Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-579

Appeal P-9300260

Ministry of Health

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ORDER

BACKGROUND:

The Ministry of Health (the Ministry) received a request pursuant to the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of "the legal opinion on which the Ministry based its decision to purchase [a named drug] exclusively from the pharmaceutical firm [a named company]". The Ministry identified two records as being responsive to the request, a 17-page legal opinion and a one-page summary of the opinion. The Ministry denied access in total to both records pursuant to section 19 of the Act. The requester appealed.

Mediation was not successful and notice that an inquiry was being held to review the Ministry's decision was sent to the Ministry and the appellant. Representations were received from both parties.

Although the Ministry identified both the legal opinion and the summary as being responsive to the request, in my view, the request is clearly for access to a copy of the opinion itself. Accordingly, it is only that record which is responsive to the request and will be considered in this order.

Before discussing the applicability of section 19 of the Act to the record at issue, I wish to provide some background information on the creation of the record and the matters that lead to this appeal.

In June of 1992, the Deputy Director of the Legal Services Branch of the Ministry requested that outside counsel provide the Ministry with a legal opinion relating to various questions that had arisen concerning the allegation of the named company that another pharmaceutical company had infringed its patent for the named drug by producing a generic version of the drug. The Ministry requested the opinion in order to make a decision whether to continue purchasing the brand name version of the named drug from the named company or to purchase the generic version. The opinion was received by the Ministry in July of 1992.

Subsequent to receiving the opinion, the Ministry decided to continue to purchase the named drug from the named company.

The appellant, and other companies in a similar position, then wrote to the Minister of Health requesting, on an informal basis, a copy of the legal opinion. On February 26, 1993, the Minister wrote to the appellant stating that "... Recent inquiries have suggested that it might be useful for the generic drug industry to have a fuller explanation of the Ministry's legal advice". The letter continued "... The Ministry sought legal advice concerning the purchase of [the named drug]" and provided a two-page summary of some of the conclusions stated in the legal opinion which the Ministry had received from outside counsel.

When the Ministry subsequently denied the appellant access to the opinion pursuant to its "formal" Freedom of Information request, claiming the exemption in section 19 of the Act, the

appellant appealed on the basis that the Minister's letter constituted waiver of the solicitor-client privilege associated with the legal opinion.

The appellant subsequently served the Ministry with notice under the Proceedings Against the Crown Act indicating an intention to commence litigation with respect to the Ministry's contract with the named company.

The sole issue in this appeal is whether the discretionary exemption provided by section 19 of the Act applies to the record. This section states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Prior to considering the application of this section of the Act to the record at issue, I would like to address one of the submissions of the appellant.

The appellant submits that:

> We are not talking of allowing effective communication between solicitor and client; we are talking about obtaining the real reason for the Ministry's decision, in a manner that would enable the affected public to question it. In other words, we are talking of the very reason for the existence of the Freedom of Information and Protection of Privacy Act . **To allow the Minister to keep the reason for her decision from the public simply because the reason happened to be embodied in a legal opinion would be to put form over substance, and would render the Act, in this case, chimerical.** [emphasis added]

The scheme of the Act, and the basis of the exemptions contained therein, requires an examination of the type of information at issue or the nature of the record to determine if access to the requested record or information should be granted. If, as the Ministry submits, the information requested is contained in a record that is subject to solicitor-client privilege, the Act provides an institution with the discretion to refuse to disclose the record. To take another example, if the reason for the Minister's decision was embodied in a Cabinet record, then section 12 of the Act, because of its mandatory nature, would preclude any disclosure at all. Therefore, the characterization of the information at issue in any case is critical to the analysis of the application of the exemption. Accordingly, I will consider the application of the section 19 exemption to the record at issue.

Section 19 consists of two branches, which provide the Ministry with discretion to refuse to disclose:

(1) a record that is subject to the common law solicitor-client privilege (Branch 1); and

(2) a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

[Order 49]

I will first consider the application of Branch 1, the common law solicitor-client privilege.

In order for the common law solicitor client privilege to apply to a record, the Ministry must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication; **and**

(b) the communication must be of a confidential nature; **and**

(c) the communication is between a client (or his agent) and a legal advisor; **and**

(d) the communication must be directly related to seeking, formulating or giving legal advice; or

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 218]

The Ministry submits that the record satisfies both parts of the Branch 1 test. It is clear that the legal opinion was a written communication directly related to the giving of legal advice to the Ministry for the purpose of answering various questions that arose in respect of what action the Ministry should take regarding future purchases of the named drug. The Ministry was the client for whom outside legal counsel prepared the opinion and submits that the communication was of a confidential nature. I therefore conclude that the record meets the criteria necessary to establish that the common law solicitor-client privilege applies.

While the appellant has not explicitly accepted this position, it appears from its representations that it implicitly agrees that the opinion is subject to solicitor-client privilege. However, as I have noted, it is the position of the appellant that the Ministry, as the client, has waived this privilege by virtue of the Minister's response in her letter to the appellant described above. The appellant's position is as follows:

> The effect of the Minister's response is two-fold: a) the Minister has waived privilege over the legal advice by disclosing its contents (or the Minister's interpretation of the contents), and b) the Minister has waived privilege over the legal advice by putting its contents directly at issue.

Waiver of the solicitor-client privilege may be express or implied. In the recent text Solicitor-Client Privilege in Canadian Law, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:

> 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.

The appellant does not expressly indicate if its position is that the waiver was express or implied. I will consider both issues.

The Ministry agrees that waiver of privilege may be either express or implied. However, it is its position that there was no express waiver as the record was never given to the appellant. Given the circumstances of this case, I am satisfied that the Ministry has not expressly waived the privilege.

I must next consider whether an objective consideration of the Ministry's conduct demonstrates an intention to waive the privilege such that it can be said that there has been an implied waiver of the privilege of the opinion itself.

One kind of implied waiver occurs through partial disclosure of a privileged document. In S & K Processors (1983), 35 C.P.C. 146 (B.C.S.C.) McLachlin J. noted:

> 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 ...
>
> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp. 148-149)

The following passage from Wigmore on Evidence, vol. 8 (McNaughton rev. 1961), as set out in The Law of Evidence in Canada (Markham: Butterworth's, 1992), by Sopinka, Lederman and

Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the recent case of Piche et al. v. Lecours Lumber Co. Ltd. et al. (1993) 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must be final.

The Ministry submits that there was no implied waiver of the privilege as "... It is clear on the face of the correspondence that the Minister chose not to disclose the entire opinion." The Ministry goes on to state that:

> It is submitted that the Ministry of Health has not, at any time, demonstrated an intention to forego the privilege. Rather, the Minister's response to repeated requests from the generic drug manufacturers for a copy of the legal opinion was to provide the Ministry's legal position regarding the patent issues, and not the underlying legal advice on this and related issues. [emphasis added].

In support of this proposition, the Ministry has referred to the case of Risi Stone Ltd. v. Groupe Permacon Inc. (No. 2) 1990, 30 C.P.R. (3d) 148 (Federal Court, Trial Division). In that case, Reed J. 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.

I believe that 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. Furthermore, I accept the position of the Ministry that the legal position of the Ministry as set out in the Minister's letter is clearly distinguishable from the contents of the opinion, setting out the legal reasons therefore, so as to constitute, in the words of Reed J. in Risi Stone, "a separate subject matter".

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 mislead 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.

Accordingly, I find that the Ministry has not waived the solicitor client privilege associated with the record at issue and the exemption provided by section 19 of the Act applies.

Section 19 is a discretionary exemption. I have reviewed the Ministry's representations on the exercise of discretion. I find nothing improper in the manner in which this discretion was exercised and would not alter it on appeal.

ORDER:

I uphold the decision of the Ministry.

POSTSCRIPT:

In this appeal, I have found that the legal opinion is subject to solicitor client privilege and that the Ministry properly exercised its discretion in refusing to disclose it. In my opinion, the provision, to the appellant, of a statement of the Ministry's legal position represents a useful way of providing some information to the public by a government institution in circumstances in which it was not required to do so pursuant to the provisions of the Act.

Original signed by: November 18, 1993
Anita Fineberg
Inquiry Officer