OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 00-27

INQUIRY REGARDING MINISTRY OF ATTORNEY GENERAL RECORDS

David Loukidelis, Information and Privacy Commissioner
July 28, 2000

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Summary: Applicant sought public body's draft memorandum to Crown counsel setting out Criminal Justice Branch policy on the laying of a specific kind of criminal charge. Only some information could properly be withheld as advice or recommendations or information used in the exercise of prosecutorial discretion, but all information in record was protected by solicitor client privilege. Public interest override not triggered.

Key Words: Advice or recommendations – solicitor client privilege – exercise of prosecutorial discretion – public interest disclosure.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 13(1), 14, 15(1)(g), 25(1).

Authorities Considered: B.C.: Order No. 142-1997; Order No. 146-1997; Order No. 162-1997; Order No. 182-1997; Order No. 197-1999; Order No. 246-1998; Order No. 321-1999; Order No. 325-1999; Order No. 331-1999; Order No. 327-1999; Order 00-02.
Ontario: Order 92; Order P-324; Order P-1014.

Cases Considered: *R.* v. *Sharpe* (1999), 69 B.C.L.R (3d) 234 (C.A.); *R.* v. *Campbell*, [1999] 1 S.C.R. 565 (S.C.C.); *Alfred Crompton Amusement Machines Ltd.* v. *Customs and Excise Commissioners No. 2*, [1974] A.C. 405 (H.L.).

1.0 INTRODUCTION

Late last year, the applicant – who is a freelance journalist – made an access to information request to the Criminal Justice Branch ("Branch") of the Ministry of Attorney General ("Ministry"), under the *Freedom of Information and Protection of Privacy Act* ("Act"), for records related to s. 159 of the *Criminal Code.* That section makes it a criminal offence for anyone under 18 years of age to engage "in an act of anal intercourse", regardless of whether the participants consent. The applicant says s. 159 has been declared unconstitutional under s. 15 of the *Canadian Charter of Rights and Freedoms* by the Ontario Court of Appeal and the Quebec Court of Appeal. Most recently, he says, Southin J.A., in *R.* v. *Sharpe* (1999), 69 B.C.L.R. (3d) 234 (C.A.), expressed the view, in passing, that s. 159 is unconstitutional. The applicant's access request apparently was for the purposes of researching and writing an article about a number of issues raised by *Sharpe*, including the constitutionality of s. 159. One aspect of that story appears to relate to the fact that, early in 1999, a resident of the Lower Mainland was charged under s. 159, although Crown counsel later stayed the charge.

The Ministry initially withheld two responsive records from the applicant, *i.e.*, a June 9, 1995 memorandum to all Crown prosecutors in the Branch's Vancouver Region and a draft practice bulletin prepared by a lawyer employed at Branch headquarters in Vancouver. The applicant requested, under s. 52 of the Act, a review of this decision. The Branch later disclosed the first of these records as a result of mediation by this Office. Since the second record was not disclosed, and the applicant requested an inquiry, I held a written inquiry under s. 56 of the Act.

2.0 ISSUES

The issues raised in this inquiry are as follows:

1. Was the Ministry authorized by s. 13(1), 14 or 15(1)(g) of the Act to refuse to disclose information to the applicant?

2. Is the Ministry required by s. 25(1) of the Act to disclose information to the applicant?

Under s. 57(1) of the Act, the Ministry bears the burden of proof on the issues contemplated by paragraph one, while – consistent with previous decisions on this point – the burden of proof on the last issue lies on the applicant. See Order No. 162-1997 and Order No. 182-1997.

3.0 DISCUSSION

3.1 Nature of the Disputed Record – This inquiry deals with the two-page draft practice bulletin, respecting s. 159 of the *Criminal Code*, prepared at the Vancouver headquarters of the Branch. Under s. 2 of the *Crown Counsel Act*, the Branch is responsible for, among other things, approving and conducting "on behalf of the Crown"

all prosecutions of offences in British Columbia and for developing policies and procedures in respect of the administration of criminal justice in British Columbia. The Branch from time to time issues practice bulletins and practice directives to all Crown counsel in British Columbia. The Assistant Deputy Attorney General issues binding practice directives under s. 4(3) of the *Crown Counsel Act*. Lawyers at the Branch's headquarters prepare practice bulletins, which are approved either by one of five Branch directors or by the Assistant Deputy Attorney General in charge of the Branch.

The Ministry says practice bulletins are "not binding on Crown Counsel, whereas Practice Directives are binding". The Ministry says each practice bulletin issued by the Branch contains the following statement:

> Practice Bulletins constitute legal opinions prepared for the assistance of Crown Counsel employed or retained by the Criminal Justice Branch. Practice Bulletins may not be released to persons outside the Criminal Justice Branch without the express consent of the person who approved the Practice Bulletin.

According to the affidavit of Elisabeth Burgess, filed by the Ministry in this inquiry, the draft practice bulletin in issue here was prepared for the purpose of providing legal advice to Crown counsel

> … in order to assist them in their making decisions, on behalf of the Crown, as to whether or not to approve charges under Section 159(1) of the *Criminal Code*.

In her affidavit, Elisabeth Burgess – who is the Director of Special Justice Programs within the Branch – deposed that she "supervised the drafting" of the disputed bulletin. She deposed that the record was "intended to be confidential and was not intended to be released outside of the Criminal Justice Branch" without her consent. At the time her affidavit was sworn for the purposes of this inquiry, the draft practice bulletin had not been circulated to Crown counsel outside Branch headquarters. It was still only a draft practice bulletin.

3.2 Disclosure in the Public Interest – It is convenient to deal first with the s. 25 issue. The applicant says the Ministry is required, by ss. 25(1)(a) and (b), to disclose the disputed record regardless of whether other exceptions apply under the Act.

Section 25(1) of the Act reads as follows:

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

The applicant says that because the disputed record deals with the constitutionality of s. 159 of the *Criminal Code*, and because the constitutionality of that provision is "of significant interest to the gay community", disclosure of the record is clearly in the public interest. He further argues that, since the constitutionality of s. 159 is in issue and constitutional issues are always of interest to the public generally, the question of whether or not a statutory provision is constitutional makes the matter one of public interest within the meaning of s. 25(1).

He says that the "reaction of the executive branch of government", in the form of the disputed record, to the mounting jurisprudence that indicates s. 159 is unconstitutional is clearly in the public interest. He says this is especially so when, he asserts, the British Columbia government "continues to approve charges under this section of the *Criminal Code*", despite court decisions indicating that it is unconstitutional. He says the Branch's reasons for, as he characterizes it, rejecting those court decisions are clearly in the public interest and therefore the record should be disclosed under s. 25(1) of the Act.

The applicant also says the record must be disclosed under s. 25(1) for the following reasons, which are found in his initial submission:

> The records in question should also be disclosed pursuant to section 25(1)(a) of the *Act*. Section 159 continues to treat a regular sexual practice of gay males as requiring differential treatment under the law. This discriminatory treatment of our sexual practices by our own representative Government has a significant impact on 'the health or safety of the public or a group of people.' It legitimizes another form of discrimination against us. By continuing to cast our basic sexual practices as <u>distinctly</u> harmful, it reinforces negative stereotypes, stereotypes which continue to provide the basis for much hatred and violence against gays and lesbians. Those stereotypes also have a detrimental impact on the ability of gay persons to develop a healthy sexual identity.
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> ...
>
> The continued application of the anal intercourse provision by the BC Government sends a chill to anyone who might consider developing safer sex materials for gay teenagers, as they can be charged with making and distributing child pornography and, if convicted, sentenced up to ten years in prison. [emphasis in original]

The Ministry, for its part, rejects the argument that s. 25(1) applies. It says the Legislature could not have intended that a public body would be required to disclose legal advice on the constitutionality of legislation as soon as the advice is given. The Ministry notes that s. 25(1) is mandatory – it *requires* public bodies to disclose information if disclosure is "clearly" in the public interest. It says that s. 25(1) only applies in the "clearest and most serious of situations", citing Order No. 246-1998, at p. 10. Last, the Ministry says – citing Order No. 142-1997 and Order No. 146-1997 – that a public body's determination that s. 25 (1) does not apply is not reviewable by the commissioner under the Act.

Leaving aside the question of the commissioner's authority to review s. 25(1) decisions by the head of a public body, this is not a situation where s. 25(1) applies. The fact that the constitutionality of a provision of the *Criminal Code* is, in some sense, dealt with in the disputed record does not mean disclosure of that record, or the advice it contains, is clearly in the public interest as contemplated by s. 25(1). This case does not possess the necessary element of seriousness and compelling need for disclosure that is contemplated by s. 25(1).

3.3 Disclosure of Advice or Recommendations – The Ministry says it is entitled under s. 13(1) of the Act to refuse to disclose information in the disputed record. That section provides that 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". In this case, the Ministry argues, disclosure of information in the record would "reveal, either explicitly or implicitly, advice prepared" by and for the Ministry. The record "clearly recommends a specific course of action" that, if the practice bulletin is approved in its present form, would either be accepted or rejected by individual Crown counsel when deciding whether or not to lay charges under s. 159 of the *Criminal Code*. Consistent with the nature of such practice bulletins, the Ministry argues, the bulletin contains advice or recommendations developed by or for the Ministry as to various possible courses of action. In the Ministry's view, the fact that the disputed record is only a draft does not change the outcome.

From the applicant's perspective, a distinction is to be drawn between advice or recommendations, within the meaning of s. 13(1), and a "policy". He says s. 13(1) does not "attach to policy decisions of a public body or an expression of that decision in a direction given to functionaries of the public body". Such policies and directions are not covered by s. 13(1) because they are not part of the internal policy discussions, or the deliberative process or debate, that are properly covered by the s. 13(1) exception.

Despite the applicant's very able arguments on this point, as on others, I find for the Ministry on this issue. The Ministry's evidence is that practice bulletins do not bind Crown counsel in the independent exercise of their prosecutorial discretion under the *Crown Counsel Act*. Crown counsel are, in the exercise of those statutory functions, 'agents 'of the Crown, *i.e.*, they act on behalf of the Crown in prosecuting criminal offences in British Columbia. Advice or recommendations of this specific kind developed by the Ministry and disseminated to Crown counsel qualify, in my view, as advice or recommendations developed by the Ministry for the use of the Crown. I have no doubt, having reviewed the disputed record, that it contains advice or recommendations which are protected by s. 13(1).

The applicant says the Ministry, in any case, has inappropriately withheld the entire record. He argues that s. 4(2) of the Act requires the Ministry to sever information that can be withheld and disclose the remainder. Section 4(2) reads as follows:

> The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be

> severed from a record an applicant has the right of access to the remainder of the record.

The Ministry says

> …an entire draft document may be withheld under s. 13 if it constitutes a suggested course of action concerning the contents and presentation of a final version of that record.

In support, the Ministry relies on Ontario Order 92, Order P-324 and Order P-1014. Here is the Ministry's argument on this point:

> The record at issue is a draft that was prepared for the Assistant Deputy Attorney General by a lawyer with the Criminal Justice Branch. The draft constitutes that employee's advice as to how the Practice Directive [*sic*] should read. Thus, the Assistant Deputy Attorney General will either accept the advice by accepting the draft in its present form or reject that advice by making changes to the document. As such, the Public Body submits that the information withheld under section 13 constitutes the advice of a Public Body employee.

The Ministry argues that it does not matter for the purpose of s. 13(1) if a record is a draft or a final document. Yet the Ministry, in the passage just quoted, suggests that this draft record, at least, should be treated differently from a final version when it comes to determining whether the entire record can be withheld. I have read the Ontario orders cited above and have decided they do not assist the Ministry here.

It is immaterial for the purposes of s. 13(1) that a record is, in some sense, a draft. If the record contains information that qualifies as advice or recommendations, its status as a draft or final document does not matter. But the fact that a record is only a draft, in some sense, does not mean that all of the record can be withheld under s. 13(1). The usual principles apply and a public body can withhold only those parts of the draft that actually are advice or recommendations within the meaning of the section.

In this instance, only the paragraph actually setting out the advice or recommendations of the Branch can be withheld. The rest of the record consists of apparently standard-form statements respecting the purpose of the record, stating whether any attachments accompany the record, naming the appropriate contact person at Branch headquarters and giving the name of the person who approved the bulletin and its date. It is equally clear that the background portion of the record sets out factual material which, as contemplated by s. 13(2) of the Act, cannot be withheld by the Ministry under s. 13(1). Section 13(2)(a), specifically, provides that a public body must not refuse to disclose "factual material" under s. 13(1). This is not a case where disclosure of such material could be said to disclose the actual underlying advice or recommendations.

I also have no doubt that s. 13(3) of the Act does not apply. That section says that information cannot be withheld under s. 13(1) if it is "in a record that has been in existence for 10 or more years". The Ministry's evidence establishes that the disputed

record was created in 1999, so there is no doubt that s. 13(3) does not, contrary to the applicant's argument, apply here.

In light of what I said above about only portions of the record being covered by s. 13(1), I find that the Ministry is not authorized by that section to refuse to disclose all of the disputed record to the applicant. It is, as specified in the order made below, entitled to withhold under s. 13(1) only the actual advice or recommendations in the record. This is subject to what is said, and ordered, below respecting s. 14.

3.4 Solicitor Client Privilege – Section 14 of the Act authorizes a public body to "refuse to disclose to an applicant information that is subject to solicitor client privilege". This exception incorporates both aspects of the common law rule of legal professional privilege. The kind in issue here is that which protects confidential communications between a client and a lawyer for the purpose of seeking or giving legal advice. The Ministry argues that this species of privilege applies because the draft practice bulletin is a confidential communication intended to provide legal advice to the Crown. It relies in this respect on the above-quoted standard practice bulletin statement regarding the nature and purpose of such bulletins, as well as the affidavit evidence of Elisabeth Burgess.

According to the Ministry, the record contains legal advice of a lawyer employed by the Crown for the purpose of advising agents of the Crown – namely, Crown counsel – in the exercise of their duties and powers under the *Crown Counsel Act*. The Ministry cites a number of Canadian and English cases in which it was held that confidential communications between a lawyer employed by a corporation or government and employees or agents of the corporation or government, for the purpose of seeking or giving legal advice, are protected by solicitor client privilege. The Ministry cites *R.* v. *Campbell*, [1999] 1 S.C.R. 565 (S.C.C.) and *Alfred Crompton Amusement Machines Ltd.* v. *Customs and Excise Commissioners No. 2*, [1974] A.C. 405 (H.L.).

The applicant says s. 14 does not apply because, consistent with his argument under s. 13(1), the record sets out a "policy" of the Ministry and such a policy cannot be characterized as "advice". He also says that when a practice bulletin is "given to members of the same government department", there is no solicitor-client relationship, because solicitor and client are one and the same. He further argues – citing Order No. 331-1999 – that the lawyer responsible for preparing the disputed record was not retained and acting as a lawyer in preparing that record

The affidavit evidence of Elisabeth Burgess is that the draft practice bulletin was intended to provide legal advice to Crown counsel in order to "assist them in making their decisions, on behalf of the Crown, as to whether or not to approve charges" under s. 159 of the *Criminal Code*. She also deposed that the disputed record was "intended to be confidential and was not intended to be released outside of the" Branch.

The evidence before me as a whole establishes to my satisfaction that Elisabeth Burgess was the person ultimately responsible for the bulletin's content. She is to be treated, in my view, as the author of that record. I find that, although employed in the Ministry, she

was acting as a lawyer for the purpose of providing legal advice to the Branch and Crown counsel. I find that she and the Ministry were in a solicitor-client relationship at the time the draft was prepared.

It is also clear – based on my review of the record – that it contains legal advice based on a review of relevant case law and an assessment of relevant legal principles. It displays the exercise of legal skill and judgement and communicates views on relevant cases and principles, while also offering appropriate courses of action. I also accept that the draft bulletin was intended to be confidential.

In light of these circumstances, I find that the disputed record is privileged and qualifies for protection under s. 14, even if it has not been circulated to others at Branch headquarters or to Crown counsel outside headquarters. The entire communication is privileged.

3.5 Information Used in the Exercise of Prosecutorial Discretion – Late in the day, the Ministry notified the applicant that it would also rely in this inquiry on s. 15(1)(g) of the Act as a basis for withholding information from the applicant. That section authorizes a public body to refuse to disclose to an applicant any "information relating to or used in the exercise of prosecutorial discretion". Schedule 1 to the Act defines "exercise of prosecutorial discretion" as

> … the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power
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> (a) to approve or not to approve a prosecution,
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> (b) to stay a proceeding,
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> (c) to prepare for a hearing or trial,
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> (d) to conduct a hearing or trial,
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> (e) to take a position on sentence, and
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> (f) to initiate an appeal.

The Ministry says the following, in its initial submission, to support its reliance on s. 15(1)(g):

> The record at issue was prepared by the Criminal Justice Branch for the purpose of assistance to Crown Counsel on whether or not to approve a prosecution under section 159(1) of the *Criminal Code*. The exercise of the power to approve or not approve a prosecution expressly falls within the definition of 'exercise of prosecutorial discretion' under the Act. The Public Body submits therefore the information withheld under s. 15(1)(g) necessarily **relates to** the 'exercise of prosecutorial discretion' within the meaning of 15(1)(g). As such, s. 15(1)(g) authorizes the Public Body to withhold that information. [emphasis in original]

The Ministry says the fact that the record in dispute is still in draft form does not "alter the fact that the information withheld from that record relates to the exercise of prosecutorial discretion".

By contrast, the applicant cites Order No. 331-1999 as support for the view that s. 15(1)(g) cannot be used – especially in light of the accountability goals of the Act as set out in s. 2(1) – unless a record has actually been "considered and used in the exercise of prosecutorial discretion in a particular case". The applicant also cites, on this point, Order No. 321-1999, Order No. 197-1999 and Order 00-02.

On its face, s. 15(1)(g) is broader than the applicant contends. It covers more than information that actually has been or is "used" in the exercise of prosecutorial discretion, since it also covers "information relating to" such an exercise of discretion. In my view, the information in the disputed record qualifies as information that relates to the exercise of prosecutorial discretion, even if the draft record has not yet been circulated to Crown counsel outside Branch headquarters. The record assesses the state of the law and recommends a course of action with respect to the exercise by Crown counsel of their prosecutorial discretion. The Ministry was not, however, authorized by s. 15(1)(g) to withhold the entire record. For the reasons given above, and subject to what I have found and ordered under s. 14, only portions of the record can properly be withheld under s. 15(1)(g), as specified in the order made below.

3.6 The Ministry's Exercise of Its Discretion – The applicant points out that all of the exceptions relied on by the Ministry are discretionary. Each exception authorizes the Ministry to refuse access to information, but does not require the Ministry to do so. The applicant says the Ministry must properly exercise its discretion, in good faith, and must take into consideration "all relevant considerations, including the public interest in having the record released". The applicant also says the Ministry must be prepared to demonstrate that it has properly exercised its discretion under ss. 13(1), 14 and 15(1)(g). He cites Order No. 325-1999 and Order No. 327-1999 in support of this argument. He says there is "no evidence that the public body in this case has exercised discretion to disclose this single record" and that the Ministry has "taken a defensive, adversarial approach to my request". The applicant cites a number of circumstances which he alleges demonstrate bad faith on the part of the Ministry in refusing his request.

The Ministry contends it has appropriately declined to exercise its discretion in favour of disclosure. It says that its decision not to disclose was made in good faith. In his affidavit, Austin Cullen – who at the time was Acting Assistant Deputy Attorney General – deposed that he considered two factors in deciding to withhold the information. First, the "historical practice of the Criminal Justice Branch has been to not release Practice Bulletins". Second, he considered "whether there was a sympathetic or compelling need to release the information and concluded that there was not", because the Branch's responsibilities under the *Crown Counsel Act* include development of "policies and procedures in respect of the administration of criminal justice in British Columbia". It is clear the Ministry did consider exercising its discretion in favour of disclosure in this case – as it should do on the merits in each case – and the matter rests there.

Having said that, I think the Ministry should, in future, consider a broader range of factors, as appropriate to the circumstances of each case. Factors that should be considered include those found in section C.4.4 of the government's own *Policy and Procedures Manual*, issued by the Information, Science and Technology Agency of the Ministry of Advanced Education, Training and Technology. I cited this list with approval in Order No. 325-1999, at p. 5.

4.0 CONCLUSION

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

1. Under s. 58(2)(b) of the Act, I confirm the decision of the Ministry that it is authorized to refuse access under ss. 13(1) and 15(1)(g) of the Act to that part of the record indicated on the copy of the disputed record delivered to the Ministry with this order;

2. Under s. 58(2)(a) of the Act, subject to the order in paragraph 3, I require the Ministry to give the applicant access to the parts of the disputed record withheld by the Ministry under ss. 13(1) and 15(1)(g) other than the part described in paragraph 1, above; and

3. Under s. 58(2)(b) of the Act, I confirm the decision of the Ministry under s. 14 of the Act to refuse to give the applicant access to the entire disputed record.

Since I have found that s. 25 of the Act does not require disclosure of the disputed record, no order is necessary under s. 58 in respect of that section.

July 28, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia