileged information severed, to the applicant by letter of June 25, 1999.

On June 28, 1999 the applicant requested a review by this Office of the decision by the Islands Trust to withhold records on the basis of s. 14 of the Act. On July 16, 1999,

during mediation, the public body released another seven records, severing three of them under s. 14.

The public body responded later to item 2 of the applicant's request and, as the applicant did not request a review of that response, that response is not an issue in this inquiry.

The applicant informed this Office on September 1, 1999 that he wished the matter to proceed to an inquiry before the Information and Privacy Commissioner.

On November 24, 1999, I told the applicant and the public body of the process to be followed:

> As permitted by s. 49 of the *Freedom of Information and Protection of Privacy Act*, the Commissioner has delegated to me the power, duties and functions necessary to deal with this inquiry (other than the power to make an order under s. 58 of the Act). This is because the Commissioner considers that he cannot act in this matter. He will be executing the order I recommend as a result of the inquiry because s. 49(1)(c) of the Act prohibits the Commissioner from delegating the authority to make orders under s.58 of the Act.

No objections were raised to the process outlined in the letter.

2.0 ISSUE

Did the Trust correctly apply s. 14 of the Act to the records in dispute and has it complied with its obligation to disclose the requested financial records for services provided to the Trust?

Under s. 57(1) of the Act, the Trust has the burden of establishing that it was authorized to withhold information under s. 14.

3.0 DISCUSSION

3.1 The Applicant's Case – The applicant states that the Trust has withheld approximately 41 records, among those identified as responsive to his request to the Trust, on the basis of s. 14 of the Act. He contends that s. 14 of the Act should not apply in this case because the relationship between the Trust and its lawyer was partially, or fully, outside the realm of relationships rightfully subject to solicitor client protection. The applicant also contends that the provisions of ss. 25(1)(b) and 25(2) of the Act should take precedence over s. 14 in this instance (initial submission of the applicant, page 1).

The applicant further submits, with regard to s. 14, that the mere fact that one party is a solicitor is not, in itself, sufficient to result in solicitor client privilege applying to all communications with that solicitor, regardless of the subject matter or contents of the communications. The applicant further states that, in the present case, it is clear that due to limited planning staff resources within the Trust, the lawyer was engaged partially or entirely to act as a "planning consultant" to perform functions normally undertaken by a

Trust staff planner. The applicant argues that the role of the lawyer was more that of a consultant than a lawyer in the strictest sense of the word. He concludes this line of argument by saying that, because the lawyer was acting in place of staff planners, the associated documents should be treated as if they were internal Trust documents involving Trust planners rather than lawyers.

The applicant further argues that the subject matter of the documents, to the extent to which it may have legal content which is beyond that which would normally be provided by Trust planners, is not of the type to which solicitor client privilege is intended to apply. The reasoning for this argument is as follows: if the documents deal with requirements which must be satisfied by proposed bylaws in order to be legally valid, they should be released if the advice was followed, as no prejudice will result to the Trust from the disclosure, as all legal requirements have been met. If the requirements as set out by the lawyer were deliberately not met by the Trust, the Trust should not be able to claim privilege for an illegal document.

Finally, the applicant argues that, in the alternative, if s. 14 is found to apply to the withheld documents, then ss. 25(1)(b) and 25(2) require that the information be disclosed in the public interest to uphold the intent, objectives and effectiveness of the Act and to prevent willful subversion of the Act, which he says appears to be the case here (initial submission of the applicant).

The applicant reiterates in his reply submissions that the relationship between the Trust and the Trust's lawyers extended beyond a solicitor client relationship in the sense to which privilege is meant to attach. He states that documents related to activities, which have been undertaken by the lawyers while filling a function which would normally have been filled by Trust planning staff, should be available to the public through the provisions of the Act and not protected by solicitor client privilege.

3.2 The Trust's Case – The Trust's submissions disclose that the records subject to this request were created in the context of the development of land use policies and regulations on Galiano Island, in the form of land use bylaws (specifically, a bylaw to amend the 1995 OCP (Draft Bylaw No.124) and a land use bylaw (Draft Bylaw No. 125) (the "Draft Bylaws")). These bylaws respond to important and divisive issues that touch on residents' concerns with respect to the value, potential development and conservation of their own land and Galiano Island resources. In addition, land use policies and regulations on Galiano have been recently subject to challenge in the courts (initial submission of the Trust, p. 2).

The Trust argues that, as a result of the above, the Trust has a heightened concern for the legal ramifications and enforceability of the Draft Bylaws. In this context, the Trust relied heavily on its solicitors for legal advice with respect to the development of the Draft Bylaws, including legal advice with respect to drafting issues, enforceability issues and procedural issues.

With regard to the issue of whether the Trust complied with its obligation to disclose the requested financial information, the Trust argues that it provided a record of all financial expenses with respect to the preparation of the Draft Bylaws. It states that the applicant has not informed the Trust of any deficiencies in the material provided.

In its submissions on the s. 14 issue, the Trust reviews a number of cases from the British Columbia Supreme Court which have considered and applied the common law concept of solicitor client privilege to s. 14 of the Act. The Trust referred to the following cases: *Municipal Insurance Association of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (1996), 31 B.C.L.R. (3rd) 203; *Legal Services Society of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372; and *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3rd) 64.

The Trust concludes that it can be seen from these decisions that all communications from a public body to its lawyers, including communications that do not actually state legal advice (such as communications requesting advice or providing background information for the purposes of future legal advice), are subject to solicitor client privilege under s. 14 of the Act (p. 11 of the Trust's initial submission).

The Trust argues that it has disclosed all records with respect to directions given to third party consultants or "other parties". It goes on to state that records responsive to the remaining portion of item 1 of the applicant's request, with respect to written directions to any law firm consulted with respect to or involved in the writing of the Draft Bylaws, are by definition subject to solicitor client privilege under s. 14 of the Act.

The Trust states that the tests enunciated in the *Legal Services Society* and *Minister of Environment, Lands and Parks* cases, above, establish that a communication will be subject to solicitor client privilege under s. 14 if it is, or discloses, a communication that is:

1. between a solicitor and its client;

2. intended to be confidential; and

3. for the purpose of obtaining legal advice.

The Trust states that

> … all of the withheld records are, or contain information relating to, communications between the Trust and its solicitors. All but seven of the withheld records were written directly to or copied to the Trust's lawyers. They therefore meet the first element of the test. The other seven (withheld records 2, 13, 20, 21, 29, 32 and 33) were not letters sent requesting legal advice, but documents in which legal advice is formulated, discussed or provided.

With respect to the second and third elements of the test, the Trust says all of the withheld records were, or disclose information that was, sent directly to or copied to the Trust's lawyers for legal consideration, advice, review or information. The communications were made with the expectation of confidentiality, and in anticipation of and for the purpose of obtaining legal advice. They therefore meet the second and third elements of the test (initial submission of the Trust, pp. 1-13).

The Trust also presented alternative arguments. First, the Trust says that, even if it was possible to disclose portions of the withheld records that are not subject to solicitor client privilege, that remaining information would not be responsive to the applicant's request. Any information left in a relevant record after the legal advice or direction was severed would no longer be relevant to the request. The Trust also argues that the information could be withheld under ss. 12(3)(a), 12(3)(b), 13(1) and 22 of the Act.

The Trust goes on to state that, in this particular case, given the nature and context of the Draft Bylaws, a certain "zone of confidentiality" around them is in the public interest, similar to the "zone of confidentiality" under ss. 12 and 13 of the Act discussed in Order No. 182-1997 and Order No. 283-1998.

3.3 Analysis – I will now discuss s. 14 and s. 25.

Solicitor Client Privilege

I have carefully reviewed each of the records in depth. I agree with the applicant and the Trust that the mere fact that one party to a communication is a solicitor is not sufficient to result in solicitor client privilege applying, where the communication is not related to the giving or seeking of legal advice.

The Trust has supplied affidavit evidence that the records it withheld were the result of the solicitor client relationship between the Trust and its lawyers and that they do disclose confidential communications regarding the seeking or receiving of legal advice.

The Trust provided affidavit evidence to show that lawyers were engaged to act as lawyers in the development of legislation – the Draft Bylaws – which also function, in a sense, as planning documents. The Trust provided evidence to rebut the claim that the lawyers were engaged partially or entirely to act as planning consultants. See the Affidavit of William Buholzer, sworn September 30, 1999, paras. 2 and 3. I accept this evidence.

I also accept the Trust's position that it is common for lawyers to review and draft OCP bylaws and land use bylaws for local governments. See the Affidavit of William Buholzer, sworn September 30, 1999, para. 4. I agree that local governments often have to choose between having internal staff draft bylaws, outside consultants draft bylaws or lawyers draft bylaws. That choice inevitably will be influenced by a number of factors, but it is a choice that the public body can make. I agree with the Trust that the

relationship between the Trust and its lawyers was no less a solicitor client relationship, simply because some of the work required expertise and knowledge of planning tools and law, as well as general legal knowledge. Simply because an outside lawyer is referred to on occasion as having prepared a "staff report" does not change the nature of the solicitor client relationship.

I concur with the Trust that the potential for prejudice is neither a factor in determining whether solicitor client privilege exists nor the underlying rationale for the existence of the privilege. Nor does a client's right to have communications with its solicitor held in confidence depend on when the advice is sought, or whether or not the client follows it.

I find that the Trust has met its burden of proof in relation to the application of s. 14 to the withheld records.

Public Interest Disclosure

The applicant argued that even if s. 14 were found to apply, s. 25 should override the s. 14 protection. I find, in this case, that the applicant has not provided sufficient grounds to consider applying the s. 25 override. The applicant argued that non-disclosure of the records must mean the Trust was willfully disregarding legal requirements. The applicant states that it is in the public interest to determine if the Trust is acting legally. With respect, I cannot accept the applicant's argument that non-disclosure of these records is linked to any illegal activity on the part of the public body.

The applicant's second line of reasoning as to why s. 25 should be applied is that the use of lawyers, as opposed to public servants, is not in the public interest. There is no evidence before me that the Trust was using its solicitors to aid in the drafting and development of the Draft Bylaws in order to subvert any possible requests for information under the Act.

4.0 FINDINGS AND RECOMMENDATIONS

For the reasons given above, I find that the Islands Trust is authorized by s. 14 of the Act to refuse to give access to the requested records and I recommend that the Commissioner confirm, under s. 58(2)(b) of the Act, the Islands Trust's decision to refuse access to the disputed records under s. 14 of the Act.

I also find for the reasons given above, that the Islands Trust is not required by s. 25 of the Act to disclose the records.

May 15, 2000

Lorrainne A. Dixon
Executive Director
Office of the Information and Privacy Commissioner