OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 04-18

MINISTRY OF PUBLIC SAFETY & SOLICITOR GENERAL

Mary Elizabeth Carlson, Adjudicator
August 12, 2004

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Summary: Applicant requested a list of all firearms matters that had proceeded to hearing. Only responsive record was a list created by legal counsel to track ongoing appeals. List withheld under s. 14. Record found to be privileged. Ministry found to have met its duty to assist. Ministry not required to create a record as contemplated by s. 6.

Key Words: solicitor client privilege, duty to assist, duty to create a record, public interest disclosure.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6, 14, 25(1)(a) & (b).

Authorities Considered: B.C.: Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 01-20, [2001] B.C.I.P.C.D. No. 20; Order 00-01, [2000] B.C.I.P.C.D. No. 1.

1.0 INTRODUCTION

[1] On February 15, 2002, the applicant submitted a request to the Ministry of Public Safety & Solicitor General ("Ministry") for a "list of all firearms matters that have gone to reference hearings and other firearm related hearings that are a matter of public record."

[2] The only responsive record was a partial list of appeals created by legal counsel at the Legal Services Branch. The Ministry responded on May 9, 2002, refusing access to the record on the grounds that it was protected by solicitor-client privilege, stating "the only information tracked by Firearms is by their legal counsel who tracks ongoing appeals used for legal advice only."

[3] On June 8, 2002, the applicant requested a review of the Ministry's refusal to disclose the requested record under s. 14 of the *Freedom of Information and Protection of Privacy Act* ("Act"). In addition, the applicant requested that this office review whether the public body had failed in its duty to assist under s. 6(1) of the Act. The applicant also submitted the disclosure of the records raised a matter of public safety under ss. 25(1)(a) and 25(1)(b) of the Act.

[4] Mediation was unsuccessful and the matter proceeded to a written inquiry on February 15, 2002. I have dealt with this inquiry by making all findings of fact and law, and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[5] There are three issues under review in this inquiry.

1. Is the Ministry required to disclose the information in the public interest as required by s. 25 of the Act?
2. Is the Ministry authorized to withhold information under s. 14 (solicitor client privilege) of the Act?
3. Did the Ministry meet its duty to assist the applicant in its response as required by s. 6?

3.0 DISCUSSION

[6] **3.1 Public Interest Disclosure** – The relevant portion of s. 25 is as follows:

> **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.

[7] Section 25 is a mandatory override of all other sections in the legislation and, as such, I will deal with this section first.

[8] The term "without delay" in s. 25 presupposes the information in the record concerns an emerging or pressing issue to be brought to the attention of the public.

In Order 02-38, [2002] B.C.I.P.C.D. No. 38, the Information and Privacy Commissioner confirmed that the term "without delay":

> …[I]ntroduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.

[9] Section 25(1)(a) requires a public body to disclose information if it pertains to a "risk" of "significant harm to the environment or to the health or safety of the public or a group of people."

[10] In Order 02-38, the Commissioner discussed some of the elements of "risk" that might be captured by s. 25(1)(a):

> [56] It is not a good idea to attempt to lay down any firm and fast rules for what information will be "about" a risk identified in s. 25(1)(a) and I will certainly not try to do so here. The circumstances of each case will necessarily drive the determination, but information "about" a risk of significant harm to the environment or to the health or safety of the public or a group of people may include, but will not necessarily be limited to:
>
> - information that discloses the existence of the risk,
> - information that describes the nature of the risk and the nature and extent of any harm that is anticipated if the risk comes to fruition and harm is caused,
> - information that allows the public to take or understand action necessary or possible to meet the risk or mitigate or avoid harm.

[11] The applicant, in her initial submission, implies that s. 25(1)(a) applies because the information in the records is about "an issue of public safety". At page 8 she asks, "Is applying for a firearms permit or license to purchase, carry, or for a business an issue of regulatory safety?"

[12] The applicant has not provided any evidence or persuasive argument that the information she seeks in any way contains information about a "risk" to which the public must be informed of "without delay" and I see no other basis in the material before me to support such a finding. I find that s. 25(1)(a) does not apply to the records in dispute.

[13] Section 25(1)(b) requires a public body to disclose information if "the disclosure of which is, for any other reason, clearly in the public interest."

[14] The applicant argues that it is in the "public interest" to have "equal access to the law (i.e. case law) and having it provided in it's [*sic*] entirety, or at the very least being told in a manner that would allow the public/applicant to acquire it." Furthermore, the applicant believes that, because the records are a matter of "public record," it is up to the

public body to "state why it is not in the public interest to release or tell where the public records are located in a coherent way."

[15] In previous orders, the Commissioner has confirmed that s. 25(1)(b) must be read in conjunction with the term "without delay". In Order 01-20, [2001] B.C.I.P.C.D. No. 20, the Commissioner found that in order for s. 25(1)(b) to apply, the information in the record must "give rise to an urgent and compelling need for compulsory public disclosure despite any of the Act's exceptions." The applicant has not produced any evidence or argument that the information in the records she has requested meets the threshold of s. 25(1)(b) and, once again, I find no other basis in the material supporting such a finding. I find that the Ministry is not required to disclose the records under s. 25(1)(b).

[16] **3.2 Solicitor-Client Privilege** – Section 14 states:

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

[17] With respect to the applicability of solicitor-client privilege to the records in dispute, the applicant argues that "[a]ny body of case law that is gathered at the tax payers' expense would not be subject to solicitor client privilege, as it contradicts the Charter not giving the public equal access to the law."

[18] Section 14 of the Act does not in the way the applicant suggests limit the common law of solicitor-client privilege. An applicant's right of access to records in the custody and control of a public body may be limited by a claim of privilege regardless of whether the taxpayers have paid for creation of the privileged material.

[19] In Order 00-01, [2000] B.C.I.P.C.D. No. 1, at page 15, the Commissioner discussed the two types of solicitor-client privilege that may protect a record from disclosure:

> Two kinds of legal professional privilege are recognized for the purposes of s. 14. First, a public body may withhold information that consists of, or would reveal, a confidential communication between a lawyer and his or her client directly related to the giving or receiving of legal advice. See, on this point, *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.), which set aside Order No. 29-1994. Second, a public body may withhold a record that was created for the dominant purpose of preparing for, advising on or conducting, litigation that was under way or in reasonable prospect at the time the record was created.

[20] In support of its application of s. 14, the Ministry stated that during its search for records responsive to the request, "it was determined that Brian Young, legal counsel for the Chief Firearms Officer, had tracked ongoing firearms appeals for the purpose of

advising the Chief Firearms Officer of the status of various firearms litigations matters." (Initial submission of public body, page 8). In a supporting affidavit, Brian Young states he created these records "in [his] capacity as legal counsel for the Chief Firearms Officer. The lists were for the sole purpose of advising the Chief Firearms Officer of the status of various litigation matters. As such, the Lists were the direct product of a solicitor client relationship."

[21] In Order 01-51, [2001] B.C.I.P.C.D. No. 54, the Commissioner considered a request for review concerning similar records which were gathered or created, in fact, by the same lawyer in the same capacity. In that case, the applicant had requested records, including case law records relating to "reference hearings pertaining to firearms." The Commissioner found that such records were gathered or compiled in contemplation of litigation and were therefore protected by litigation privilege. The circumstances of these two cases are similar. I find that litigation privilege applies to the records in dispute.

[22] **3.3 Ministry's Duty to Assist the Applicant?** – Section 6 states:

> **Duty to assist applicants**
>
> 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.
>
> (2) Moreover, the head of a public body must create a record for an applicant if
>
> (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
>
> (b) creating the record would not unreasonably interfere with the operations of the public body.

[23] The applicant believes the public body did not meet its duty to assist her, for two reasons. First, she argues that under s. 6(1) it was incumbent upon the public body to advise her if the records existed in "other available formats". Second, she believes the Ministry had a duty under s. 6(2) to create a record "that would fulfill [her] request if no [other] format of [records] exist presently." (Initial submission of the applicant at page 6).

[24] The "other available formats" the applicant appears to be referring to are records held by the individual court registry where the matter is heard. In her initial request, she demonstrates awareness that these records are available through "the relevant court registry" but states "I have to know where to look in order to obtain information that is publicly available without going on a wild goose chase." (Initial submission of applicant at page 4.)

[25] It is clear from the first correspondence the applicant sent to the Ministry that she was well aware that the information sought was publicly available through court

registries. I agree with the Ministry's statement "the applicant is able to search for firearms case law in the same manner as anyone else, namely, from reviewing law reports, searching court cases or using other research avenues available to any member of the public." (Reply submission of the Ministry at page 1).

[26] It is not clear from the applicant's initial or reply submissions exactly what type of record she believes could be created from the records in dispute, or at all. In her reply submission, the applicant states the Ministry should create a record by "using all the information that is normally on the first page of reasons for judgement." (Reply submission of the applicant at page 5]. In reply, the Ministry correctly states "the Applicant did not request access to the first pages of the reasons for judgements." (I note, in passing, that such judgements are publicly available for purchase. See Order 01-51.)

[27] The obligation on public bodies to create a record is specifically defined in s. 6(2). The Ministry states that it is "unable to create the record requested by the applicant, namely one comprehensive list of all firearms matters, containing the names of the parties, date, Docket Number and the location of the registry from a machine readable record in the custody or under the control of the Ministry using its normal computer hardware and software and technical expertise." (Initial submission of the public body at page 8). The Ministry states that it does not have the capacity to create the record the applicant has asked for "short of an employee spending hundreds of hours checking court registry records across the province, something that, in the Ministry's submission, the Act does not require." In other words, there is no "machine-readable record" from which the Ministry could create a record. I find that s. 6(2) does not require the Ministry to create such a record.

4.0 CONCLUSION

[28] Because I have found ss. 25(1)(a) and 25(1)(b) do not require the Ministry to disclose the information it has withheld, no order is required in that respect.

[29] Under s. 58(2)(b), I confirm that the Ministry is authorized by s. 14 to refuse access to the records in dispute.

[30] Under s. 58(3)(a) I confirm that the duties of the Ministry under s. 6 of the Act have been performed.

August 12, 2004

ORIGINAL SIGNED BY

Mary Carlson
Adjudicator