



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

ORDER MO-1371

Appeal MA-990273-2

Amherstburg Police Service



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:

The appellant submitted a seven parts request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Town of Amherstburg (the Town). The Town then transferred portions of the request (items 1, 3, 4, 5, 6 and 7) to the Amherstburg Police Services Board (the Police). The portions of the request transferred to the Police read as follows:

1. Copies of any and all correspondence from May 1, 1998 to today's date, from the Town and [the Police] to the Ontario Civilian Commission on Police Services and Ministry of Solicitor General pertaining to the delivery of police services in the town.
3. The dollar amount of any and all legal fees incurred by the town as a result of the civil suit filed by [named individual] against [the Police] chief and [Police]; including, but not limited to, advice, court appearances, motions, correspondence, preparations, etc.
4. The dollar amount of any and all legal fees associated with the judicial review of March 19, 1998.
5. The dollar amount of any and all legal costs incurred by the town pertaining to the [*Police Services Act*] hearing of [named individual]; including, but not limited to, preparation, appearances, prosecutor's fees, prosecutor expenses including travel
6. The dollar amount of any and all costs associated with the internal investigation conducted by London Police Service in the fall of 1997.
7. The 1998 contract between the Amherstburg Police Association and the Police.

In response, the Police stated:

A decision has been made to grant you full disclosure to correspondence between the Town, [the Police] to the OCCPS and Ministry of the Solicitor General pertaining to the delivery of police services in the [Town].

Partial access is being granted in relation to the dollar amounts for legal fees incurred by the Town (refer to items 3 through 5 in your [request] letter).

Access is denied to the record pursuant to Section 12 - Solicitor Client Privilege...

The appellant appealed the decision of the Police to withhold portions of records responsive to items 3, 4 and 5 of the request.

I sent a Notice of Inquiry setting out the issues in the appeal to the appellant, who provided representations in response. In the circumstances, I determined that it was not necessary to seek representations from the Police.

RECORDS:

The records at issue in this appeal consist of withheld portions of accounts and reporting letters submitted to the Police by two lawyers for the Police.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Introduction

Section 12 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 counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide an institution with discretion to refuse to disclose:

1. a record that is subject to 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).

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 . . . 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.)].

Thus, section 12 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, it must be demonstrated that one or the other, or both, of these heads of privilege apply to the records at issue.

Solicitor-Client Communication Privilege

Introduction

My review of the records and the surrounding circumstances indicate that the common law solicitor-client communication privilege may apply. This 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].

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-1409]

The privilege has been found to apply to “a continuum of communications” between a solicitor and client:

. . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as “please advise me what I should do.” But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Previous orders

In previous orders, this office has found that solicitor-client communication applies to legal accounts

[see, for example, Orders PO-1714, P-1409 and MO-1339]. In Order PO-1714, Adjudicator Holly Big Canoe stated:

In my view, the Federal Court of Appeal's recent decision in [*Stevens v. Canada (Prime Minister)*] (1998), 161 D.L.R. (4th) 85 (Fed. C.A.)] has persuasive value in the context of the Information and Privacy Commissioner's decisions relating to lawyer's bills of account and solicitor-client privilege. In that case, the requester and appellant had sought access to billings, cheque requisitions and authorizations for certain named counsel who provided services to the Commission of Inquiry headed by Mr. Justice Parker. The Commission of Inquiry had investigated and reported on allegations that Mr. Stevens had a conflict of interest during his tenure as a minister in the Mulroney cabinet.

The Privy Council Office disclosed approximately 336 pages of accounts, receipts and related documents. The accounts normally showed the name of the lawyer providing services, the dates on which services were being rendered, the time spent each day, and disbursements. Billed amounts were disclosed. However the narrative portions on 73 pages, describing the services, were withheld as being subject to privilege. This decision was upheld on appeal by the Information Commissioner, whose decision was upheld by the Federal Court, Trial Division on judicial review.

.

Later (at pages 107-8), the Court describes the privilege applicable to legal bills of account as a "blanket" privilege:

In the case at bar, though the appellant contends that the information which he seeks relates only to acts of counsel and therefore should not be privileged, I am satisfied that the narrative portions of the bills of account are indeed communications. This is not analogous to a situation where a lawyer sells a piece of property for the client or otherwise acts on the client's behalf. The research of a subject or the writing of an opinion or any other matter of that type is directly related to the giving of advice. Despite the fact that the appellant is content to have the specific topic of research remain privileged, those other portions of the bills of account still constitute communications for the purpose of obtaining legal advice. In those circumstances the lawyer is not merely a witness to an objective state of affairs, but is in the process of forming a legal opinion. This is true whether the lawyer is conducting research (either academic or empirical), interviewing witnesses or other third parties, drafting letters or memoranda, or any of the other myriad tasks that a lawyer performs in the course of his or her job. It is true that interviewing a witness is an act of counsel, and that a statement to that effect on a bill of account is a statement of fact, but

these are all acts and statements of fact that relate directly to the seeking, formulating or giving of legal advice. And when these facts or acts are communicated to the client they are privileged. This is so whether they are communicated verbally, by written correspondence, or by statement of account.

The Court further drives home its conclusion that lawyers' bills of account are privileged in their entirety by means of the following commentary on the fact that severed copies had already been disclosed (at page 109):

I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. As I mentioned earlier, a Government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients.

Accordingly, despite the complexity of the issues, the bottom line in *Stevens* is clear. Unless an exception such as waiver applies, lawyers' bills of account, in their entirety, are subject to solicitor-client privilege at common law, and the common law must determine the application of privilege where an access statute incorporates it in an exemption. I agree. Accordingly, in my view, because Records 12, 13, 14, 15 and 20 would be subject to solicitor-client privilege at common law, I find that they are properly exempt under section 19 of the *Act*.

Appellant's representations

The appellant submits that "the records were not created for the purposes of legal advice" and that the events related to her request are now completed. The appellant also submits that "everything that occurred up until [September 1998] was open to the public and is available publicly at the court or in a transcript and witnessed by me already." The appellant continues:

The records are not confidential communication and are not privileged. They may contain a list of routine actions undertaken, without stating the advice sought or given. The attached invoice . . . is an example of one I obtained a couple of years ago; available publicly from the town hall . . .

Public money is being spent and the public, including me, has a right to know what is being incurred.

In a separate appeal with the Town and the Police, the town's law firm recently issued documents to me that were supposedly subject to solicitor/client privilege, attached . . . Would the police services board and the law firm render a similar decision for the records at issue? Were they even consulted?

Findings and conclusions

In my view, the principles in PO-1714, derived in part from *Stevens*, are applicable here. Some of the records at issue clearly on their face consist of legal bills rendered to a client, the Police, in relation to legal advice provided to the Police in relation to particular court proceedings. The remainder of the records consist of reporting letters from the lawyers to the Police. I am satisfied that, on their face, they consist of confidential communications from a lawyer to a client in relation to legal advice on the same matters. Accordingly, I find that all of the records qualify for solicitor-client communication privilege.

In addition, although the Police have chosen to disclose portions of the records, based on the principles in *Stevens*, this partial disclosure does not amount to waiver. Further, the fact that other bills of account, or other similar records have been disclosed in the past, either pursuant to a request under the *Act* or otherwise, does not render the privilege respecting these records inapplicable. Finally, the fact that the matter or matters in question may be completed at this time does not negate the application of solicitor-client communication privilege, as may be the case with litigation privilege. Therefore, the portions of the records at issue are exempt under section 12 of the *Act*.

I appreciate the appellant's concerns surrounding public scrutiny of expenses incurred by the Police. In Order PO-1714, Adjudicator Big Canoe indicated that the amounts charged by legal counsel may not be privileged if they are requested from other sources:

The public policy objectives referred to in the *Stevens* case are valid, and the same considerations are present here. However, if the institution chooses not to waive privilege and disclose the total amounts charged by legal counsel on the lawyers' bills of account, it is worth noting that this information may not be subject to privilege if it is requested from other sources, such as copies of the institution's accounting records.

For example, in [*Ontario (Securities Commission) v. Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Div. Ct.)], the question of privilege arose in the context of a solicitor's activities with respect to money held in trust for the client. Southey J. held that the privilege did not attach to this activity. He stated [at page 337]:

Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. Oral evidence regarding such matters, and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged . . .

Further, in *Law Society of Prince Edward Island v. Prince Edward Island (Attorney General)* [(1994), 382 A.P.R. 217 (P.E.I.S.C.)], the R.C.M.P. attempted to seize documents in the possession of a lawyer relating to trust ledgers, general ledgers and bank reconciliation ledgers which pertained to the dealings of a number of the lawyer's clients. MacDonald C.J.T.D. determined [at p. 221]:

It is the communications between the client and his lawyer that are privileged. The trust ledgers, general ledgers and bank reconciliation ledgers are not communications between the solicitor and the client. These documents form part of the solicitor's records and are reports of acts, not communications. Privilege does not attach to these documents.

ORDER:

I uphold the decision of the Police's to withhold portions of the records at issue.

Original Signed By: _____ November 29, 2000
David Goodis
Senior Adjudicator