



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

ORDER P-1075

Appeal P-9500463

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to billing records submitted to the Ministry by a lawyer appointed by the Official Guardian (now the Children's Lawyer) to represent the interests of the requester's son. The requester is the non-custodial parent and is involved in litigation with the child's mother over access to their son.

The Ministry located records responsive to the request and granted access, in part, to them. The undisclosed portions of the records consist of the particulars of the services rendered by the lawyer on behalf of the requester's son as enumerated on each legal account. The Ministry claimed that the information which was not disclosed falls within the following exemptions contained in the Act:

- solicitor-client privilege - section 19
- invasion of privacy - sections 21(1) and 49(b)
- discretion to refuse requester's own information - section 49(a)

The requester appealed the Ministry's decision to deny access to the records and claimed that the public interest override provided by section 23 of the Act applied to the undisclosed information. In addition, the appellant submitted that additional records responsive to his request should exist.

A Notice of Inquiry was provided to the Ministry, the appellant and to five individuals whose rights might be affected by the disclosure of the records (the affected persons). Representations were received from the Ministry and the appellant.

PRELIMINARY ISSUE:

In his representations, the appellant submits that the Divorce Act and the Children's Law Reform Act grant him a right of access to information about his son in addition to that which he may exercise under the Act. The proceeding in which the appellant is seeking access to his son is being conducted under the Children's Law Reform Act before a Judge of the Ontario Court (Provincial Division). I have not been provided with any evidence to indicate that a proceeding under the Divorce Act has been commenced. Section 20(5) of the Children's Law Reform Act provides as follows:

The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the **health, education and welfare** of the child. (emphasis added)

I have reviewed the undisclosed portions of the records and find that the information which they contain do not relate in any direct or tangible way to the health, education or welfare of the child.

I find therefore, that the provisions of the Children's Law Reform Act respecting the right of a non-custodial parent to make inquiries and obtain information about his or her child have no application in the present appeal.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual.

In this case, the undisclosed information contained in the records pertain to the services provided by the lawyer appointed to represent the appellant’s son in the access proceedings between the appellant and his former wife. I have reviewed the records and I find that all of them contain the appellant’s personal information as well as personal information pertaining to other individuals.

DISCRETION TO REFUSE REQUESTER’S OWN INFORMATION

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual’s own personal information in instances where certain exemptions would otherwise apply to that information. Section 49(a) states as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information; (emphasis added)

In order to determine whether the exemption provided by section 49(a) applies to the undisclosed information contained in the records, I will begin by considering the Ministry’s claim that this information qualifies for exemption under section 19, which is referred to in section 49(a).

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that section 19 of the Act applies to the undisclosed information contained in the legal accounts which are at issue in this appeal.

Section 19 consists of two branches, which provide the Ministry 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 Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Ministry indicates that it is relying on Branch 1 of the section 19 exemption. In order for a record to be subject to the common law solicitor-client privilege (Branch 1), 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 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 appellant maintains that no solicitor-client relationship exists between his son and counsel, that since his son is very young he could not have instructed counsel and that he has been poorly represented. In essence, the appellant argues that he, as well as his son, is entitled to be considered the client in this solicitor-client relationship.

I find, however, that a solicitor-client relationship exists only between the appellant's son and his counsel. Counsel represents the interests of the son, which may not be concurrent with those of the appellant or his former wife. The child's lawyer may take positions which are adverse in interest to those of the appellant or his former wife. In order to fairly and properly represent the interests of the child, the solicitor-client relationship must be exclusively between counsel and the child, without the involvement of the appellant or his former wife.

The Ministry, quoting from Orders M-213 and P-624, submits that the contents of the legal accounts relate in a direct and tangible way to the seeking, formulating and provision of legal advice. It indicates that the disclosure of the information contained in the accounts would reveal the subject(s) for which legal advice was sought, the strategy used to address the issues raised, the particulars of any legal advice provided and the outcome of investigations undertaken by the solicitor.

In Order P-624, Inquiry Officer Anita Fineberg addressed the application of the solicitor-client privilege found in section 19 to legal accounts. In this order, Inquiry Officer Fineberg held that when determining whether a legal account contains legal advice:

the decision maker must determine, based on the contents of each legal account, whether the information contained in the document relates in a tangible and direct way to the seeking, formulating or provision of legal advice.

I adopt this approach for the purposes of this appeal. I have reviewed the undisclosed information contained in the legal accounts which are at issue in this appeal and find that it describes in sufficient detail the strategies employed by counsel on behalf of the appellant's son during the course of the litigation involving his parents and relates directly to the formulating and provision of legal advice by counsel on behalf of the child. Accordingly, I find that it qualifies for exemption under Branch 1 of the section 19 exemption. As a result, the undisclosed information is exempt under section 49(a) of the Act.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that there exists a public interest in the disclosure of the information contained in the records. This raises the possible application of the "public interest override" provided by section 23 of the Act. This section states:

An exemption from disclosure of a record under sections 13, 15, 17, 18 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The solicitor-client privilege exemption provided by section 19 of the Act is not one of the sections mentioned in section 23. Accordingly, section 23 cannot apply to override this exemption.

REASONABLENESS OF SEARCH

In his representations, the appellant submits that additional legal accounts beyond those identified in this appeal ought to exist. The appellant points out that the most recent account which was identified by the Ministry is dated September 26, 1994 and that counsel appointed by the Office of the Children's Lawyer has made several court appearances and has been involved in other aspects of the proceedings involving the child since that date.

The Ministry has provided an affidavit from counsel in the Office of the Children's Lawyer in which she describes the steps taken to locate records responsive to the appellant's request. She indicates that searches were undertaken of files located in that office as well as the files maintained by counsel for the child, and that all of the statements of account contained in both locations were identified and provided to the Ministry's Freedom of Information and Privacy Coordinator.

Where a requester provides sufficient details about the records which he is seeking and the Ministry indicates that records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

I have reviewed the affidavit submitted by the Ministry and I am satisfied that its efforts to locate and identify the legal accounts which were requested were reasonable in the circumstances.

Because of the manner in which I have dealt with the records in my discussion of section 19 above, it is not necessary for me to address the application of sections 21(1) or 49(b) to them.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____

Donald Hale
Inquiry Officer

_____ December 5, 1995