

Indexed as:

**British Columbia (Minister of Environment, Lands and Parks)
v. British Columbia (Information and Privacy Commissioner)**

**IN THE MATTER OF The Judicial Review Procedure Act, R.S.B.C.
1979, C. 209**

**AND IN THE MATTER OF The Decision of the Information and
Privacy Commissioner of British Columbia (Order No. 29-1994),
dated November 30, 1994, made under the Freedom of Information
and Privacy Act, S.B.C. 1992, C. 61**

Between

**The Minister of Environment, Lands and Parks and The Minister
Responsible for Human Rights and Multiculturalism, and The
Attorney General of British Columbia, petitioners, and The
Information and Privacy Commissioner of the Province of
British Columbia, respondent**

[1995] B.C.J. No. 2594

16 B.C.L.R. (3d) 64

59 A.C.W.S. (3d) 813

Vancouver Registry No. A943843

British Columbia Supreme Court
Vancouver, British Columbia
(In Chambers)

Thackray J.

Heard: November 9 and 10, 1995.

Judgment: filed December 12, 1995.

(26 pp.)

Crown -- Examination of public documents -- Freedom of information, bars -- Solicitor-client privilege.

Application for an order setting aside a decision of the respondent Information and Privacy

Commissioner. In April, 1994, CBR Ltd. submitted a request to the applicant Minister seeking disclosure of records held by the Ministry relating to a Park Use Permit. In June, 1994, the Minister released a number of documents to CBR Ltd. Two documents related to the said Permit were withheld on the ground that their contents were protected by solicitor-client privilege. "Document A" consisted of the Minutes of a meeting attended by 10 persons including a solicitor employed by the Ministry while "Document B" consisted of the report and recommendations of that solicitor related to the Park Use Permit in question. In support of its request for a review of the Minister's decision, CBR Ltd. argued that all statements of fact or factual information contained in the documents were not protected by solicitor-client privilege and that under section 14 of the Freedom of Information and Protection of Privacy Act, only those portions containing requests for or the giving of legal advice were privileged. The respondent Commissioner concluded that the Ministry had not shown that the documents in their entirety fell within section 14 of the Act. With respect to "Document A", he decided that only those lines of information in which the Ministry's solicitor was specifically mentioned could be properly withheld and regarding "Document B", he directed that relevant factual and descriptive information contained therein be severed and disclosed to CBR Ltd. The Minister on this application contended that the Commissioner erred in his interpretation of section 14 of the Act.

HELD: Application allowed. The Commissioner committed an error of law in proceeding on the premise that solicitor-client privilege was to be interpreted narrowly and not expansively for the purposes of the Act. Once the common law principle of solicitor-client privilege was transported into the Act, as it was by section 14, the principle could not be abridged to accomplish some "narrow" result. There was no basis to find that the language of section 14 suggested, even if defined narrowly, that there was to be an exception for factual or descriptive information contained in privileged documents.

Statutes, Regulations and Rules Cited:

Freedom of Information and Protection of Privacy Act, ss. 2, 4(2), 5, 14, 52(1), 58(2)(a).

Counsel:

D.K. Lovett, for the Petitioners.

S.E. Ross, for the Commissioner.

R.J. McDonell, for Cypress Bowl Recreation Ltd.

J.J. Arvey, Q.C., for the Law Society of B.C.

D. Loukidelis, for I.C.B.C.

1 THACKRAY J.:-- This is a petition pursuant to the provisions of the Judicial Review Procedure Act for an order setting aside a decision of the Information and Privacy Commissioner of the Province of British Columbia (the "Commissioner") on the basis that he erred in his interpretation of section 14 of the Freedom of Information and Protection of Privacy Act (the "Act").

BACKGROUND

2 On April 13, 1994 Cypress Bowl Recreation Ltd. ("Cypress Bowl") submitted a request to the

Minister of Environment, Lands and Parks and Minister Responsible for Human Rights (the "Minister") for records held by the Ministry of Environment, Lands and Parks and Ministry Responsible for Human Rights (the "Ministry") relating to Park Use Permit Number 1506 (the "permit"). This request was made pursuant to s.5 of the Act.

3 On June 21, 1994 the Minister released a number of documents to Cypress Bowl. Two documents and parts of one other document were withheld on the basis that certain information was protected by solicitor-client privilege. On July 20, 1994 Cypress Bowl asked the Commissioner to review the Minister's decision to withhold these documents. This request was made pursuant to s.52(1) of the Act which reads:

52(1). A person who makes a request to the head of a public body, other than the commissioner, for access to a record or for correction of personal information may ask the commissioner to review any decision, act or failure to act of the head that relates to that request ...

4 "Record" is defined in Schedule 1 of the Act as follows:

"record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, ...

5 "Public body" is defined as including the ministries of the government of British Columbia. The definition also includes the intervenors in this case being the Law Society of British Columbia and the Insurance Corporation of British Columbia.

6 The review hearing was conducted on the basis of affidavit evidence and written submissions. The inquiry was to examine the extent to which the Ministry may use section 14 of the Act to refuse disclosure of information. Section 14 reads:

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

7 Section 57(1) places the burden on the Ministry to establish that Cypress Bowl has no right of access to the records in question. At the review Cypress Bowl said that one of the documents is a record of minutes of a meeting with a public legal advisor and as such the information which is a purported statement of fact by a public servant is not covered by the privilege. Further, any purported statements of fact contained in any of the records are not covered by solicitor-client privilege.

8 There are two documents in dispute before the Court. Document 254 is a record entitled "Minutes of a Meeting on Ski Resort Park Use Permits Held at Vancouver District Office, June 19, 1990 at 10:00 a.m.". Ten people attended the meeting including Mr. Spencer M. Manning, a solicitor with what was then the Ministry of Parks. He deposed that he provided legal advice at the meeting. The Ministry released some information from this document.

9 Cypress Bowl submitted to the Commissioner that this document was developed as a Ministry file document and not as a written communication between solicitor and client. It contended that the material

was factual as it related to Cypress Bowl land tenure and hence was not confidential.

10 Document 311 is entitled "Report and Recommendations - Cypress Bowl Park Use Permit 1506." It was prepared by Mr. Manning who deposed that the document was prepared in his capacity as a lawyer in response to a request for legal advice. The Ministry released the title page and the author's signature on the final page.

11 Cypress Bowl applied to the Commissioner for all statements of fact or factual information contained in the report and any additional information not related to the giving of legal advice. It contended that such information could be severed from any legal advice. Counsel for Cypress Bowl took the position that whereas at common law written solicitor/client communications are privileged in their entirety, under the Act only those portions that contain requests for or the obtaining of legal advice are privileged.

ORDER OF THE COMMISSIONER

12 The reasons of the Commissioner, which are entitled an Order, were released on November 30, 1994. In it he said that the Ministry's view was that "two issues are at stake" in the inquiry. One was whether section 14 permits severance of information thereby revealing information otherwise subject to solicitor-client privilege. The other was whether solicitor-client privilege applies to that part of a communication between a lawyer and client that sets out facts.

13 The Commissioner noted that the Ministry submitted that both documents met the test of privilege: they were the products of a lawyer-client relationship arising from the consultation of a lawyer acting within his capacity as legal adviser and, ultimately, a confidential communication for the purpose of obtaining and giving legal advice. The Ministry contended that "communications between solicitor and client for the purposes of obtaining or giving legal advice are privileged in their entirety."

14 In a "Discussion" section the Commissioner discussed the meaning of solicitor-client privilege. He said as follows:

The purpose of the Act is to ensure the openness and accountability of public bodies. Section 2(1) clearly outlines the two purposes of the legislation: "to make public bodies more accountable to the public and to protect personal privacy." The section continues that these purposes are met, in part, by "specifying limited exception to the rights of access."

15 The Commissioner noted what had been said by the Attorney General when introducing the Bill. This statement was to the effect that the Bill was so that citizens could "make informed judgments about government policy." The Commissioner thereby concluded as follows:

In my view, the Legislature did not intend to weaken this clear purpose of greater openness and accountability by means of an expansive interpretation of the section 14 exception. Thus my intention is to interpret this section narrowly in accordance with the basic intent of the legislation.

16 The Commissioner acknowledged that he was "moved by the conclusions of my distinguished federal colleague, John W. Grace," with respect to views which he expressed regarding solicitor-client

privilege. Mr. Grace said that tax dollars had been paid for legal opinions and unless "injury to the conduct of government affairs could reasonably be said to result from disclosure, legal opinions should be disclosed."

17 With respect to "severing", the Commissioner referred to a Manual accompanying the Act. He cited an example from the Manual wherein it was said that a description of the condition of a highway could be severed from the opinion regarding the potential liability for failure to repair the highway. He concluded that "this description is an accurate assessment of the severing that should occur under section 14 in comparable circumstances."

18 Before the Commissioner the Ministry submitted that the Act incorporated the common law privilege. Therefore, if the document meets that test for solicitor-client privilege, the law holds that the entire document is privileged. Cypress Bowl contended that section 14 limited the common law and consequently only the portions of a document containing requests for, or the obtaining of, legal advice could be severed. In his reasons the Commissioner noted that sections 14 speaks of "information" that is subject to privilege, and not of a "record" and that section 4(2) reads:

4(2). 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.

19 He then said that the section 4(2) requirement to sever is not "inconsistent with the application of common law solicitor-client privilege." He continued on to say that this section imposed an obligation to identify the information in a record that can reasonably be severed and that "a public body normally must undertake a line-by-line analysis of an entire record to accomplish this task. Section 4(2) clearly applies to records containing section 14 information."

20 The commissioner, after further reflections, said as follows:

If a written legal opinion in its entirety is a solicitor-client communication, the factual material in it need not be severed. However, because a client can be questioned on discovery about factual information, I think that public bodies should consider whether disclosure of factual material in a legal opinion would disclose legal advice or legal strategy. If it does not, public bodies should be encouraged to waive privilege over portions of the documents in order to disclose as much factual material as possible, notwithstanding the strict common law rule.

21 The Commissioner set forth a four part test to establish solicitor-client privilege. He also mentioned with approval a definition of "legal advice" prepared by the Ontario Assistant Commissioner of Information and Privacy. Following this he said that "in a line-by-line analysis of a record" there may be information which may not meet the test of solicitor-client privilege.

22 With regard to document 254 the Commissioner acknowledged that the discussion revolved around a specific park use permit on an article by article basis. He noted that the solicitor had deposed that he provided legal advice and the Commissioner said "I accept his point." However, he said that the solicitor

sometimes ventured an opinion or gave advice on strategy "only some of which is legally related."

23 The Commissioner then agreed "that the Ministry has a plausible argument to withhold those lines of information when Mr. Manning is specifically mentioned." He said he "would urge the Ministry to release those passing mentions that are not clearly related to obtaining legal advice."

24 In conclusion regarding this document the Commissioner said:

While I agree that at least portions of this record may be subject to solicitor-client privilege, the Ministry did not prove that the entire record falls under the exception in section 14.

25 With respect to document 311 the Commissioner acknowledged the solicitor's deposition that the document is a legal opinion. However, he said it was his role to examine the "record and characterize its actual contents ...". In doing so he said that his review of the document lead him to a contrary finding to the opinion of the solicitor. He held that the Ministry had not proved that the entire record fell under the provisions of section 14.

26 He concluded as follows:

I propose to send Document 311 back to the Ministry for appropriate severing in accordance with my suggestions The important severing principle is that relevant factual and descriptive information should be released to the applicant in this case, unless its release would clearly reveal information related to seeking, formulating, or giving legal advice.

PETITION FOR JUDICIAL REVIEW

27 The Ministry submitted that the application for judicial review raises the following issues:

1. What is the appropriate standard of review to be applied to the commissioner's interpretation of ss. 14 and 58 of the Act?
2. Did the commissioner err in his interpretation and application of s. 14 of the Act to documents 254 and 311?
3. Did the commissioner commit jurisdictional error by ordering the ministry to review the documents and sever information "in accordance with the directions set out in [his] reasons"?

28 It is the Minister's position that the appropriate standard of review is a correctness standard. He says that the Commissioner "clearly erred" in his interpretation of s. 14 of the Act. For this reason, according to the Minister, the decision regarding documents 254 and 311 should be quashed on the basis that s. 14 applies to protect them from disclosure.

29 The further position of the Minister is that if the Commissioner did not err in his interpretation of s. 14, he committed a jurisdictional error when he ordered the Ministry to review the documents and sever information in accordance with his directions.

30 Counsel for the Ministry raised the question of the standing of the Commissioner in the hearing. She contended that the Commissioner is limited to an explanatory role or speaking to any allegations of breach of jurisdiction. She conceded that the Commissioner is to be allowed to speak to the standard to be applied in the review because this touches upon jurisdiction.

31 However, according to the Minister, the Commissioner is not allowed to "defend" his decision. Counsel for the Minister isolated portions of the Commissioner's brief that she said did just this and should not be heard by the Court. For instance, the submission that the onus is on the Ministry and it must take responsibility for any inadequacy in the evidence tendered to the Commissioner. She said it that was too late to raise such issues.

SUBMISSIONS OF THE COMMISSIONER

32 Counsel for the Commissioner said that she viewed her role as explaining the record and the statute. She intended to review the record and explain that the Commissioner dealt with the matter in a reasonable way. She then presented her brief to the Court and made her oral presentation without any objections being heard. I am therefore content to consider her views on behalf of the Commissioner as being within the confines of the standing afforded to the Commissioner in a judicial review.

33 Counsel for the Commissioner made two concessions. One was that the common law principle of solicitor/client privilege is embraced fully by section 14 of the Act. The second concession was that where the issue is solicitor/client privilege pursuant to section 14, as here, the Judicial Review may be conducted without curial deference.

34 Counsel for the Commissioner said that the Commissioner agrees with the Minister that the interpretation of s. 14 is a question of law within the Commissioner's jurisdiction. She said that the position of the Commissioner is therefore as follows:

Like all exceptions in Division 2, Part 2 of the Act, because s. 14 is subject to and honours the severance principle stipulated in S. 4(2) of the Act, it is to be applied against information in a requested record, not on a global record by record basis. There is nothing in the Act to suggest that s. 14 is to be treated any differently than other exceptions in this regard.

35 Counsel for the Commissioner then submitted that s. 14 involves compliance with the purposes of the Act which mandate making public bodies more accountable by giving the public rights of access, with exceptions, to documents in the public domain. She further suggested that this "ethic" of greater accountability "is not traditional or familiar territory for the courts, but it is the full-time, permanent mandate of the Commissioner's office under the Act and it is this Commissioner's professional life's work."

36 She went on to "explain" the Commissioner's conclusion that there is no inconsistency between the incorporation of the common law principle of solicitor-client privilege in s. 14 and the severance concept stipulated in s. 4(2) of the Act. According to his counsel, the Commissioner agrees with the Ministry that if a record is in its entirety a solicitor-client communication, then factual material in it need not be severed. Accordingly, a line-by-line analysis of records to which solicitor-client privilege "may" apply is not inconsistent.

37 Consequently, according to counsel for the Commissioner, when the Commissioner determined where in each document privilege applied, he was entitled to direct the Ministry to disclose the rest of the document. She said it was not with the Commissioner to do a line-by-line analysis but rather with the Ministry to examine and sever the records. The role of the Commissioner would then be supervisory.

SUBMISSIONS OF CYPRESS BOWL

38 Cypress Bowl urges recognition of the difference between the words "information" and "record" as used and defined in the Act. It points out that s. 14 allows the Minister to refuse to disclose "information that is subject to solicitor-client privilege." It says that this is distinct from privilege that might attach to "documents".

39 Cypress Bowl thereby submits that it has "a right to information contained in a record which is not excepted under Division 2, if it can be reasonably severed from the remainder of the document."

40 The submission of Cypress Bowl is founded upon the proposition that the common law as it relates to documents which contain privileged information is different than the Act. It says that at common law the entire document is privileged but the facts are not. That, according to Cypress Bowl, is an anomaly that has been resolved by the Act in favour of the release of portions of documents by way of severance.

THE STATUTORY SCHEME

41 The Act is a comprehensive statutory scheme which regulates the release or protection of all information contained in a record which is held by a public body. Counsel for the Commissioner said that the purposes of the Act relevant to judicial review are to make public bodies more accountable to the public by giving rights of access to records controlled by a public body, by specifying limited exceptions to those rights to access and by providing for an independent review of decisions made under the Act.

42 In *Aquasource Ltd. v. The Information and Privacy Commissioner for the Province of British Columbia*, December 12, 1994, Vancouver Registry No. A941851, Mr. Justice Vickers of this Court carefully reviewed the history of the legislation. He also outlined the contents and mechanics of the Act. The parties to this judicial review do not take any exception to that outline and consequently I do not have to say more in this regard.

STANDARD OF REVIEW

43 The standard to be applied in this review is one of correctness. That is, did the Commissioner act lawfully, rather than appropriately, in the manner in which he ordered the production of portions of the documents in question.

44 The Act circumscribes the jurisdiction of the Commissioner in s. 58. The Minister says that the Commissioner should have carried out a line-by-line analysis, made a determination as to privilege and then, pursuant to s.58(2)(a) require the Minister to act in accordance with that determination. Section 58(2)(a) reads as follows:

58.(2) If the inquiry is into a decision of the head of a public body to give or to refuse to give access to all or part of a record, the commissioner must, by order,

do one of the following:

- (a) require the head to give the applicant access to all or part of the record, if the commissioner determines that the head is not authorized or required to refuse access;

45 The Minister says that in simply finding that the documents could be severed and returning them to the Ministry for severance runs counter to that section's requirement. The Minister submits that what the Commissioner did was rule as to whether or not the Ministry was correctly interpreting the Act and that this is outside of his mandate. As a result the Commissioner committed a jurisdictional error.

46 The Commissioner submitted that in concluding that some parts were governed by privilege and other parts were not so protected he made the required determination. The result being that there was no jurisdictional error.

CONCLUSIONS

47 The common law principles of solicitor-client privilege are incorporated into the Act by s. 14. Section 4(2) does not modify the common law principles. Consequently, the issue is whether or not pursuant to s.4(2) severance can be accomplished without damaging the common law principles of solicitor-client privilege. If the Commissioner made an error in this regard then it was an error in law. That is, he was not legally correct.

48 It is conceded that this Court has the jurisdiction to correct such an error. Given the Commissioner's concession that the issue of solicitor-client privilege can be reviewed by this Court without curial deference, this case can be decided without the necessity of determining whether or not an error in law by the Commissioner is jurisdictional or otherwise.

49 Section 14 created a class-based exception to protect information that is "subject to solicitor-client privilege". This suggests that the Legislature accepted the principle of privilege without exception and that it should be accorded its full common law weight. Solicitor-client privilege is more than a rule of evidence. In *Solosky v. The Queen* [1980] 1 S.C.R. 821 at 839 Dickson J. put it this way:

... the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client ...

50 This was reiterated by Lamer J. in *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 873:

Although the right to confidentiality first took the form of a rule of evidence, it is now recognized as having a much broader scope, as can be seen from the manner in which this Court dealt with the issues raised in *Solosky*.

51 It is not open to the Commissioner to dilute the principles of solicitor-client privilege because of respect for the views of a federal colleague. With no disrespect to Mr. Grace, his opinions couched in what appear to be political rhetoric should carry no weight in the process of statutory interpretation.

52 The Commissioner thereby concluded that s.14, and therefore solicitor-client privilege, is to be

interpreted "narrowly" and not "expansively" for the purposes of the Act. Carrying out his interpretation in this manner allowed him to conclude that factual and descriptive information, included in a privileged document, should be released unless to do so would "clearly reveal information related to the seeking, formulating, or giving legal advice."

53 In my opinion this approach by the Commissioner was in error. Once the common-law principle of solicitor-client privilege is transported into the Act, as it was, the principle cannot be abridged to accomplish some "narrow" result. It must be read and interpreted in the same manner as any other statute and in conformity with the well-recognized principles of statutory interpretation. A predetermined result cannot be reached by applying a unique method of statutory interpretation.

54 There is no basis to find that the language of s. 14 suggests, even if defined narrowly, that there is to be an exception for factual or descriptive information contained in privileged documents. Section 4(2) specifically states that the right of access to a record does not extend to information excepted from disclosure by solicitor-client privilege.

55 The Supreme Court of Canada established that, as a rule of statutory interpretation, legislation should be interpreted so as not to restrict solicitor-client privilege. Even where legislation expressly purports to restrict such privilege, it must be interpreted to restrict the privilege only to the extent absolutely necessary to achieve the ends sought by the enabling legislation: *Descoteaux*, supra at 875.

56 This had been said much earlier by Mr. Justice Munroe of this Court in *Re Director of Investigation and Research and Canada Safeway Ltd.* (1972), 26 D.L.R. (3d) 745 at 747:

The right to enter upon private premises and to examine private and privileged documents is, of course, a derogation from common law rights and therefore requires legislation expressed with irresistible clarity.

57 The provision in s. 4(2) that severable information gives a right of access in no way modifies or abrogates the principle of solicitor-client privilege. As was submitted by counsel for ICBC, the purposes of the Act as set forth in s. 2 and the severance provisions of s.4(2) fall "far short of the clear and unambiguous mandate [required] for interference with solicitor-client privilege."

58 Severance is not a common law concept in solicitor-client privilege. In *Descoteaux*, supra, at page 892 Lamer J. said:

In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

59 Document 311 was prepared by Mr. Manning who deposed that the document is "a legal opinion." With respect to this document the Commissioner said that "The entire record is not directly related to seeking, formulating, or giving legal advice. ...[some of the record] is factual and descriptive information."

60 Yet the Commissioner accepted that the document is a legal opinion that is entitled to s. 14 protection. Having identified different aspects of the opinion, the Commissioner proceeded to order the Ministry to sever "in accordance with my suggestions."

61 Document 254 is minutes of a meeting between a solicitor and members of the Ministry. Mr. Manning deposed that he attended the meeting with individuals from the Ministry of Parks "with respect to a matter that is the subject of these proceedings before the Information and Privacy Commissioner. At that meeting I provided legal advice on various issues that my client, the Ministry of Parks, raised with me."

62 The Commissioner said as follows:

In Document 254, I have noted eight times when the minutes identify Mr. Manning as having made a specific point. He stated in his affidavit that he "provided legal advice on various issues," and I accept his point. However, I have no evidence that the entire meeting was solely for the purposes of providing legal advice or seeking instructions. While most of the information which refers to Mr. Manning ... appears to contain legal advice, sometimes counsel is simply venturing an opinion or giving advice on strategy in dealing with a problem, only some of which is legally related.

63 The Commissioner concluded that the Ministry "has a plausible argument to withhold those lines of information when Mr. Manning is specifically mentioned." I take this to mean that he accepted that there was privilege. The Commissioner went on to say that a "lawyer would have to play a very central role in the" meeting for solicitor-client privilege "to be fully activated."

64 I do not accept the Commissioner's thesis that solicitor-client privilege is capable of less than full activation. Once it is acknowledged to apply, it is, by its very nature, "fully activated". Any report, such as minutes, of the communications must necessarily be accorded the same "fully activated" protection.

65 It follows that the "severable" concept which the Commissioner holds as to documents protected by privilege is not valid. When a client communicates factual and descriptive information to a solicitor for the purpose of obtaining legal advice, the information forms an integral and indivisible part of the privileged communication:

... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. Per Taylor LJ, *Balabel and another v Air-India* [1988] 2 All ER 246 at 254 (CA).

66 To establish solicitor-client privilege three criteria must be established. One, the communication must be between solicitor and client. In the case at bar there was clearly a solicitor-client relationship.

Two, the parties intended the communication to be confidential. Here, there is satisfactory evidence that such was the case.

67 Third, the communication entails the seeking or giving of legal advice. It is the purpose of the communication that is relevant. If the purpose of the communications was simply to obtain information as to a matter of fact, the communications would not be privileged. However, if the purpose was to obtain legal advice then the privilege attaches even if the communication entails no more than the passing of factual information.

68 In the case at bar the communications were exchanged with the solicitor acting in his professional capacity. Simply because the information given to the solicitor may be compellable from the client does not mean that it is compellable within the context in which it was given to the lawyer. The fact that certain information may be compellable on discovery does not bear upon the issue of solicitor-client privilege.

69 Legal opinions contain a broad range of factual and documentary material. For instance, plans of properties for comparison to property that forms the subject matter of a dispute. Those plans are in the public domain but they carry the same privilege within the document as does an expression of opinion or a related fact. I am of the opinion that the Commissioner was incorrect, as was the Manual, in accepting the example wherein the description of a highway was said to be exempt from solicitor-client privilege in a legal opinion.

70 With the three noted criteria established, the documents are privileged. The privilege cannot be limited by a narrow interpretation of s.14 nor by severance pursuant to s.4(2). The Commissioner divided the factual information from the legal advice and, in my opinion, failed to appreciate that they could not be severed simply because they carry different labels.

71 The Commissioner said that "a public body normally must undertake a line-by-line analysis of an entire record to accomplish" the required s. 4(2) severance. This statement compounds the conceptual error in that pursuant to his severability theory he sent the documents back to the Ministry for a line-by-line analysis.

72 Section 58 of the Act requires the Commissioner to "dispose of the issues" by ordering the Ministry to do one of three things: allow access, refuse access, or reconsider his decision if the Minister had refused access. The Commissioner has no authority to order the Minister to apply his, the Commissioner's, interpretation of the Act to the documents in question. It is for the Commissioner to make the determination as to the production of the documents. In failing to do so his procedural order was made without jurisdiction. This is in keeping with the judgment in *Aquasource*, supra.

73 The release of portions of Documents 254 and 311 by the Ministry was an error. It is of no consequence and does not operate to the detriment of the Ministry in the issues before the Court in this petition.

74 I have not seen Documents 254 and 311 and have no reason to do so. Neither, in my opinion, did the Commissioner. I am not suggesting that there are not cases wherein the Commissioner should not peruse the questioned documents. However, when a question of solicitor-client privilege is the issue that step should be taken only if necessary. It should never become routine.

75 In cases where the document is established to be a legal opinion I cannot conceive of a circumstance that would mitigate in favour of a Commissioner's review of the document. The same does not apply with equal force to other forms of documents where there is the potential for a proper severance. I hesitate to conjure up such a document but what comes to mind is a binder, classified as one document, but of which only one tab met the criteria to establish solicitor-client privilege.

RESULT

76 The Commissioner was incorrect, that is committed an error in law, and also exceeded his jurisdiction. The remedy is to quash the decision of the Commissioner with respect to Documents 254 and 311. It would not be appropriate to remit the matter back to the Commissioner, with directions, in that there are no documents that are subject to production.

THACKRAY J.