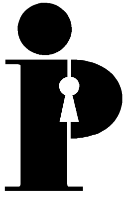

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

FINAL ORDER P-1633

Appeal P_9800041

Ministry of the Attorney General

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

This order represents my final order in respect of the outstanding issues from Interim Order P-1620.

BACKGROUND:

The Ministry of the Attorney General (the Ministry) and the Ontario Native Affairs Secretariat (ONAS) received a request for access to specified records relating to meetings of the Interministerial Committee for Aboriginal Emergencies and meetings of the Core Working Group from September 3, 1995 to October 1, 1995 inclusive. The Ministry represented both itself and ONAS throughout the request and appeal stages of this matter. The Ministry located several pages of records and granted access in full to some and denied access in whole or in part to others. The requester appealed the denial of access. An inquiry was conducted, representations were received from the Ministry only, and I issued Interim Order P-1620. All issues with the exception of the litigation privilege portion of section 19 of the Act and personal information issues regarding pages 50 and 51 were disposed of in Interim Order P-1620.

As far as litigation privilege was concerned, I stated in Interim Order P-1620:

> Having reviewed the records, in my view, the issue of whether litigation privilege which may have been enjoyed by the Crown has been lost through the absence of reasonably contemplated litigation or the termination of litigation is relevant with respect to certain records at issue in this appeal. I have decided that the parties should be given the opportunity to provide representations on this issue before I make my determination on these records, and a Supplementary Notice of Inquiry will be sent to the parties coincidental with the issuance of this order.

Accordingly, a Supplementary Notice of Inquiry was issued, and representations on the issue of litigation privilege were received from the Ministry only.

The pages of records which remained at issue under the litigation privilege claim consisted of court documents and drafts (such as orders, affidavits, notices of motion, statements of claim) and various other related documents (such as legal opinions and background material relating to the then-anticipated litigation).

In its representations, the Ministry states that it has decided to withdraw its section 19 exemption claims for pages 596-601, 602-604, 605-612, 614 and 615-622. It is not clear whether these pages have in fact been disclosed and, because no other exemptions remain at issue with respect to these pages, I will order the Ministry to disclose them to the appellant.

The pages of records which remain subject to the litigation privilege claim are pages 59-59B, 188A-188B, 194-195, 471-478, 516, 545-547, 591-595, and 655.

As far as the remaining personal information issues are concerned, I deferred my decision on pages 50 and 51 because I found that they contained information relating to an identifiable individual whose interests may be affected by the outcome of this appeal. This individual had not been notified of the appeal and, therefore, had not been given the opportunity to provide representations regarding disclosure of this information. Accordingly, a Supplementary Notice of Inquiry was sent to this individual, inviting him/her to comment on whether the records contain his/her personal information, and if so, whether it qualifies for exemption under section 21(1) of the Act. This was the only exemption claimed by the Ministry for this information.

This individual subsequently withdrew his/her objection to disclosure and, as a result, the Ministry disclosed the portions of pages 50 and 51 which contained his/her information. Other portions of these pages contain what might be characterized as personal information of other identifiable individuals, which I will discuss later in this order.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

This exemption is set out in section 19 of the Act, which 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.

Section 19 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 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 two 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 P-1342]

LITIGATION PRIVILEGE

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 [<u>Hickman v. Taylor</u> 329 U.S. 495 at 508_511 (1947); <u>Strass v. Goldsack</u> (1975), 58 D.L.R. (3d) 397 at 424_425 (Alta. C.A.); <u>General Accident Assurance Co. v. Chrusz</u> (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 <u>Ottawa_Carleton (Regional Municipality) v. Consumers’ Gas Co.</u> (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.

The parties were asked to submit representations on whether the relevant litigation has been terminated, or is no longer reasonably contemplated. Because the rationale for litigation privilege is, in essence, to protect the adversary system of justice, the parties were also asked to submit representations on whether the adversary system of justice would be harmed through disclosure of the records, notwithstanding the termination of litigation or the loss of reasonably contemplated litigation.

The Ministry acknowledges that pages 59-59B, 194-195, 516 and 545-547 do not qualify for litigation privilege, but claims that they are exempt under the solicitor-client communication privilege portion of section 19. The Ministry relies on both solicitor-client communication privilege and litigation privilege for the remaining records. I will deal with litigation privilege first, then consider solicitor-client communication privilege for the records listed above, together with any records that I find do not qualify for litigation privilege.

The Ministry submits that the pages which remain subject to its litigation privilege claim all "... dealt with an application for injunctive relief as a mechanism to remove the occupiers from Ipperwash Provincial Park. To this day, there are several outstanding litigation matters."

The Ministry goes on to identify ongoing criminal and civil actions, and states that:

> ... the litigation that is ongoing is directly related to the application for the injunction and therefore the reason for the privilege subsists. It is also extremely significant that the occupation of the part still continues today. There still remains the issue of how to remove the occupiers from the park. The possibility of injunctive relief may still be an option to be considered.

According to the Ministry, all ongoing matters arose out of the same subject matter in which the Crown has an interest and, therefore, litigation privilege continues even though the application for the injunction in 1995 was discontinued at that time. However, the Ministry does not submit nor does my examination of the pages indicate that any of these records comprise the opinion work product of Crown counsel.

There would appear to be no dispute that the specific litigation for which the pages were prepared was terminated in September 1995 when the injunction application was withdrawn by the government. The only remaining question is whether the policy reasons underlying the privilege remain, despite the end of that specific litigation. In other words, is it accurate to say that the current ongoing litigation arises from the same subject matter as the injunction. In my view, the answer is no.

The injunction application was brought for a specific purpose in September 1995. As court documents indicate, public access to Ipperwash Park was under blockade, and tensions among native people, police and neighbouring residents were intense. Public safety concerns had reached the point where the government concluded that legal action was required. Although Ipperwash Park may continue to be "occupied", as the Ministry maintains, more than three years have passed since the injunction application was withdrawn. The evidence before me does not support the conclusion that any ongoing or contemplated litigation is sufficiently linked to the September 1995 injunction application that records produced in that context would be relevant in other subsequent litigation. Although I have been provided with no evidence of any ongoing interest or intent on the part of the Ontario Provincial Police or the government to take action of any kind involving Ipperwash Park, should an injunction be brought in future, in my view, it would be sufficiently remote from the circumstances that existed in September 1995 that it would represent a new matter rather than one continuing from or related to the September 1995 injunction application.

As far as any ongoing criminal matters are concerned, they arise from actions which are quite separate and distinct from the injunction application and, for the most part, post-date the application itself. Although they relate to events surrounding the September 1995 occupation of Ipperwash Park, in my view, they involve different subject matters from the injunction application. Similarly, although the ongoing civil law suits also involve matters related to the occupation, they deal with broader issues of liability for actions which took place during this

period of time, and I am not persuaded, based on the evidence submitted by the Ministry, that they arise out of the same or sufficiently closely related subject matter as the injunction application itself that they should continue to be subject to litigation privilege. The Ministry has also not demonstrated how disclosure of these records, created more than three years ago, could have a chilling effect on a lawyer's preparation for any ongoing litigation or otherwise adversely affect the adversary system of justice.

Accordingly, I find that the pages are not subject to litigation privilege.

SOLICITOR-CLIENT COMMUNICATION PRIVILEGE

As I noted above, the Ministry now submits that all pages of records that remain at issue in this appeal are subject to 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 (Order P-1551).

The Ministry has divided the pages for which this exemption has been claimed into several groups as it did in Interim Order P-1620. I will use these categories in my discussion.

Opinion: Background and outline of relevant legislation - Pages 194-195

The Ministry submits that pages 194-195 contain the results of research conducted by an ONAS legal counsel in order to provide advice to the Core Working Group on an issue which was under discussion during the period of time covered by the appellant's request.

The Ministry states:

> It is acknowledged that in our representations filed in Appeal No. 9800041, these records were dealt with under the heading of "Background materials prepared for litigation counsel". However, it is respectfully submitted that this was an error. The paper was prepared on September 12, 1995, while [legal counsel] had appeared in court on the previous day to indicate to the court that the motion for injunctive relief was being withdrawn. Thus it can be seen that this opinion was not prepared for the litigation. These records are exempt under both the first and second Branches of section 19. It is a legal opinion prepared for a client and is thus subject to solicitor-client privilege. As well, it was prepared by Crown counsel for use in giving legal advice.

I accept the Ministry's position. In my view, the information contained on pages 194-195 was prepared for the purpose of permitting Crown counsel to report on a confidential basis to his client on legal issues being considered by the Core Working Group. I find that it was prepared "for use in giving legal advice" and, therefore, qualifies for exemption pursuant to section 19.

Opinion: Criminal and civil proceedings to terminate the occupation of Ipperwash - Pages 59-59B, 516 and 545-547

Pages 59-59B and 545-547 are basically identical to each other, as is page 516 to portions of pages 59-59B and 545-547. The Ministry explains that they are all various iterations of the same basic document. I concur.

According to the Ministry, these pages are a legal opinion produced by two Crown counsel during the course of preparing for the injunction application. The purpose of the opinion was to provide legal advice to the government (their client) regarding the application. The Ministry submits that the pages were prepared by Crown counsel for the purposes of giving confidential legal advice.

Although there is nothing on the face of these records to indicate that they are a direct communication between a solicitor and a client, the information contained in the records is clearly in the form of confidential legal advice and, in my view, disclosure of these pages would reveal this legal advice. Accordingly, I find that these pages qualify for exemption under section 19.

Draft court documents: Order (591-595), Affidavit of [a named government employee] (Pages 471-478) and Statement to be read to Court (Pages 188A-188B and 655)

As I noted earlier, the Ministry has withdrawn its section 19 exemption claim for pages 596-601, 602-604, 605-612, 614 and 615-622. Its stated reason for doing so is that these draft documents are either identical or virtually identical to the documents which were actually filed in court. The Ministry submits that the remaining draft documents were prepared by two Crown counsel in the context of finalizing the injunction application. According to the Ministry, several remedies or courses of action were under consideration at the time, and these draft documents contain information that did not find its way into the final versions of the various court documents. In the Ministry's view, these draft documents "... indicate a course of action proposed by counsel and revised based, in part, on instructions from clients." However, the Ministry does not provide any additional evidence or argument in support of these points in its representations and, based on my independent review of these pages, I am unable to infer the role played by the "client" in this process.

Having carefully reviewed the remaining records, I find that pages 591-595, 471-478 and M474-478 also contain information that is virtually identical to the content of the pages the Ministry is prepared to disclose. Although there are differences among them (e.g. revisions to the order and/or content of some of the listed provisions and the addition or deletion of some factual information), in my view, these differences are not significant. When I compare the content of the "still-exempt" and "now-discloseable" versions of these pages, I find that the different information contained in the "still-exempt" pages does not satisfy the requirements of solicitor-client communication privilege. Specifically, based on the representations provided by the Ministry, I am not persuaded that the portions which differ are communications between a client and a legal advisor, nor that they are directly related to the seeking, formulating or giving of legal advice. Therefore, the pages 591-595, 471-472 and 474-478 do not qualify for exemption under section 19 of the Act, and should be disclosed to the appellant.

Page 473 contains handwritten notes which appear to be providing instructions on the contents of this page. I accept the Ministry's position that these notes were prepared for use in giving confidential legal advise and, therefore, qualify for exemption under section 19. I will order these handwritten notes to be severed from page 473 prior to disclosure. The rest of page 473 should be disclosed.

Pages 188A-188B and 655 are identified as "Statement to be read to Court" and each of them are drafts of a statement that was ultimately read in court by counsel when the government decided to withdraw the injunction application. The Ministry submits that:

> [A]lthough this statement effectively put an end to the litigation, it is respectfully submitted that it was nevertheless in the context of litigation in that the matter was still outstanding and it was necessary to report to the court that the Government was not intending to proceed, and to thus bring closure to the matter.

As far as page 655 is concerned, the Ministry submits:

> It appears that Record 655, ie. the Statement to be read to the Court, was typed by someone in the office of the Crown Attorney in Sarnia, where [legal counsel] was making use of their facilities. However, [legal counsel] advises that he believes that this statement does not represent his entire presentation to the court, and his recollection is that he made additional statements to the Court that are not included in this Record. As such, therefore, since it does not appear to be complete, it is respectfully submitted that it is a draft only and that it does not necessarily record a communication made in open court.

Although the Ministry's position may have been relevant to a claim for litigation privilege while the injunction application was ongoing, in my view, these representations do not establish the requirements of solicitor-client communication privilege. The editorial changes made on pages 188A and 655 are not significant, and appear to have been made by counsel himself. The Ministry appears to acknowledge that the content of page 655 was in fact read in court, together with unspecified additional information subsequently prepared by legal counsel. In my view, the content of these pages is not accurately characterized as legal advice, and I find that these pages do not qualify for exemption under section 19 of the Act, and should be disclosed to the appellant.

PERSONAL INFORMATION AND INVASION OF PRIVACY

Section 2(1) of the Act states that "personal information" means recorded information about an identifiable individual, and goes on to list a number of examples of such information, which include:

> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

In Order P-1409, former Adjudicator John Higgins considered similar records and issues involving some of the same affected persons whose names remain at issue on pages 50 and 51. He conducted a very detailed and thorough analysis of all representations received in Order P-1409, as well as the records and relevant case-law in reaching his conclusions as to which information contained in the records satisfied the definition of personal information.

I have reviewed the contents of Order P-1409 and carefully considered the representations provided by the Ministry. I am in full and total agreement with the reasoning and conclusions reached by former Adjudicator Higgins in the pervious similar appeal, and adopt them for the purposes of the personal information and invasion of privacy issues before me in the present appeal.

Therefore, I make the following findings:

- the positions held by native leaders is analogous to employment or a profession, and references to these individuals contained on page 50 is not the personal information of these individuals (see also Orders P-157, P-270 and P-300 referred to in Order P-1409);

- the remaining information severed from page 51 consists of a reference to the name of an individual. This information when combined with other personal information related to this individual falls within the scope of paragraph (h) and the introductory wording of the definition of personal information in section 2(1).

Section 21(1) of the Act is a mandatory exemption claim, which requires the Ministry to deny access to personal information unless certain circumstances listed in section 21(1) are present. The only circumstance with potential application in the circumstances of this appeal is section 21(1)(f), which provides that:

> 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.

In the absence of any representations or evidence to show that disclosure of the personal information contained on page 51 would **not** be an unjustified invasion of that individual's personal privacy, I find that it would. The information, in my view, is highly sensitive personal information (section 21(2)(f)) which, in the absence of any evidence to the contrary, would also fail to satisfy the requirements of the section 21(1)(f) exception.

Therefore, I find that the personal information contained on page 51 is exempt from disclosure under section 21(1).

Because section 21(1) of the Act can only apply to personal information, I find that this exemption does not apply to the remaining portions of page 50 for which it was claimed.

PUBLIC INTEREST IN DISCLOSURE

As noted in Interim Order P-1620, the appellant claimed that the "public interest override" in section 23 of the Act applies in this case.

Section 19 is not subject to section 23. Therefore, the only information which qualifies for consideration under section 23 is the name of the individual contained on page 51 that I have found qualifies for exemption under section 21.

For the same reasons I outlined in the Interim Order P-1621, and in the absence of any representations from the appellant on this issue, I find that any public interest that may exist in disclosure of this name is insufficiently compelling to outweigh the purpose of the mandatory personal information exemption, in the circumstances of this appeal.

ORDER:

1. I order the Ministry to disclose pages 50, 471-472, 474-478, 591-595, 596-601, 602-604, 605-612, 614 and 615-622 in their entirety; and pages 51 and 473 in accordance with the highlighted copies of these pages which I have attached to the Ministry's copy of this final order (the highlighted portion is **not** to be disclosed) to the appellant by **January 21, 1999**, but not before **January 18, 1999**.

2.. I uphold the Ministry's decision to deny access to the remainder of the pages of records.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the pages of records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: December 15, 1998
Tom Mitchinson
Assistant Commissioner