



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-260

Appeal M-9300113

Belleville Police Services Board



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Belleville Police Services Board (the Police), received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all information related to the requester's reclassification.

The Police identified eight pages of responsive records and denied access to all of them pursuant to section 12 of the Act. In addition, the Police claimed that section 6(1)(b) of the Act applied to exempt pages 1, 2 and 6 from disclosure. The requester appealed the decision of the Police.

During the course of mediation, the appellant narrowed the scope of the appeal to include only pages 3, 4 and 5 of the record, for which only section 12 is claimed.

As further mediation was not possible, notice that an inquiry was being conducted to review the decision of the Police was sent to the appellant and to the Police. Representations were received from both parties.

The record at issue consists of a three-page letter dated April 6, 1990, sent by a lawyer to the Chief of the Police.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the record contains "personal information" as defined in section 2(1) of the Act.
- B. Whether the record qualifies for exemption under section 12 of the Act.
- C. If the record contains the personal information of the appellant, and the answer to Issue B is yes, whether the discretionary exemption provided by section 38(a) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the record contains "personal information" as defined in section 2(1) of the Act.

Personal information is defined in section 2(1) of the Act which states, in part:

"personal information" means recorded information about an identifiable individual, including,

...

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

After reviewing the record and the representations, I am of the view that the record contains the personal information of the appellant.

The record also contains minor references to two other named individuals. However, as this information arises in the context of their professional responsibilities as employees of the Police, I do not consider it to be their personal information (Orders P-326, P-333 and P-377).

ISSUE B: Whether the record qualifies for exemption under section 12 of the Act.

Section 12 of the Act states:

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

This section consists of two branches, which provide a head with the 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 counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for the record to be subject to the common law solicitor-client privilege (Branch 1), the Police 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 must be 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.

[Orders 49, M-2 and M-19]

Having reviewed the record, I am satisfied that it is subject to the common law solicitor-client privilege. It is a written communication of a confidential nature prepared by a legal advisor and forwarded to his client, the Police. The contents of the record directly relate to giving legal advice.

However, the appellant submits the solicitor-client privilege was waived by the Police when they placed a copy of the record in her personnel file and permitted her to examine it during the course of her duties.

The Police have not made any representations on the issue of waiver. They merely state that "It is obvious that section 12 (Solicitor-Client Privilege) does apply in this situation."

The following factual background is useful in understanding the position of the appellant with respect to the issue of waiver.

The personnel practices of the Police provide that if an employee wishes to view his/her personnel file, confidential information is removed before allowing the employee to view the file. This practice was not followed in the case of the appellant because of her position. Nothing was removed from her file prior to her viewing it.

At the time she viewed the record, the appellant points out that she was serving as acting Assistant Executive Administrative Secretary and Assistant Board Secretary. In these positions, she had access to the most sensitive and confidential of internal records. The Police concur.

The appellant states that the record has been in her personnel file since 1990 and is still in her file as of the time of her representations. She knew of the letter because of her duties with the Police and examined it on October 1, 1992, with the permission of the Deputy Chief.

She could view her file and the record at issue at any time, and still may. The Deputy Chief does not disagree with these facts. It was upon making a request to obtain a copy of the record under the Act that the issue of solicitor-client privilege arose.

Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied. As the appellant has not specifically stated whether she claims the waiver was express or implied, I shall examine both issues.

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.

Given the circumstances of this case, and after carefully examining the representations, I am persuaded that the Police did not expressly waive the solicitor-client privilege.

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 ...

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.

In my view, the fact that the appellant may view the record at any time when she is acting as the Executive Secretary to the Police is a relevant factor in considering whether the Police have implicitly waived the solicitor-client privilege. Although, as I have previously stated, the Police do not address the issue of waiver in their representations, they do indicate that they are reviewing their policies with a view towards creating a separate filing system for solicitors' letters and removing them from employees' personnel files.

Given the particular circumstances of this appeal, I believe that an objective consideration of the facts suggests that the Police have implicitly waived the solicitor-client privilege associated with the record at issue. Accordingly, section 12 does not apply to the record.

Because of the way I have disposed of Issues A and B, it is not necessary for me to deal with Issue C.

ORDER:

1. I order the Police to disclose the record to the appellant within fifteen (15) days of the date of this order.
2. In order to verify compliance with this order, I order the Police to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1 of this order, **only** upon request.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ February 4, 1994