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

ORDER P-1561

Appeal P-9700232

Ministry of the Attorney General

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BACKGROUND:

In 1993, two men with a gun confronted a third man. This resulted in a series of events which led to the first man's death. The third man was originally charged with criminal negligence causing death and manslaughter in relation to the first man's death, but those charges were withdrawn. The second man was charged and convicted of a number of weapons offences in connection with this incident.

The deceased man's family is suing the appellant, an insurance company, to recover the death benefit under the deceased man's life insurance policy. The appellant has denied liability on the basis that the death of the insured occurred as a result of his involvement in criminal activity. The appellant is seeking information regarding the circumstances of the death of the insured in order to defend itself in the civil action.

NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of the Attorney General (the Ministry). The request was for access to records relating to the circumstances surrounding the death of the deceased man.

The Ministry identified 1951 pages of responsive records consisting of general correspondence, internal memos, documentary evidence, pre trial brief, Crown brief, court documents, preliminary inquiry transcript, photographs and a video. The Ministry denied access to all responsive records pursuant to the following exemptions:

- solicitor-client privilege - section 19
- invasion of privacy - section 21

The appellant appealed the decision of the Ministry to deny access to the records.

This office sent a Notice of Inquiry to the Ministry and the appellant. Representations were received from both parties.

RECORDS:

The records are identified by category in Appendix "A" to this order. Category H refers to duplicate copies of records found originally in Categories C and D. My findings with respect to the records in Categories C and D should be applied equally to the duplicate records found in Category H.

PRELIMINARY MATTER:

The records in Category A are identified as the transcript of the preliminary hearing of the prosecution of the weapons offences. The transcript indicates that this proceeding was subject to a publication ban. The Ministry has confirmed that the publication ban expired on conclusion of the trial, and is no longer in effect.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the Act 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).

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.

[Order 49]

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 Crown counsel; **and**

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

The Ministry submits that all of the records qualify for exemption under Branch 2 of section 19, as they were prepared by Crown counsel for use in litigation.

Having reviewed the records, I find that each category contains records which were prepared by or for Crown counsel in contemplation of litigation or for use in litigation. However, in Order

P-1342 I considered whether Branch 2 of the section 19 exemption would be available in cases where a record would not qualify for solicitor-client privilege at common law under Branch 1. After reviewing the legislative history of section 19, I concluded (at page 8):

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.

In that case, four records were at issue. The Ministry claimed that the Branch 1 litigation privilege applied to two of the four, and that the Branch 2 litigation privilege applied to all four. I found that none of the records qualified for litigation privilege under either branch, since the relevant litigation had terminated and, alternatively, since the Ministry had waived any privilege which might have attached through disclosure to a third party. This order was sustained by the Ontario Court (General Division) Divisional Court on judicial review. In Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.), the court found that the common law principle of waiver applies equally to Branch 1 and Branch 2 of section 19 of the Act. In my view, consistent with this court decision, other common law principles which define the scope of solicitor-client and litigation privilege should apply equally to both branches. This preserves for government institutions the full scope of the privilege extended to private litigants.

Accordingly, I must consider whether the common law principles which define the scope of Branch 1 of the privilege, and apply equally to Branch 2, are present in the circumstances of this appeal in order to determine whether the records at issue qualify for exemption under Branch 2 of section 19.

- **Solicitor-Client Communication Privilege**

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.

Having reviewed the records at issue, I am satisfied that they are not direct communications between a solicitor and client, or their agents or employees. Accordingly, this part of the exemption does not apply.

- **Litigation Privilege**

Litigation privilege, often referred to as the "work product" or "lawyer's brief" rule, protects documents which are not direct solicitor-client communications, but which are "derivative" of that relationship. This includes communications between the solicitor or the client and third parties, documents generated internally by the solicitor or the client, or documents compiled for a lawyer's brief, where the dominant purpose for which they were created or obtained is existing

or reasonably contemplated litigation. Litigation privilege applies only if the document was made or obtained with an intention that it be confidential in the course of the litigation.

The rationale for litigation privilege is to protect the adversary system of justice by ensuring a zone of privacy for counsel preparing a case for litigation [Hickman v. Taylor 329 U.S. 495 at 508-511 (1947); Strass v. Goldsack (1975), 58 D.L.R. (3d) 397 at 424-425 (Alta. C.A.); General Accident Assurance Co. v. Chrusz (1997), 34 O.R. (3d) 354 at 370 (Gen. Div.), leave to appeal granted (1997), 35 O.R. (3d) 727 (Gen. Div.)]. As the Ontario Court (General Division) Divisional Court explained in Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co. (1990), 74 D.L.R. (4th) 742 at 748:

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research investigations and thought processes in the trial brief of opposing counsel.

Under the litigation privilege or work product rule, a distinction has been drawn between "ordinary" work product (documents gathered from third parties, the document itself or factual information) and "opinion" work product (counsel's mental impressions, conclusions, opinions or legal theories), with the latter enjoying a heightened protection [R.J. Sharpe, "Claiming Privilege in the Discovery Process", Law Society of Upper Canada Special Lectures, 1984 (Richard DeBoo Publishers, 1984), pp. 175-177; In re Sealed Case, 676 F.2d 793 at 809-810 (U.S.C.A., Dist. Col., 1982); C.A.); Mancao v. Casino (1977), 17 O.R. (2d) 458 (H.C.)].

Having reviewed all of the records for which the section 19 exemption is claimed, I am satisfied that each was prepared or obtained for the dominant purpose of existing or reasonably contemplated litigation. I am also satisfied that each record was prepared or obtained with an intention that it be confidential in the course of the litigation, with the exception of certain records in Category F (see "No Privilege Where Communication Between Opposing Parties" below).

- **Loss of Privilege Through Termination of Litigation**

Litigation privilege ends with termination of the litigation for which the documents were prepared or obtained [Boulianne v. Flynn, [1970] 3 O.R. 84 at 90 (Co. Ct.); Meaney v. Busby (1977), 15 O.R. (2d) 71 (H.C)]. The exception to this rule is where the policy reasons underlying the privilege remain, despite the end of the litigation. For example, privilege may be sustained in related litigation involving the same subject matter in which the party asserting the privilege has

an interest [Carleton Condominium Corp. v. Shenkman Corp. (1977), 3 C.P.C. 211 (Ont. H.C.)]. In other words, the law will only give effect to the privilege while the purpose for its recognition continues to be served. Unlike solicitor-client communication privilege, the purpose of which is to protect against disclosures which could have a chilling effect on the solicitor-client relationship, the purpose of litigation privilege is to protect against disclosures which could have a chilling effect on the lawyer's preparation for the particular litigation, or any related litigation arising out of the same subject matter.

As indicated above, "opinion" work product, which consists of counsel's mental impressions, conclusions, opinions or legal theories, enjoys a heightened protection over ordinary work product. Having reviewed the records at issue, I find that there are six pages of undated handwritten notes on lined paper, headed "matters to consider" in Category C and two copies of a five-page letter dated March 15, 1994 from the Assistant Crown Attorney in Category G which consist of "opinion" work product. In the circumstances, I am satisfied that the rationale for litigation privilege is present with respect to these records. Accordingly, despite the termination of litigation, I find that these records qualify for exemption under section 19 of the Act.

With respect to the remaining records, all litigation involving the Crown is now at an end regarding these matters and, on the basis of the representations and the contents of the records, I am not satisfied that disclosure of these records will harm the adversarial process by hindering the investigation and preparation of future cases of this nature. Therefore, the rationale for litigation privilege is no longer present and, accordingly, I find that these records do not qualify for exemption under Branch 1 of section 19.

The Ministry argues that the records deal with very sensitive matters, and that their disclosure would inhibit future witnesses from coming forward and co-operating with the police and the Crown Attorney's office. The sensitivity issue is addressed in section 21(2)(f) of the Act, the applicability of which I will consider below.

- **No Privilege Where Communication Between Opposing Parties**

Certain records in Category F are letters from the Crown Attorney to opposing counsel.

At common law, communications between opposing parties, even in contemplation of litigation, are not considered privileged unless made with a view to settlement [see, for example, Flack v. Pacific Press Ltd. (1971), 14 D.L.R. (3d) 334 (B.C. C.A.); Strass v. Goldsack (1975), 58 D.L.R. (3d) 397 at 426-427 (Alta. C.A.)]. In Solicitor-Client Privilege in Canadian Law (Toronto: Butterworths, 1993), R.D. Manes et al. explain the rationale for not extending privilege to cover this circumstance (at page 148):

> The key to holding that privilege cannot possibly attach to communications between opposing parties is that in the making of such a communication, there cannot have been an intention of confidentiality, and that the production ... cannot violate a confidential relationship between the defendants and their solicitors. Thus, there is no room for privilege to attach. The denial of privilege operates on principles similar to those in waiver of privilege, in that by communicating to the

> other side, the communicating party could be said to have waived privilege with respect to that communication.

In my view, this common law principle also applies to the records in Category F, and therefore no privilege attaches to these records.

In summary, I find that only the six pages of undated handwritten notes on lined paper, headed "matters to consider" in Category C and two copies of a five-page letter dated March 15, 1994 from the Assistant Crown Attorney in Category G are exempt under section 19 of the Act.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Having reviewed the records, I find that they do not contain the personal information of the appellant.

Each category of records contains information which qualifies as the personal information of the deceased and other witnesses and parties involved in the incident.

However, with the exception of the records in Category E, each category of records also contains information which does not qualify as recorded information about an identifiable individual. Since section 21 cannot apply to information which is not personal information, the records and parts of records in Categories A to D and F to G which do not contain personal information do not qualify for exemption under section 21 of the Act and, unless already exempt under section 19, they should be disclosed to the appellant. Because the Ministry has not indexed the records or numbered the pages, I am unable to specify which of the records do not contain personal information in this order. I will remain seized of the issue of identification of personal information should the Ministry experience some difficulty.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(1)(f) of the Act reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2).

A section 21(3) presumption can be overcome if there is a finding under section 23 of the Act that a compelling public interest exists in the disclosure of the record which clearly outweighs the purpose of the section 21 exemption.
The Ministry submits that section 21(3)(b) applies in the circumstances of this appeal. The appellant argues that section 21(2)(d) is relevant. In my view, sections 21(2)(f) and 21(3)(a) are also worth considering in the circumstances of this appeal. These sections read:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

The records do not contain the personal information of the appellant. Therefore the exemption under consideration is section 21(1), which applies **unless** it is established that disclosure would not be an unjustified invasion of personal privacy.

Much of the personal information found in the records was compiled and is identifiable as part of an investigation into a possible violation of law and I find that the presumption in section 21(3)(b) applies to it. This personal information is typically found in witness statements, police officers' notes, and other documentary evidence.

The information in the post mortem report (in Category D) relates to the medical condition of an individual other than the appellant. I find that the presumed unjustified invasion of privacy in section 21(3)(a), which applies to information that "relates to medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation", applies.

Even if I were to find that the factor favouring disclosure in section 21(2)(d) applies to this information, as noted previously a factor in section 21(2) cannot rebut a presumption. As this is not information to which section 21(4) applies, I find that disclosure of this information which is subject to the presumptions in sections 21(3)(a) and/or (b) would be an unjustified invasion of personal privacy and it is exempt under section 21(1).

With respect to the personal information which does not fall within either presumption, I am not satisfied that there is a sufficient link between the appellant's civil suit and this remaining personal information to establish the application of section 21(2)(d). As stated above, the deceased man's family is suing the appellant, an insurance company, to recover the death benefit under the deceased man's life insurance policy. The appellant has denied liability on the basis that the death of the insured occurred as a result of his involvement in criminal activity. In my view, this personal information, typically found in correspondence and related records, is not relevant to the determination of whether the death of the insured occurred as a result of his involvement in criminal activity, in some cases does not even relate to the insured and has no bearing on the appellant's civil suit. Accordingly, I find that it is therefore not "relevant to a fair determination of rights" for the appellant and section 21(2)(d) does not apply.

As either a presumption applies or no factors favouring disclosure have been established, I find that the records and parts of records containing personal information are exempt under section 21(1).

ORDER:

1. I uphold the Ministry's decision not to disclose to the appellant the records or parts of records which contain personal information.

2. I uphold the Ministry's decision not to disclose the six pages of undated handwritten notes on lined paper, headed "matters to consider" in Category C and two copies of a five-page letter dated March 15, 1994 from the Assistant Crown Attorney in Category G.

3. I order the Ministry to disclose the remaining records or parts of records to the appellant by sending them a copy by **June 1, 1998**.

4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

5. I remain seized of this matter to ensure implementation of and compliance with this order in accordance with its terms.

Original signed by: May 11, 1998
Holly Big Canoe
Adjudicator
(formerly Inquiry Officer)

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD CATEGORY	DESCRIPTION
A	Preliminary inquiry transcript of the prosecution of the weapons offences. The transcripts are 129 pages in length.
B	Pre-trial brief for both criminal cases assembled for the Crown to use during pre-trial negotiations. The negotiations were conducted in order to determine whether the respective prosecutions could be resolved without the need of a trial. The pre-trial brief is 56 pages long.
C	Crown brief for prosecution of the weapons offences. The brief contains will says, witness statements, accident reports, etc. and is 151 pages long. Contained in a separate envelope is 589 pages of documentary evidence, including telephone records, that was compiled for the prosecution.
D	Crown brief for the prosecution of the third man. The brief is set out in 5 volumes (a total of 539 pages). The brief contains will says, witness statements, accident reports, statements by police officers, police officer's notes, etc. Contained in a separate envelope are 163 photograph of the crime scene, as well as a video of the crime scene.
E	Copies of documents filed in court for the prosecution of the weapons offences. These documents include a pre-sentence report and a copy of an application record.
F	Correspondence between the Crown, Defence Counsel and the trial coordinator for both prosecutions. The correspondence includes requests for disclosure, the scheduling of pre-trials and other court appearances as well as discussions regarding issues that arose in the course of the prosecution. These documents total 93 pages.
G	Correspondence between the Crown and the police, between Crown Attorneys and memos to file. This group also contains the Crown's legal opinion concerning the decision not to proceed with the prosecution of the third man. These documents number 84 pages.
H	Duplicate copies of reports and statements that were part of the two Crown briefs.