

**ORDER PO-1807**

Appeal PA-990288-1

Ministry of the Attorney General

## **NATURE OF THE APPEAL:**

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information Act (the Act) for access to “any and all materials submitted to the Minister in support or justification of his approval of the exhumation of my grandson.” The appellant indicated that he was acting on behalf of his wife and his daughter, who is the mother of the deceased grandson.

The Ministry identified a one-page memorandum (Record 1) and a 71-page report with attachments (Record 2) as the only responsive records. Record 2 consists of memoranda, a police brief prepared by a local police service, monthly calendars, a Case History (in duplicate), medical reports and letters, a “Synopsis of Witnesses”, and witness statements. The Ministry denied access to both records in their entirety pursuant to the following sections of the Act:

- section 13(1) - advice and recommendations
- section 19 - solicitor-client privilege
- section 14(1)(c) - investigative techniques used in law enforcement
- section 21 - invasion of privacy

The appellant appealed the Ministry’s decision.

During mediation, the appellant’s daughter provided this Office with written confirmation that the appellant was acting on her behalf, and consented to the disclosure of any information relating to her or her deceased child.

The appellant also indicated that he did not require the monthly calendars (pages 14-32, 40 and 41) and agreed not to pursue access to the duplicate copy of the Case History (pages 42-48). Therefore, these records are no longer at issue in this appeal.

Also during mediation, the Ministry agreed to conduct a further search for additional responsive records. The Ministry located 25 additional pages referred to as being part of Record 2 but not originally identified by the Ministry. These pages consist of additional witness statements and various administrative forms, such as burial records, statement of live birth, death certificate, statement of death and records relating to disinterment. The Ministry issued a supplementary decision letter, denying access to these pages on the same basis as the previously identified records. In addition, the Ministry provided the appellant and this Office with an Index of Records that included a brief description and the exemptions claimed for each record.

Because some pages appeared to contain the personal information of the appellant, his daughter or his wife, the Mediator added the possible application of sections 49(a) and (b) of the Act to the scope of this appeal.

I sent a Notice of Inquiry initially to the Ministry and received representations in response. I then sent the Notice, together with a copy of the non-confidential portions of the Ministry’s representations to the appellant, who also submitted representations.

## **RECORDS:**

Record 1 is a memorandum from Senior Counsel at the Ministry to the Director of the Crown Law Office and concerns the disinterment of the appellant's grandson's body.

Records 2 is a report prepared by an articling student employed by the Ministry, and also concerns the disinterment of the appellant's grandson's body. It consists of a cover page (page 2), a four-page memorandum (pages 3-6) from the articling student to the Senior Counsel, and a list of appendices (page 7). There are two appendices: a one-page letter and a police brief. The letter (page 8) is from Senior Counsel at the Ministry to the Director of Crown Operations, North Region, and concerns the disinterment. The police brief contains the following documents:

- pages 9-13 - a cover page, investigative procedures, a table of contents and an index of documents
- pages 33-38 - "Case History"
- pages 39 and 49-56 - medical reports and correspondence
- pages 57-59 - synopsis of witness statements
- pages 60-74 - witness statements
- pages 75-78 - final autopsy report.
- pages 79-80 - correspondence.
- pages 81-87 - additional witness statements.
- pages 89-97 - burial permit, statement of live birth, medical certificate of death, statement of death, grave and burial contract, crew work card, information for public department, and correspondence.

## **DISCUSSION:**

### **Personal Information**

Section 2(1) of the Act defines "personal information" to mean recorded information about an identifiable individual.

All pages of the records relate to the death of the appellant's grandson and deliberations concerning the decision to exhume his body. As such, I find that all pages contain the personal information of the deceased grandson.

In addition to the deceased grandson, I find that Record 1 and pages 10, 33, 34, 35, 36, 37, 49, 53, 54, 55, 57, 61, 62, 63, 65, 66, 67, 68, 69, 79, 80, 83, 85, 86, 87, 89, 91, 93 and 97 of Record 2 also contain the personal information of the appellant, his daughter and/or his wife.

The appellant states in his representations:

As you well know, our system of justice is based on British Common Law. I suggest that “common sense” would dictate that an 11 month-old infant has no expectation of personal privacy relating to documented information.

Section 2(2) of the Act provides that personal information does not include information about an individual who has been dead for more than thirty years. The appellant’s grandson died on November 30, 1995, so section 2(2) does not apply, and the information about the appellant’s grandson qualifies as the grandson’s personal information.

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

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 discretion to deny access to an individual’s own personal information in instances where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

The Ministry claims that both records in their entirety are exempt from disclosure pursuant to section 19. For those pages of Record 2 that do not contain the personal information of either the appellant, his wife or his daughter, I will consider whether the requirements of section 19 have been established by the Ministry. For Record 1 and those pages of Record 2 that do contain the personal information of any of these three individuals, I will consider section 19 as a preliminary step in determining whether the records qualify for exemption under section 49(a) of the Act

Section 19 of the Act reads:

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 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).

In order for a record to be subject to the common law solicitor-client privilege, 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, see also Orders M-2 and M-19]

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]

**Scope of Branches 1 and 2 determined with reference to the common law**

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

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.

[Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)]

**Solicitor-Client Communication Privilege**

Solicitor-client communication privilege, which is an aspect of solicitor-client privilege at common law (Branch 1), 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. (See Order P-1551).

This privilege has been described by the Supreme Court of Canada as follows:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...

(Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-409)

Record 1 clearly satisfies all of the requirements of solicitor-client communication privilege. It is a written communication, concerning a confidential matter, between a legal counsel and his Ministry client which relates to the giving of legal advice, specifically whether or not this is an appropriate case to seek the consent of the Attorney General to disinter the body of the appellant's grandson. For these reasons, I find that the requirements of the solicitor-client communications privilege component of section 19 have been established for Record 1.

Record 2 consists of the work undertaken by an articling student employed by the Ministry in determining whether this was an appropriate case to seek the Attorney General's consent. It is written communication concerning the same confidential subject matter as Record 1. The four-page memorandum (pages 3-6) summarizes the steps taken in developing recommendations for appropriate action in the circumstances, and the remaining pages consist of the supporting materials used by the articling student in developing her recommendations. In my view, Record 2, considered as a whole, consists of the articling student's communication to her principle and client, the Senior Counsel, and is directly related to the giving of legal advice to the Minister regarding the appropriateness of disinterment in this case. The recommendations originating with the articling student were passed from one individual to another "up the ladder" to the Minister and, although I acknowledge that several individuals viewed the recommendations, I am satisfied that the communication was of a confidential nature since only key officials appear to have been privy to the recommendations.

I am also satisfied that a solicitor and client relationship existed between the various Crown counsel involved in this matter and the Minister. The Ministry submits in their representations:

Crown counsel, particularly the Special Prosecutions office and the Crown Law Office - Criminal, frequently advise the Minister with respect to appropriate courses of action in cases requiring the consent or order of the Attorney General under the *Criminal Code* and other legislation. Such cases include commencement of proceedings to have an offender

declared a dangerous offender under Part XXIV of the *Criminal Code*, the preferring of an indictment, and recommencement of proceedings under ss.477 and 485.1 of the *Criminal Code*, and instituting proceedings for child abduction (s.283), fraudulent concealment of title documents (s.385), nudity (s.174(3)), obscenity (s.164(7)), offences in or on territorial seas (s.477.2), operation of an unsafe vessel, aircraft, railway equipment (s.251(3)) and war crimes (s.7(3.75)).

For these reasons, I find that the requirements of the solicitor-client communication privilege component of section 19 have been established for Record 2, in its entirety.

The Ministry provided representations regarding the exercise of discretion under section 49(a) for those portions of the records that contain the personal information of the appellant, his wife and/or his daughter. In this regard the Ministry states:

The release of these documents to a third party would negatively affect how Crown Counsel handle their responsibility to advise the Minister in the future ... It is submitted that Crown Counsel would be hesitant to create written documents in advising the Minister for fear that they will be released in the future to third parties. Crown Counsel deal with sensitive criminal matters. In order to investigate and prosecute effectively Crown Counsel must have the assurances that the legal advice that they provide and the documents they compile in support of such advice and in contemplation of future litigation must remain confidential even if a prosecution never materializes.

The release of these documents would also discourage prospective witnesses from cooperating with the police and the Crown. ...

... The effect that dissemination of the contents of Crown briefs would have on the administration of justice has been noted in the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Ontario Ministry of the Attorney General (1993) (the "Martin Report"). The Martin Report explicitly recognized the need for confidentiality in order to maintain public co-operation with the justice system. ...

...

While proper limiting of recourse to the privilege exemption is best achieved by narrowly interpreting this exemption, the Ministry submits that the exercise of discretion in relation to the privilege exemption in s. 19 of the *Act* should not be interfered with lightly. The disclosure of information given in confidence, absent a compelling interest, would defeat the very purpose of the privilege.

The Ministry also makes the point that the maintenance of public co-operation with the justice system is an underlying policy rationale for solicitor-client communications privilege, and that disclosure of the records at

issue in this appeal would harm the criminal justice system by hindering the investigation and preparation of future cases of this nature, regardless of whether or not charges were laid in this particular case.

I find that the Ministry has properly exercised its discretion in regard to the application of section 49(a) to Record 1 and those pages of Record 2 which contain the personal information of the appellant, his wife and/or his daughter. The remaining pages of Record 2, which contains only the personal information of the appellant's grandson, qualify for exemption under section 19.

Because of my decision that the records qualify in their entirety for exemption under sections 19 and 49(a), it is not necessary for me to consider the sections 13(1), 14(1)(c), 21 and 49(b) exemption claims.

**ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

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July 18, 2000