



Information and Privacy
Commissioner/Ontario

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

ORDER P-1602

Appeal P_9800065

Office of the Public Guardian and Trustee



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Office of the Public Guardian and Trustee (the Trustee) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for copies of all documentation held by the Trustee's London or Toronto offices with respect to the appellant's wife's "life, health care and property since December 24, 1996." The appellant provided the Trustee with a copy of a continuing power of attorney appointing him as his wife's attorney for both property and personal care.

The Trustee identified 71 pages of responsive records and granted access in full to 55 pages. The Trustee denied access in full to the remaining 16 pages (numbered 1-16) on the basis of one or more of the following exemptions:

- advice or recommendations - section 13(1)
- solicitor-client privilege - section 19
- discretion to refuse requester's own information - section 49(a)
- danger to mental or physical health of the requester - section 49(d)

The appellant appealed the Trustee's decision.

During mediation, the appellant indicated that he did not require any records containing medical information about his wife. Consequently, page 15 of the records was removed from the scope of the appeal. Pages 4 and 9 are identical, so page 9 was also removed from the scope of this appeal.

The 14 records which remain at issue and the relevant exemption claims are:

- internal memoranda, correspondence, and a referral summary (Pages 1-8 and 10-13) - sections 49(a) and 19
- a checklist (Page 14) - sections 49(a) and 13(1)
- a financial statement (Page 16) - section 49(d)

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

After issuing the Notice it became apparent that the outcome of this appeal could affect the interests of four individuals (the affected parties), and that sections 17, 21 (together with section 2(1)) and 49(b) of the Act might be relevant considerations in the circumstances of this appeal. Therefore, a Supplementary Notice was sent to the Trustee, the appellant and the four affected parties. Representations were also sought on the possible application of litigation privilege under section 19, which had not been specifically included in the original Notice. Only the appellant and one affected party responded to the Supplementary Notice.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual. I find that all of the records contain the personal information of the appellant and/or his wife. The personal information includes the medical condition of the appellant’s wife, opinions and views about the appellant and his wife, information relating to the employment and financial status of the appellant and his wife, and other personal identifiers, such as names and home addresses.

Some records also contain information relating to other identifiable individuals, including the affected parties. However, in all instances this information relates to these individuals while acting in their professional or employment capacities. Many past orders have determined that information which identifies an individual in his or her employment, professional or official capacity, or provides a business address or telephone number, is not generally regarded as the “personal information” of these individuals. This approach also applies to opinions developed or expressed by an individual in an employment, professional or official capacity, and information about other normal activities undertaken in that context (see for example Orders P-157, P-270, M-113, P-1180 and P-1409).

Pages 1-3 are internal communications between employees of the Trustee and its legal counsel about the steps to be taken in proceedings to process the appellant’s wife’s file. I find that these communications were carried out in the performance of these individuals’ employment functions and information about these individuals is not “personal information”.

Pages 11-13 are letters written by an employee of the Trustee to three external health care providers seeking information about their dealings with the appellant and his wife. Pages 6-8 and 10 are the responses received from two of these health care providers. Page 4 is a referral letter to the Trustee from one of the affected parties, and Page 5 is a referral summary prepared by an employee of the Trustee in response to Page 4. I find that any identifiable information of individuals other than the appellant and his wife found in any of these records was also provided in the performance of their professional and employment capacities and responsibilities, and does not constitute their “personal information”.

Accordingly, in my view, the only personal information contained in the records is that of the appellant and his wife. Because I am satisfied that the appellant is his wife’s attorney under a continuing power of attorney, I find that disclosure of her personal information to him would not result in an unjustified invasion of her personal privacy. Therefore, I find that sections 21 and 49(b) are not applicable in the context of this appeal.

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. Section 49(a) reads:

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]

The Trustee claims that section 13 applies to Page 14 (the checklist), and that section 19 applies to Pages 1-8 and 10-13 (the internal memoranda, correspondence and a referral summary).

The Supplementary Notice of Inquiry raised the possible application of section 17 of the Act (third party information). None of the parties provided representations on this issue. Based on a review of the records, I am satisfied that section 17 is not applicable in the circumstances of this case, and I will not consider this issue further.

ADVICE OR RECOMMENDATIONS

Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Order 118).

Page 14 is titled “Acquiring Jurisdiction - Policies and Procedures”, and consists of an administrative checklist of steps to be taken by employees when opening a new file. The Trustee states that:

... The individual boxes relate to how a civil servant is to proceed in opening a new file and what procedures have to be carried out during this initial phase. This document was prepared by a civil servant during the course of her duties in our office and should therefore qualify as advice and recommendations and should not be released.

Furthermore, it is submitted that this document should not be released as it indicates the procedures our office follows when opening a file in our office. The procedures we follow should be kept confidential given the highly sensitive information our office deals with.

I do not accept this submission. As I stated above, the record is quite simply a checklist of steps to be taken when a client file is opened with the Trustee. Each item on the list is “checked off” once completed. As such, the record does not contain, nor would it reveal, advice or recommendations or a suggested course of action and, therefore, section 13(1) has no application. Accordingly, I find that page 14 does not qualify for exemption under section 49(a) of the Act.

Since no other discretionary exemptions were claimed for this record and no mandatory exemptions apply, it should be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

Section 19 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.

This section consists of two branches, which provide the Trustee 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 Trustee 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.

[See Order 210]

The Trustee claims that Branch 1 of the section 19 exemption applies to Pages 1-8 and 10-13.

Solicitor-Client Communication Privilege

Pages 1-3 consist of a written memorandum and a record of three e-mail messages between legal counsel for the Trustee and the Trustee's Client Representative. The Trustee submits that these are confidential communications between a lawyer and a client for the purpose of seeking and giving legal advice pertaining to issues raised in the course of administering the finances of the appellant's wife. Having reviewed these records and considered the surrounding circumstances I am satisfied that these records constitute confidential communications between a lawyer and her client (the Client Representative) for the purposes of seeking and giving legal advice regarding the management of the appellant's wife's finances. Accordingly, I find that these records are subject to solicitor-client communications privilege and satisfy Branch 1 of section 19. Therefore, Pages 1-3 are exempt under section 49(a) of the Act.

Page 4 (a referral letter to the Trustee from an affected party) and Page 5 (a referral summary) pre-date any involvement of legal counsel and do not constitute communications between a solicitor and client. Therefore, these records are not subject to solicitor-client communication privilege.

The Trustee submits that Pages 6-8 and 10-13 are communications relating to issues that were raised by legal counsel and are as a result of instructions received from counsel. These records consist of letters sent by the Client Representative to the three health care facilities in which the appellant's wife received care, and replies received from two of these facilities. These records do not constitute communications between a solicitor and client. The fact that they may relate to issues raised by legal counsel and may have been generated as a result of advice from legal counsel is not sufficient to bring them within the ambit of solicitor-client communication privilege. Therefore, I find that Pages 6-8 and 10-13 are not subject to solicitor-client communication privilege.

Litigation Privilege

One issue identified in the circumstances of this appeal was whether any possible litigation privilege which may have been enjoyed by the Crown has been lost through the absence of reasonably contemplated litigation. Because the rationale for litigation privilege is, in essence, to protect the adversary system of justice, the parties were asked to submit supplementary representations indicating whether and how the adversary system of justice would be harmed through disclosure of the specific records for which section 19 has been claimed.

None of the parties submitted representations on this issue.

The scope of litigation privilege was described by Adjudicator Holly Big Canoe in Order P_1551 as follows:

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.)].

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.

Having reviewed the records and the particular circumstances of this appeal, I find that while litigation may have been contemplated at some point during the course of the Trustee's involvement with the appellant and his wife, litigation is no longer contemplated. I find support for this conclusion in the Trustee's initial representations, which state that after its legal counsel reviewed the appellant's power of attorney and determined that it was valid, the file was closed.

In light of the above, and in the absence of any evidence as to whether there is currently a reasonable prospect of litigation, I find that the records are not subject to litigation privilege.

Therefore, I find that the Trustee is not entitled to rely on section 19, and consequently 49(a), to deny access to Pages 4-8 and 10-13. Since no other discretionary exemptions have been claimed for these records and no mandatory exemptions apply, they should be disclosed to the appellant.

DANGER TO MENTAL OR PHYSICAL HEALTH OF THE REQUESTER

The Trustee submits that the information contained in Page 16 is exempt under section 49(d) of the Act. This section states:

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

that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual.

Under section 49(d), the Trustee has discretion to deny the requester access to his/her own personal information if that personal information is medical information which, if disclosed, could reasonably be expected to prejudice the mental or physical health of the requester.

Page 16 is a "Form 22" financial statement under the Mental Health Act. The only medical information contained in this record is the identification of the medical affliction suffered by the appellant's wife, information which she and the appellant are well aware. The rest of the form consists of non-medical information, such as the wife's name, gender, home address, date of birth, occupation, marital status, and the name and address of the appellant.

As stated earlier, during mediation the appellant apparently removed all records containing medical information about his wife from the scope of the appeal. Because section 49(d) only applies to medical information, arguably Page 16 could have been removed from the scope of the

appeal prior to this inquiry. However, Page 16 was included in the Notice of Inquiry, and I will deal with the proper application of section 49(d) to that record.

The Trustee's entire representations on this issue are the following:

The records which the Head is claiming a discretionary exemption pursuant to section 49[d] of the Act relate to medical and psychiatric information about the client, the release of which might cause undue harm to the client. The head has therefore used her discretion and has determined that the information should not be released as the release could reasonably be expected to prejudice the mental or physical health of the individual.

Section 49(d) requires that the disclosure of medical information **could reasonably be expected to** prejudice the mental or physical health of the individual. The Trustee's representations do not contain any evidence of the mental or physical harm that could reasonably be expected to result from disclosure. Given the lack of evidence provided by the Trustee and the type of information contained in the record, I am not persuaded that disclosure of the appellant's wife's medical information to him or her could reasonably be expected to prejudice the mental or physical health of either individual. Accordingly, I find that Page 16 does not qualify for exemption under section 49(d) of the Act.

ORDER:

1. I order the Trustee to disclose to the appellant Pages 4-8, 10-14 and 16 in their entirety by sending the appellant a copy no later than **September 8, 1998** but not before **September 3, 1998**.
2. I uphold the Trustee's decision to deny access to Pages 1-3.
3. In order to verify compliance with this order, I reserve the right to require the Trustee to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

August 4, 1998