OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-07

INQUIRY REGARDING MINISTRY OF ATTORNEY GENERAL RECORDS

David Loukidelis, Information and Privacy Commissioner
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Summary: Applicant sought records relating to him, and a legal opinion about him, in Ministry's custody. Ministry authorized to withhold information under s. 14. Ministry not authorized to withhold information under s. 17(1), but Ministry required to withhold same information under s. 22

Key Words: Solicitor client privilege – law enforcement – unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1) and (2), 4(1), 14, 15(1)(d), 17 and 22(1), (2)(c), (e) and (f).

Authorities Considered: B.C.: Order No. 193-1997; Order 00-02. **Ontario:** Order P-352 (September 21, 1992); Order P-579 (November 18, 1993).

Cases Considered: *Ontario (Solicitor General)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602 (Ont. Div. Ct.); *S & K Processors Ltd.* v. *Campbell Ave. Herring Processors Ltd.* (1983), 35 C.P.C. 146 (B.C.S.C.); *Lowry* v. *Canadian Mountain Holidays Ltd.* (1984), 59 B.C.L.R. 137 (B.C.S.C.); *Pacific Press, A Division of Southam Inc.* v. *British Columbia (Attorney General)* (1997), 45 B.C.L.R. (3d) 235 (B.C.S.C.); *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.); *Stevens* v. *Canada (Privy Council)*, [1997] F.C.J. No. 288 (T.D.) (affm'd, [1998] F.C.J. No. 794 (C.A.)); *Rogers* v. *Bank of Montreal*, [1985] B.C.J. No. 2716 (S.C.); *Great Atlantic Insurance Co.* v. *Home Insurance Co*, [1981] 2 All E.R. 485 (C.A.); *Power Consolidated (China) Pulp Inc.* v. *British Columbia Resources Investment Corp.*, [1988] B.C.J. No. 1960 (C.A.); *Zimmer* v. *Haaf*, [1988] S.J. No. 502 (Sask.Q.B.); *McCarty* v. *Chen*, [1994] B.C.J. No. 1347 (C.A.), *Conrad* v. *Martin*, [1993] O.J. No. 1593 (Gen.Div.); *Mackin* v. *New Brunswick (Attorney General)*, [1996] N.B.J. No. 557 (Q.B.); *Risi Stone Ltd.* v. *Groupe Permacon Inc. (No. 2)* (1990), 30 C.P.R. (3d) 148 (F.C.T.D.); *Weiler* v. *Canada (Department of Justice)* (1991), 37 C.P.R. (3d) 1 (F.C.T.D.) and *Canada* v. *Central Cartage Co.* (1987), 10 F.C.R. 225 (F.C.T.D.).

1.0 INTRODUCTION

On October 26, 1998, and December 11, 1998, the applicant made two access to information requests to the Ministry of Attorney General ("Ministry"), for information about him from June 1998 onward (including information or legal advice about certain issues involving the applicant). The responsive records relate to the Ministry's dealings with the applicant. They include e-mails, memorandums, legal opinions, file notes, handwritten notes, fax messages and statements. Some of the records contain legal advice given by Ministry lawyers. The Ministry responded to the applicant's request on January 8, 1999, providing some records but withholding others pursuant to ss. 13, 14, 15 and 22 of the *Freedom of Information and Protection of Privacy Act* ("Act"). The Ministry subsequently abandoned its reliance on s. 13 of the Act.

This inquiry was held because the applicant's requests for review in respect of his two access requests were not resolved in mediation. The two inquiries were consolidated and, by mutual consent, the deadline for both was extended. It should be noted, however, that during mediation the Ministry released further records to the applicant. As is his right, the applicant continues to seek full access to all of the remaining records, arguing that the decision of the Ministry to withhold them offends "basic principles of fairness."

At the inquiry, the applicant requested an interlocutory order that all or parts of the *in camera* components of the Ministry's initial submission be disclosed to him. After reviewing the *in camera* portions of the materials, I concluded that the material had been appropriately submitted *in camera*. My reasons for reaching this conclusion are set out below.

2.0 ISSUES

The amended notice of written inquiry sent by our office to the parties – which was not disputed by them – noted this inquiry would deal with ss. 15, 17 and 22 of the Act. The parties later agreed that this inquiry should also deal with the Ministry's reliance on s. 14 of the Act in relation to some information. I must therefore consider whether the Ministry was authorized to withhold all or portions of the records under ss. 14 or 17 and whether the Ministry was required to withhold information under s. 22. Because of my findings respecting ss. 14 and 22(1), I have decided that it is not necessary to deal with the Ministry's s. 15 argument.

Under s. 57(1) of the Act, the Ministry bears the burden of proving that it is authorized to refuse to disclose information under ss. 14 and 17 of the Act. Under s. 57(2) of the Act, the applicant bears the burden of establishing that third party personal information in the records can be disclosed without unreasonably invading third parties' personal privacy. Last, since some of the personal information in the records is personal information of the applicant, the Ministry bears the burden of proving that the applicant is not, because of s. 22(1), entitled to have access to that information.

3.0 DISCUSSION

3.1 Relevance of Certain Information Provided by the Parties – In his submissions, the applicant provided me with a fair amount of detail about matters in which he had been involved with the Ministry. None of this information is relevant to the issues before me except (incidentally) as regards the s. 22 issues, which are dealt with below. It is not for me to comment on or decide the strengths and weaknesses of the parties' positions in any other dealings between them.

Similarly, as part of its initial submission, the Ministry provided an affidavit to which the applicant objected. He said the affidavit, notably Exhibit "A" to it, was filed "for no apparent reason" and was intended to discredit him. In its reply, the Ministry withdrew Exhibit "A". That exhibit had no bearing on the issues before me. Contrary to the applicant's view about the body of the affidavit itself, however, the affidavit is relevant to an issue before me, *i.e.*, whether some information was properly withheld under s. 14 of the Act.

3.2 Applicant's Objections to *In Camera* Submissions – Although he submitted factual material *in camera*, the applicant objected to the Ministry having done the same thing. On its side, the Ministry submitted *in camera* material, but objected to the applicant's having done that.

The applicant lodged a "passing objection" to paragraphs 4.02 through 4.07 of the Ministry's initial submission being received *in camera*. In the end, he only took the position that it was "not acceptable" that paragraphs 5.34 through 5.41 were received *in camera* and that he should be given access to those paragraphs. He said he needed to see this *in camera* "legal argumentation" in order to make a full reply, and that my finding here that the Ministry could submit *in camera* argument was "poor practice".

The applicant made detailed submissions on the point, including as to his contention that only copies of records should be received *in camera*. He said that legal argument about the records, or discussion of their contents, should not be *in camera*. The applicant offered me some detailed guidelines on *in camera* submissions and asked that I consider them for adoption as policy.

The applicant's concerns about paragraphs 5.34 through 5.41 are unfounded, since they are not "legal argument". It is not clear what led the applicant to conclude they contain "legal argument". The following paragraph from the Ministry's initial submission, which was disclosed to the applicant, immediately precedes those *in camera* paragraphs:

> (The following submissions are required to be submitted on an *in camera* basis because its [*sic*] disclosure to the Applicant would reveal information the Public Body submits it is authorized or required to refuse access to under sections 15(1)(d) and 22(1) of the Act).

As the passage just quoted indicates, the *in camera* submissions that follow it contain information in dispute in this inquiry, which could not be disclosed to the applicant without rendering this inquiry futile. Those passages discuss the evidence found in the Ministry's *in camera* affidavit evidence. The passages are intended to give evidentiary foundation to the Ministry's s. 22(1) decision.

My assurance to the applicant extends also to the *in camera* portions of pp. 5, 6 and 7 of the Ministry's reply. Those passages contain information in dispute in this inquiry, in respect of which the Ministry submitted an *in camera* affidavit to rebut factual assertions made by the applicant in his initial submission. Both the affidavit and discussion of the information were properly submitted *in camera*.

Last, I have decided that the applicant's submission of *in camera* material was appropriate as well. Contrary to the Ministry's position, I find that the Ministry was not thereby prejudiced in its ability to reply to the applicant's submissions.

As far as reliance on *in camera* submissions generally is concerned, there is no doubt the Act gives me the authority to receive materials *in camera*. This should be done only where it is necessary to do so to protect information that is subject to one of the Act's exceptions to the right of access. This is what has happened here. If, however, a party submits material that should not properly be *in camera*, because it is not necessary to protect information, it risks having me reject that material. This office's published policies and procedures – and the notice of inquiry in each case – set out the procedure that will be followed on this point.

3.3 Ministry's Wish to Submit Further Reply – The applicant's initial submissions (which total three and one half pages) very briefly refer to his contention that the Ministry *expressly* waived solicitor client privilege at an August 1998 meeting with Ministry officials. The applicant argues that the Ministry "was not entitled to later alter the terms of the August agreement and attempt to reinstate the client-solicitor privilege". While the applicant's supporting affidavit refers to letters which are said to summarize the legal opinion that was given, he does not refer to these letters in connection with an assertion of *implied* waiver in his initial submission.

The applicant filed ten pages of reply submissions. Some three and one-half pages are devoted to the question of whether the Ministry either expressly *or* implicitly waived privilege. The applicant again argues that express waiver was occasioned by the Ministry's alleged agreement to disclose the opinion. He goes on to say that "there is a second way to waive client-solicitor privilege and that is implicitly". On this point, he says the Ministry, through its officials, "has implicitly waived the privilege in a number of ways", one of which is "by attempting to summarize the legal opinion through a memo from the Human Resources Division". He also argues (relying on *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326) that there are public interest or policy grounds which would support disclosure. The extent to which the applicant relies on this as a separate ground or in support of his arguments about implied waiver, or both, is not entirely clear.

The Ministry asked for an opportunity to respond to the arguments about implied waiver. The applicant objected to this, but I gave the Ministry that opportunity. In its further reply, the Ministry argued that revealing the conclusion of a legal opinion does not constitute an implicit waiver of the privilege over the whole of the legal opinion. In making this argument, the Ministry relied on Ontario Order P-579, *Risi Stone Ltd.* v. *Groupe Permacon Inc. (No. 2)* (1990), 30 C.P.R. (3d) 148 (F.C.T.D.), and *Power Consolidated (China) Pulp Inc.* v. *British Columbia*, [1988] B.C.J. No. 1960 (B.C.C.A.)

3.4 Solicitor Client Privilege – The Ministry has withheld some of the information under s. 14 of the Act, which says a public body may refuse to disclose information that is "subject to solicitor client privilege." It is no longer necessary for me – or a public body in its submissions in an inquiry – to cite authority for the proposition that s. 14 incorporates the common law of solicitor client privilege. The question here is whether the Ministry is authorized by s. 14 to refuse to disclose parts of the disputed records. The following discussion is necessarily technical and includes a discussion of the waiver issue.

Both parties agree that legal advice given by the Ministry's Legal Services Branch to other ministries, or to other Ministry divisions, is advice given by a solicitor to a client. I agree with the Ministry that the *Attorney General Act*, among other things, supports this view. It is also supported by such cases as *Stevens* v. *Canada (Privy Council*), [1997] F.C.J. No. 228 (F.C.T.D.); (affm'd [1998] F.C.J. No. 794 (F.C.A.)), *Weiler* v. *Canada (Department of Justice)* (1991), 37 C.P.R. (3d) 1 (F.C.T.D.) and *Canada* v. *Central Cartage Co.* (1987), 10 F.C.R. 225 (F.C.T.D.). The advice is therefore privileged and covered by s. 14.

The applicant argues, however, that the Ministry has both expressly and implicitly waived solicitor-client privilege in this case. R. Manes and M. Silver, *Solicitor-Client Privilege in Canadian Law* (1993, Toronto: Butterworths), write, at pp. 189 and 191, that:

> Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
> …
> Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

A good starting point for an analysis of waiver is the following passage from the judgment of McLachlin J. (as she then was) in *S & K Processors Ltd*. v. *Campbell Ave. Herring Processors Ltd.* (1983), 35 C.P.C. 146 (B.C.S.C.):

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would

> otherwise attach to that advice is lost: *Hunter* v. *Rogers*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).
>
> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Hunter* v. *Rogers, supra*, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich* v. *Stamp* (1979), 27 O.R. (2d) 395, 14 C.P).C. 246, 11 C.C.L.T. 49, 106 D.L.R. (3d) 340n, 59 C.C.C. (2d) 87 (S.C.C.)], it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use the privilege to prevent his opponent exploring its validity.

Thus, in the context of civil litigation, fairness will imply waiver by a party where legal advice is raised in a pleading, as well as in circumstances where evidence of a privileged communication has been given. See, for example, *Rogers* v. *Bank of Montreal*, [1985] B.C.J. No. 2716 (B.C.S.C.).

As the S. *& K. Processors* case makes clear, waiver of privilege respecting part of a communication can be held, in the interests of fairness, to require waiver in respect of the whole communication. It is clear, however, that there are circumstances in which disclosure of part of a privileged communication does not constitute waiver of privilege over all of the communication. The basic rule was articulated as follows in *Great Atlantic Insurance Co.* v. *Home Insurance Co.*, [1981] 2 All E.R. 485 (C.A.), at p. 490:

> … the simplest, safest and most straightforward rule is that if a document is privileged, then privilege must be asserted, if at all, to the whole document unless the document deals with separate subject matters so that the document can in effect be divided into two separate and distinct documents each of which is complete.

In the *Great Atlantic Insurance* case, the Court of Appeal for England held that the deliberate introduction by the plaintiffs of part of a legal memorandum into the trial record, as a result of a mistake made by them, waived privilege with regard to the whole document. In an important passage, at p. 492, the Court had the following to say:

> … however, the rule that privilege relating to a document which deals with one subject matter cannot be waived as to part and asserted as to the remainder is based on the possibility that any use of part of a document may be unfair or misleading, that the party who possesses the document is clearly not the person who can decide whether a partial disclosure is misleading or not, nor can the judge decide without hearing argument, nor can he hear argument unless the document is disclosed as a whole to the other side. Once disclosure has taken place by introducing part of the document into evidence or using it in court it cannot be erased.

As Rothstein J. found in *Stevens* v. *Canada (Prime Minister)*, above, at p. 11, the general rule articulated in the *Great Atlantic Insurance* case

> … has been confined to circumstances in which partial disclosure has occurred in the context of a trial. (See, for example, *G.E. Capital Corporate Finance Group Ltd*. v. *Bankers Trust Co.*, [1995] 2 All E.R. 993 (C.A.).) There is also a line of authority that has developed to the effect that it is necessary to consider all the circumstances in determining whether a partial disclosure constitutes an attempt to mislead so that privilege over the entire document is lost. In *Lowry* v. *Canadian Mountain Holidays Ltd*. (1984), 59 B.C.L.R. 137 (S.C.), Finch J. stated at pages 142-43:
>
> > I do not think it would be in the interests of justice to drive litigants or their professional advisers to these or other means of avoiding the effect of a "single subject matter" rule on the question of waiver. Whether the document relates to a single subject matter or not, it is, in my view, preferable to look at all the circumstances of the case, and to ask whether the defendant's conduct in disclosing that part of the report concerning factual observations can be taken to mislead either the court or another litigant, so as to require the conclusion that privilege over the rest of the report has been abandoned.
>
> *Lowry* has been followed by the British Columbia Court of Appeal in *Power Consolidated (China) Pulp Inc.* v. *British Columbia Resources Investment Corp*. (1988), 32 B.C.L.R. (2d) 320, and more recently in the context of the *Access to Information Act* by the New Brunswick Court of Queen's Bench, Trial Division, in *Mackin* v. *New Brunswick (Attorney General)* (1996), 141 D.L.R. (4th) 352 (N.B.Q.B.).
>
> In my opinion, the approach of Finch J. in *Lowry* is appropriate for the purposes of determining whether, in the context of the *Access to Information Act*, privilege with respect to documents that have been disclosed in part has been waived in whole. While it cannot be ruled out that in some circumstances questions of misleading and unfairness might arise under the *Access to Information Act*, I would think that such issues would arise infrequently because of an oversight by the Information Commissioner and by the Court.

I agree generally with this view. As was noted in the *Stevens* case, *Lowry* was followed by the British Columbia Court of Appeal in the *Power Consolidated* case, where Toy J.A., speaking for the Court, adopted the passage in *Lowry* referred to above. More recently, in *Pacific Press, a Division of Southam Inc.* v. *British Columbia (Attorney General)*, [1997] B.C.J. No. 2765 (B.C.C.A.), the Court of Appeal applied this approach to an attempt to require disclosure of a special prosecutor's opinion on the constitutionality of provisions of the *Election Act*. The plaintiffs had argued, among other things, that the waiver of privilege respecting the opinion was implied by publication of a press release that referred to the conclusions of the special prosecutor respecting possible prosecution of violators of the impugned provisions. The Court of Appeal was satisfied that partial disclosure was not intended to mislead the court or the parties.

In my view, the approach of Finch J. (as he then was) in *Lowry* v. *Canadian Mountain Holidays Ltd.* [1984] B.C.J. No. 2743, is appropriately applied in considering whether s. 14 of the Act applies to the information in issue here. These general principles govern my consideration of the applicant's assertion that the Ministry has both expressly and implicitly waived solicitor client privilege.

The applicant's main argument is that the Ministry expressly waived solicitor client privilege. In his supporting affidavit, the applicant deposes that, in a meeting attended by the applicant, a representative of the applicant, and Ministry officials, the Ministry agreed to obtain a legal opinion about matters involving the applicant and to provide that legal opinion to the applicant once it was obtained. No supporting affidavit of the applicant's representative has been provided on this point. By contrast, in its affidavit material, the Ministry official who is said to have made this commitment deposes that at "no time did I agree or promise to provide a copy of the legal advice at issue in this inquiry" to the applicant. Another Ministry official, who was also present at this meeting, deposes that no agreement or promise to provide the legal advice was made.

The applicant says this alleged express intention to release a legal opinion that did not exist yet constitutes an express and irrevocable waiver of the solicitor client privilege that would otherwise apply to this record and precludes the Ministry from relying on s. 14 as the basis for withholding the legal advice subsequently given. The applicant provides no authority for the proposition that an expression of an intention to release legal advice sought and obtained at a future time that is subsequently rescinded constitutes a binding and irrevocable waiver of privilege. The evidence before me makes it clear that the legal advice subsequently provided to the Ministry by its solicitors was sought and provided in confidence. The applicant himself deposes that, while the Ministry initially agreed to provide him with a copy of the legal opinion once it came into existence, it subsequently reneged on this agreement. Even before the Minstry sent the applicant a letter, dated November 6, 1998, setting out the "gist" of the legal advice that had been provided to the Ministry, the Ministry told the applicant that the opinion might not be released to him because of solicitor client privilege. (This letter is discussed below.)

Once it has been established on the evidence, as it has been here, that legal advice provided by a solicitor to her or his client is privileged – *i.e.*, the advice constitutes communications between solicitor and client which were intended to be confidential and which relate directly to the seeking or giving of legal advice - that advice remains privileged unless the privilege is waived by the client. As I just noted, the applicant says the alleged initial agreement, or expression of intent, by the Ministry to release the opinion constitutes an express waiver of the privilege. As is also noted above, there is a direct conflict in the evidence as to whether such an agreement or commitment was ever made. Given my conclusions below, it is not necessary for me to resolve that evidentiary conflict in this case, although I note that the assertion by the Ministry official that no promise or commitment to release the legal advice once obtained was made is corroborated by other affidavit evidence. Accordingly, I am inclined to resolve the evidentiary conflict in favour of the Ministry.

In any event, if I assume, for argument's sake, that an agreement or promise to release was initially made, then at most what has happened is that, before the opinion had actually been provided, the Ministry changed its mind and decided not provide that opinion. Once the opinion came into existence, no steps were taken by the client Ministry that could be said to be consistent with an express or voluntary waiver of the privilege. On the contrary, the evidence is that the Ministry intended to and did assert solicitor client privilege as the basis for refusing to provide the opinion to the applicant.

In reaching this conclusion, I have considered such cases as *Zimmer* v. *Haaf*, [1988] S.J. No. 502 (Sask.Q.B.), *McCarty* v. *Chen*, [1994] B.C.J. No. 1347 (B.C.C.A.) and *Conrad* v. *Martin*, [1993] O.J. No. 1593 (Ont. C.J., Gen. Div.). These cases are of little assistance here. In *Zimmer*, the Court found that a written offer, made in the context of litigation, to provide what would otherwise be privileged documents for a certain fee constituted a waiver of privilege. The defendant presumably did not wish to pay the fee and instead sought an order requiring the plaintiff to produce the documents for inspection. In contrast to this case, the privileged documents in issue in *Zimmer* – medical reports - were clearly in existence and there was no evidence before the Court to suggest that the plaintiff who had made the offer intended these documents to be confidential. As the Court observed in *Zimmer*:

> ... when there is no desire to keep such communications secret then surely it follows that a claim of privilege cannot be maintained. To offer to sell information is to say that there is no desire to keep it secret. There is simply a desire to obtain money for it.

Zimmer was followed by the Ontario Court of Justice in *Conrad* v. *Martin*, above. The judge in that case described it as dealing with a situation "indistinguishable from *Zimmer* v. *Haaf*". In contrast, in *McCarty* v. *Chen*, above, the British Columbia Court of Appeal declined to apply the reasoning in *Zimmer* and found that, in circumstances where an offer to disclose a medical legal report for a fee had been made, privilege had not thereby been waived. This case stands for the general proposition that the making of a conditional waiver (*i.e.*, waiver for a fee) does not, unless the condition is met, constitute a waiver of the privilege. As the Court of Appeal said in *McCarty*, at pp.7 and 8:

> The basic point is that the possessor does not, merely by making the offer, evince an intention to waive privilege. It follows that, in my view, the decision to order disclosure was wrong in principle and should be set aside.

In this case, there is evidence that, at a second meeting with Ministry officials in October 1998, the applicant was told the Ministry might not release the opinion. As is noted above, the Ministry later told the applicant, in writing, in the Ministry's November 6, 1998 letter that the legal opinion would not be released to him because it was privileged. In these circumstances, it cannot reasonably be concluded that the actions of the Ministry evince an intention to waive privilege.

The applicant also argues that the Ministry implicitly waived solicitor client privilege by disclosing a summary of the legal advice in a letter to him. A copy of that letter, which is

dated November 6, 1998, forms Exhibit "E" to the applicant's affidavit in this inquiry. The Ministry's letter to the applicant enclosed a copy of a November 5, 1998 memorandum that the applicant says discloses the substance of the legal advice and thus waives privilege. The November 6, 1998 letter says the memorandum contains the gist of the legal opinion previously given to the letter's author. The letter goes on to say that the "legal opinion itself is a confidential document and may be protected by solicitor-client privilege". The letter says that the opinion would not be released because of this.

Of the November 6, 1998 letter, the applicant says that the Ministry cannot assert privilege while at the same time "trying to introduce evidence out of that relationship in another form". The applicant further says that the Ministry waived privilege "[b]y putting the legal opinion on the table" against him. The applicant did not explain this, but it appears that the applicant believes the opinion was "put on the table" in the November 5, 1998 letter through the disclosure of the conclusions of the Ministry's lawyer.

The November 5, 1998 memorandum says that an office of another ministry agreed with the legal opinion that has been given and that "their opinion" – quite clearly, the opinion of that office and not a lawyer – was as summarized in the memorandum. In my view, this memorandum itself does not necessarily disclose any legal advice. The enclosing letter, on the other hand, says the memorandum "contains the gist" of the legal advice that had been given to the Ministry. As the cases discussed above illustrate, this does not necessarily mean that the Ministry has waived solicitor client privilege over the whole of the opinion.

In *Stevens* v. *Canada (Prime Minister)*, above, Rothstein J. observed, at p. 12, that the Privy Council had, in that case:

> … expurgated the narrative portions [of a legal bill] because its officials believed (incorrectly in my view) that it was not subject to solicitor-client privilege. Certainly in the context of disclosure under the *Access to Information Act*, the partial disclosure of privileged information cannot be taken as an attempt to cause unfairness between parties, or to mislead an applicant or a court, nor is there any indication that it would have that effect. I therefore find that the disclosure of portions of the solicitors' accounts does not constitute waiver of solicitor-client privilege.

Similarly, in *Mackin* v. *New Brunswick (Attorney General)*, (1996), 141 D.L.R. (4th) 352 (N.B.Q.B.), the Court dismissed an application for disclosure of the whole of a legal opinion made under New Brunswick's *Right to Information Act* in circumstances where the result of the opinion had been disclosed by the Deputy Attorney General. Applying the *Power Consolidated* and *Lowry* decisions, the Court concluded, at p. 4, that:

> The circumstances in this application reveal a potential complaint, a request for an independent legal opinion, the receipt of that opinion, and disclosure of a summary of the opinion and part of the text of the opinion in correspondence. In my opinion this fact does not amount to waiver of privilege of the whole document.

Finally, in Order P-579, a decision under Ontario's *Freedom of Information and Protection of Privacy Act*, it was held that disclosure - in a letter sent to certain parties by Ontario's Minister of Health - of the conclusions of a legal opinion did not constitute a waiver of the whole opinion. Relying on another case, *Risi Stone Ltd.* v. *Groupe Permacon Inc.* (No. 2) (1990), 30 C.P.R. (3d) 148 (F.C.T.D.) – which held that the legal reasons upon which the solicitor reached his conclusion were protected by solicitor client privilege even though the recommendation had been disclosed – the following was said, at p. 4 of Order P-579:

> … an objective consideration of the facts of this case suggests that the Ministry still intended to rely on solicitor client privilege to deny access to the opinion itself … .
>
> In this case, the purpose for requiring disclosure of the entire opinion on the basis of implied waiver would be to prevent any unfairness to the appellant, so that the appellant would not be misled as to the Ministry's position or so that the Ministry could effectively rely on only those elements of the opinion which are advantageous to its position. In my opinion, given what I see to be the distinction between the Ministry's legal position and the supporting advice and/or reasons, I do not see that fairness requires the disclosure of the record at issue.

In this case, I am satisfied that the disclosure of the "gist" of the legal opinion – really, the conclusion of the Ministry's legal advisor – cannot on any objective analysis be considered to demonstrate an intention to waive privilege. On the contrary, the record in question makes it clear the Ministry did not intend to waive privilege over that opinion. I am also satisfied - based on my review of the withheld information - that, to quote Rothstein J. in the *Stevens* case, "the partial disclosure of [the] privileged information cannot be taken as an attempt to cause unfairness between parties, or to mislead an applicant or a court, nor is there any indication that it would have that effect". To my mind, neither the facts nor fairness compel a conclusion that the Ministry has waived privilege here.

Finally, the applicant argued that the legal advice should be disclosed because the legal opinion will eventually be released through other legal processes, to which he referred. The question of whether such other legal processes would, for reasons of fairness, require disclosure of privileged documents is not properly an issue before me and has no bearing on my decision about s. 14 of the Act.

For the above reasons, I find that the Ministry is authorized by s. 14 of the Act to refuse to disclose to the applicant information withheld by the Ministry under that section.

3.5 Confidential Law Enforcement Information – The Ministry applied s. 15(1)(d) to some of the disputed information. The Ministry said the information would reveal the identity of someone who had provided information to the Ministry about the applicant in the context of a "law enforcement" matter.

Section 15(1)(d) says a public body may refuse to disclose information if its disclosure could reasonably be expected to "reveal the identity of a confidential source of law enforcement information". In support, the Ministry cited two orders by my predecessor, and argued that he had found that the term "law enforcement" encompasses employment investigations by an employer.

In Order No. 193-1997, David Flaherty held that a ministry's investigation in a matter that ultimately led to the demotion and transfer of one of its employees was a "law enforcement" matter for the purposes of s. 15(1)(d). Schedule 1 to the Act defines the term 'law enforcement' as meaning:

> (a) policing, including criminal intelligence operations,
>
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
>
> (c) proceedings that lead or could lead to a penalty or sanction being imposed.

In Order No. 193-1997, the ministry involved in that case had investigated allegations of sexual harassment against one of its employees. The employee was, as a result of the investigation findings, demoted and transferred. Having found that the ministry had the authority to impose a penalty or sanction, and did so, my predecessor concluded that the matter was a law enforcement matter within the meaning of the Act. In arriving at this conclusion, he distinguished a decision under Ontario's access to information legislation where a contrary conclusion had been reached in relation to Ontario's similar, but not identical, provision. That decision was upheld by the court on judicial review. See Ontario Order P-352 (September 21, 1992) and *Ontario (Solicitor General)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602 (Ont. Div. Ct.).

In light of my finding with respect to s. 22(1) of the Act and the information in dispute, I do not need to make any finding about the Ministry's reliance on s. 15(1)(d). Whether the term 'law enforcement' covers an employer's investigation into an employee's conduct, pursuant to the employer's rights under the employment contract only, is a matter for another day.

3.6 Harm to Financial Interests of the Province – Again, the amended notice of written inquiry in this matter says that one of the issues to be considered is whether the Ministry was authorized by s. 17(1) of the Act to refuse to disclose information to the applicant. Neither the applicant nor the Ministry addressed the s. 17(1) issue in initial or reply submissions. The burden lies on the Ministry to establish that s. 17(1) authorizes it to refuse to disclose information to the applicant. Since the Ministry has not adduced any evidence or advanced any argument on the issue, the Ministry has failed to satisfy its burden of proof under s. 57(1). Accordingly, I find that the Ministry was not authorized by s. 17(1) to refuse to disclose information to the applicant. The information to which

the Ministry had applied s. 17(1) is also subject to s. 22(1), as the discussion below indicates, and therefore cannot be disclosed.

3.7 Can Personal Information in the Records be Disclosed? – The Ministry has taken the position that it is required by s. 22(1) to refuse to disclose information to the applicant. Section 22(1) reads as follows:

> The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

In appropriate cases, s. 22(1) doubtless overcomes an individual's *prima facie* right of access to her or his own personal information, in order to protect third party privacy. See, for example, Order 00-02 and Order No. 193-1997. The Ministry says this is one of those cases.

In this case, the Ministry said, it was required to refuse to disclose

> … information which would reveal the identity of individuals who provided information during the course of the Investigation [by the Ministry about the applicant], statements made during interviews and discussions about those statements.

It is clear from the rest of the Ministry's argument on this issue that, despite this passage from the Ministry's submission, the Ministry has concluded that disclosure of statements during interviews, and discussions about those statements, also would reveal the identity of individuals who provided information during the Ministry's investigation. In essence, the Ministry's case is that disclosure of the information – including personal information of the applicant – would, in all the relevant circumstances, unreasonably invade third party privacy *and* compromise the Ministry's investigation.

As was noted above, the applicant bears the burden of establishing that third party personal information can be disclosed without unreasonably invading the personal privacy of third parties. The Ministry bears the burden of establishing that the applicant's own person information cannot be disclosed to him without unreasonably invading the personal privacy of third parties.

The Ministry said the relevant circumstances in s. 22(2)(c), (e) and (f) support its position. The most compelling of these, in my view, is the relevant circumstance in s. 22(2)(f), which requires a public body to consider whether the personal information in issue has been "supplied in confidence" to the public body. The Ministry said that the information in issue here – much of which is information about the applicant and is therefore his personal information – was supplied in confidence during interviews. The Ministry says those who gave the information did so having been given explicit assurances the information was received in confidence. The Ministry backed this up with affidavit evidence. I find the Ministry has established that the information in issue -

being both personal information of the applicant and personal information of others - was supplied to the Ministry in confidence.

The next relevant circumstance relied on by the Ministry is found in s. 22(2)(e), which says the Ministry must consider whether disclosure would expose a third party "unfairly to financial or other harm". Once again, the Ministry submitted affidavit evidence to support the relevance of this circumstance. I find the Ministry has also established that s. 22(2)(e) is relevant here. This is supported both by the Ministry's affidavit and the other material before me (including the applicant's own submissions as to the nature and circumstances of his dealings with the Ministry).

The last relevant circumstance that the Ministry contends must be considered is found in s. 22(2)(c), which requires a public body to consider whether disclosure of the personal information is "relevant to a fair determination of the applicant's rights". The Ministry said this factor is not relevant here. The main thrust of its argument is that the applicant can – and should – take advantage of other information-disclosure processes available to him. The Ministry noted that s. 2(2) of the Act says the Act "does not replace other procedures for access to information", and intimated that any information sought by the applicant should be obtained through other avenues. The Ministry also quoted a passage from the judgment of LaForest J., dissenting on another point, in *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.), at para. 99. Here is part of the passage quoted by the Ministry:

> Of course, collective bargaining plays an important role in the democratic society. However, it [the collective bargaining and labour relations system] is in many ways an autonomous regime, with its own enabling legislation and comprehensive system of dispute resolution. This system attempts to mediate the conflict between the private interests of employers and the private, collective interests of workers. In this sense, a union's interest in obtaining helpful information from its employer is no greater than the employer's interest in obtaining like information. **Conflicts regarding such information should be resolved within the confines of that system, i.e., by recourse to the usual dispute resolution methods of labour relations - negotiation, arbitration and administrative review.** There is no indication that access to information legislation was intended to enable one side in this conflict to obtain information that it would not otherwise be entitled to under the collective bargaining system. It is acceptable, of course, if the legislation permits this incidentally, i.e. by permitting someone with a particular private interest to benefit because disclosure accords with the public goals of the legislation. The legislation should not be interpreted, however, with the collective bargaining system specifically in mind. [Emphasis added by the Ministry]

As I understand its argument, the Ministry is asking me to accept that the right of access to information under the Act is to be read down, or supplanted, if another avenue for access exists in a given case. Section 2(1) of the Act is against the Ministry, as is s. 2(2). The

former says that the Act's purposes include making public bodies more accountable to the public, including by "giving the public a right of access to records". This right, which is found in s. 4(1), is subject to "limited exceptions" specified in the Act (s. 2(1)(c)). The Ministry wishes to effectively turn s. 2(2) on its head – in effect, to ignore ss. 2 and 4 – so that existence of other actual or possible avenues of access to information renders the Act inapplicable.

The *Dagg* decision does not assist the Ministry. The above-quoted passage simply says that access to information legislation "should not be interpreted with the collective-bargaining system specifically in mind". It is noteworthy that LaForest J. also said it is acceptable if the legislation permits "someone with a particular private interest to benefit" incidentally through disclosure under an access law, which generally has "public goals" and not private goals. This sentiment is reflected, among other things, in s. 22(2)(c) itself, which explicitly contemplates the possibility that disclosure of information under the Act may advance a requester's private interests. Nothing turns on the fact that s. 22(2)(c) deals with third party personal information and not general information of a public body.

It is apparent from the Ministry's materials that some sort of legal process involving the Ministry and the applicant is underway or may at some point be started. Again, we are dealing here with personal information of the applicant – what others have said about him – and personal information of third parties. In considering whether any personal information at all could be disclosed to the applicant, in my view, one could readily conclude the personal information is, to some degree, relevant to a fair determination of the applicant's rights. The issue is whether the personal information itself is relevant, not whether disclosure through the Act – as opposed to through some other means of disclosure – is relevant.

Having said that, even if one concludes the personal information in dispute here *is* relevant to a fair determination of the applicant's rights, that fact is not conclusive of the issue. The question remains: 'If the s. 22(2)(c) circumstance is relevant, is any presumed (or other) unreasonable invasion of third party personal privacy overcome?' In answering this, one must bear in mind that the Ministry considered – in my view, properly – two other relevant circumstances, *i.e.*, those set out in ss. 22(2)(e) and (f).

In the circumstances of this case, the Ministry was correct to decide that the personal information – including the applicant's own personal information – must be withheld from him. Again, it is relatively unusual for someone to be denied access to his or her own personal information (even personal information consisting of things others have said). But in all the circumstances of this case – and I am constrained in how much I can say here – I conclude that the Ministry was required by s. 22(1) to withhold the requested information from the applicant. I also conclude that the Ministry was not required by s. 22(5) to provide summaries of the personal information to the applicant.

4.0 CONCLUSION

For the reasons given above, I make the following orders:

1. Having found that the Ministry was authorized by s. 14 of the Act to refuse to disclose information to the applicant, under s. 58(2)(b) of the Act I confirm the decision of the Ministry to refuse access to the information withheld by the Ministry under s. 14.

2. Having found that the Ministry was not authorized by s. 17(1) of the Act to refuse to disclose information to the applicant, subject to the finding and order in paragraph 3, below, under s. 58(2)(a) of the Act I require the Ministry to give access to the information withheld by the Ministry under s. 17(1).

3. Having found that the Ministry was required by s. 22(1) of the Act to refuse to disclose personal information to the applicant, including the applicant's own personal information, under s. 58(2)(c) of the Act I require the Ministry to refuse access to that personal information.

March 16, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia