



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-505**

## **Appeal M-9400711**

### **Sudbury Regional Police Services Board**



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## **NATURE OF THE APPEAL:**

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Sudbury Regional Police Services Board (the Police) received two requests for access to records containing the requester's personal information. The Police identified 572 responsive records and disclosed many in full, some in part and withheld others in their entirety relying on the following exemptions contained in the Act:

- solicitor-client privilege - section 12
- discretion to refuse requester's own personal information - section 38(a).

The requester appealed the decision to deny access. During the mediation stage of the appeal, the appellant indicated that he no longer sought access to the personal information of others and, accordingly, that information is no longer at issue.

A Notice of Inquiry was sent to the appellant and the Police. Representations were received from both parties.

The 19 records which remain at issue in this appeal are listed in Appendix "A" to this order. As two requests were received by the Police, two searches were undertaken for records which resulted in the preparation of two indices entitled 94-010 and 94-011.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE/DISCRETION TO REFUSE REQUESTER'S OWN PERSONAL INFORMATION**

All of the records at issue in this appeal contain the personal information of the appellant.

Under section 38(a) of the Act, the Police have the discretion to deny access to records which contain an individual's own personal information in instances where certain exemptions would otherwise apply to that information. The exemptions listed in section 38(a) include the solicitor-client exemption provided by section 12. The Police claim that the records are exempt under section 38(a) because they qualify for exemption under section 12. In the discussion which follows, I will consider whether the records at issue in this appeal qualify for exemption under section 12 as a preliminary step in determining whether the exemption in section 38(a) applies.

Section 12 of the Act 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).

The Police submit that Records 3-4 and 14 are exempt under Branch 1 of section 12. As the Police claim the application of section 12 to all of the records, I will also apply the test set forth in Branch 1 to Records 21 and 81.

In order for a 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.

The Police claim that Records 3-4 and 14 are exempt under the second part of the common law solicitor-client privilege. I have reviewed the records and considered the above-noted test. Record 14 is a letter from the Ontario Human Rights Commission (OHRC) seeking the submissions of the Police as to whether a Board of Inquiry under section 36 of the Human Rights Code should be appointed in a complaint which had been instituted by the appellant. Record 3-4 similarly invites the Police to provide submissions on the appellant's request for a reconsideration of OHRC's decision not to appoint a Board of Inquiry into the appellant's complaint.

While litigation in the form of a proceeding before the OHRC was under way at the time the letters were received, I find that they cannot be characterized as records created especially for the lawyer's brief for existing litigation within the meaning of the Act. Records 3-4 and 14 are not concerned with the preparation of the case for the Police by the lawyer who was retained. They simply acted as notification to counsel for the Police that a complaint, and then a reconsideration request, had been made by the appellant. Records of this description do not fall within the solicitor-client privilege.

As no other exemptions have been claimed for Records 3-4 and 14, and no mandatory exemptions apply, they should be disclosed to the appellant.

Records 21 and 81 are letters to the Chair of the Sudbury Regional Board of Commissioners of Police from its counsel. These records clearly fall within the ambit of Branch 1 of the section 12 exemption, being

confidential correspondence between a solicitor and client which directly relate to the seeking and giving of legal advice. I find, therefore, that Records 21 and 81 fall within the ambit of Branch 1 of the section 12 exemption.

The Police claim the remainder of the records are exempt under Branch 2 of the section 12 exemption. A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by the Police; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

These records consist of letters to and from counsel for the Police and the OHRC, the Sudbury Regional Police Association, the Workers' Compensation Board (WCB) and the Chair of the Sudbury Regional Board of Commissioners of Police.

Record 1-2 is the submission, prepared by counsel retained by the Police, in response to the appellant's request for reconsideration of the OHRC decision not to appoint a Board of Inquiry. The letter soliciting these submissions from the Commission, Record 3-4, indicates that the submission would be shared with the appellant and that he would have the opportunity to comment on them. I find that the submissions were, nevertheless, prepared by counsel for use in litigation, the proceeding before the OHRC involving the appellant, and that Record 1-2 falls within the section 12 exemption.

Record 9-13 is the Police submission, prepared by its counsel, responding to Record 14 which is the OHRC's request for the position of the Police to the original complaint. Record 20 is a letter from counsel to the OHRC regarding an extension for the submission of a response by the Police to the appellant's complaint. Record 24-25 is an earlier statement to the OHRC of the Police position with regard to the appellant's complaint. I find that each of these records were prepared by counsel for use in the litigation of the appellant's OHRC complaint and also fall within the section 12 exemption.

Records 30, 31, 58, 68, 77, 79 and 300 are letters between counsel for the Police and the President of the Sudbury Regional Police Association in which the appellant's employment situation and job duties are discussed. These records relate to the implementation of a proposed settlement of litigation between the parties before the OHRC and the WCB and, accordingly, fall within the exemption provided by Branch 2 of section 12.

Records 57, 67 and 78 are letters from counsel for the Police to the OHRC requesting that certain steps be taken relating to the naming of a co-respondent to the appellant's complaint. On a plain reading of section 12, these records were also prepared for use in litigation as they relate directly to the conduct of the OHRC complaint made by the appellant against the Police.

Record 34 is a letter from counsel for the Police to the WCB setting out additional submissions to the employer's reply earlier filed. I also find that litigation in the form of a contested proceeding before the WCB involving the appellant and the Police was underway at the time this record was prepared. Accordingly, I find that the letter was prepared for use in litigation within the meaning of Branch 2 of the section 12 exemption.

To conclude, Records 1-2, 9-13, 20, 21, 24-25, 31, 34, 57, 58, 67, 68, 77, 78, 79, 81 and 300 qualify for exemption under section 12 of the Act. Accordingly, they are exempt under section 38(a) of the Act.

**ORDER:**

1. I order the Police to disclose to the appellant Records 3-4 and 14 within twenty-one (21) days of the date of this order.
2. I uphold the decision of the Police to deny access to Records 1-2, 9-13, 20, 21, 24-25, 31, 34, 57, 58, 67, 68, 77, 78 79, 81 and 300.
3. In order to verify compliance with this order, I reserve the right to require the Police to provide me with copies of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

\_\_\_\_\_ March 29, 1995

## APPENDIX "A"

RECORD #	DESCRIPTION	DISPOSITION
<b>INDEX 94-010</b>		
1-2	Letter dated 03/18/94 from law firm to OHRC	Exempt from disclosure
3-4	Letter dated 03/08/94 from OHRC to law firm	Disclosed
9-13	Letter dated 08/24/93 from law firm to OHRC	Exempt from disclosure
14	Letter dated 07/19/93 from OHRC to law firm	Disclosed
20	Letter dated 07/27/93 from law firm to OHRC	Exempt from disclosure
21	Fax cover sheet dated 03/24/92 from law firm to Police	Exempt from disclosure
24-25	Letter dated 03/24/92 from law firm to OHRC	Exempt from disclosure
30	Letter dated 10/02/91 from law firm to third party	Exempt from disclosure
31	Letter dated 09/20/91 from third party to law firm	Exempt from disclosure
34	Letter dated 06/18/91 from law firm to WCB	Exempt from disclosure
57	Letter dated 04/26/91 from law firm to OHRC	Exempt from disclosure
58	Letter dated 04/23/91 from third party to law firm	Exempt from disclosure
67	Letter dated 04/22/91 from law firm to OHRC	Exempt from disclosure
68	Letter dated 04/12/91 from law firm to third party	Exempt from disclosure
77	Letter dated 03/12/91 from law firm to third party	Exempt from disclosure
78	Letter dated 03/12/91 from law firm to OHRC	Exempt from disclosure
79	Letter dated 03/08/91 from third party to law firm	Exempt from disclosure
81	Letter dated 01/28/91 from the Police to law firm	Exempt from disclosure
<b>INDEX 94-011</b>		
300	Letter dated 03/01/91 from law firm to third party	Exempt from disclosure