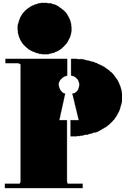

ORDER PO-1833

Appeal PA-990106-1

Ministry of the Solicitor General and Correctional Services

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

BACKGROUND:

This matter stems from a fire which completely destroyed a house in 1997. After an initial investigation into the circumstances surrounding the fire by the local police, the Office of the Fire Marshal (OFM) was notified and conducted its own investigation into the matter. To assist it in its investigation, the OFM engaged the services of the Centre of Forensic Sciences (CFS). (Both the OFM and the CFS are part of the Ministry of the Solicitor General). Subsequently, the police charged an individual (the accused) with arson with intent to defraud the insurer of the property under section 435(1) of the *Criminal Code*. The accused was later convicted by a judge of the Ontario Superior Court of Justice, although this judgment is currently the subject of an appeal before the Court of Appeal for Ontario.

In addition to the above, the owner of the house (the owner) has commenced civil proceedings in the Superior Court of Justice against the insurer, seeking payment for the loss. The insurer has denied coverage on the basis of the alleged arson and alleged fraudulent misrepresentations relating to the insurance policy, and has commenced a counterclaim against both the owner and the accused.

NATURE OF THE APPEAL:

The appellant, the insurer which issued the policy on the house, made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Solicitor General and Correctional Services (now the Ministry of the Solicitor General) (the Ministry). The request was for access to records held by the OFM pertaining to the fire described above.

The Ministry denied access to the records, stating that they "concern a matter which is currently under investigation and/or before the courts." The Ministry also cited the exemptions found in sections 14 (law enforcement), 19 (solicitor-client privilege) and 21 (invasion of privacy) of the *Act*.

The appellant appealed the Ministry's decision to this office.

This office sent a Notice of Inquiry to the Ministry and the appellant setting out the issues in the appeal. Representations were received from both parties. A Supplemental Notice of Inquiry was later sent to the Ministry and the appellant, in response to which representations were received from the Ministry. The Supplemental Notice of Inquiry sought representations on the impact of previous orders of this office on the application of the law enforcement exemption in the circumstances of this appeal.

RECORDS:

During the inquiry the appellant confirmed that she was already in possession of a number of responsive records and, therefore, she agreed that these records were no longer at issue in this appeal. These records are described as follows:

- Records 12-20, OFM Fire Investigation Report dated April 22, 1997 (and duplicate Records 170-178)

- Record 139, undated typewritten statement of firefighter
- Records 140-141, handwritten statement of firefighter dated February 28, 1997
- Record 142, undated handwritten statement of firefighter
- Record 143, handwritten statement of firefighter dated March 3, 1997
- Records 144-145, undated handwritten statement of firefighter
- Records 157-169, local police occurrence report and follow-up reports

Records 90-106 were described in the Report of Mediator as a March 29, 1999 follow-up report. It is actually dated March 29, 1997 and is not a follow-up report, but a handwritten version of the Fire Investigation Report which forms Records 12-20. Because Records 90-106 are identical in content to Records 12-20, I have concluded that Records 90-106 are also no longer at issue in this appeal.

The records remaining at issue include documents prepared by the OFM including an engineering report, several fire investigation reports, major occurrence preliminary information forms, a red book entry form, and handwritten notes. The records also include correspondence to the OFM from insurance adjusters, and from the appellant's client, as well as correspondence from the OFM to the local fire department. Also included are a summons to witness to, and a witness statement of, an OFM engineer, house floor plans, a chemical resistence guide. Finally, the records include CFS reports and a witness statement of a CFS chemist, and local fire department reports.

DISCUSSION:

LAW ENFORCEMENT

Law enforcement report: section 14(2)(a)

Introduction

The Ministry submits that Records 1-9, 10-11, 70-71, 111, 112, 130-131, 132-133, 136, 137-138, 147-148, 151-152, 179-180, 181-182 and 187-188 qualify for exemption under section 14(2)(a) of the *Act*. These records are generally described as an engineering report, several fire investigation reports, major occurrence preliminary information forms and a red book entry form.

Section 14(2)(a) of the *Act* reads:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the Ministry must satisfy each part of the following three-part test:

1. the record must be a report; **and**

2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law [Orders 200 and P-324].

Assistant Commissioner Tom Mitchinson discussed part three of the test at some length in Order P-352. That case dealt with a request to the Archives of Ontario for access to a 1976 report prepared by the Inspection and Standards Branch of the Ministry of Correctional Services concerning alleged inappropriate staff conduct at the Grandview Training School for Girls. Assistant Commissioner Mitchinson stated:

> I have reviewed the record and I find that it is a report, and this report was prepared in the course of an investigation, thereby satisfying the first two parts of the test.
>
> As far as the third part of the test is concerned, the Archives submits that the report was prepared as a result of an investigation conducted by the Inspections and Standards Branch of the Ministry of Correctional Services, pursuant to section 7 of the *Training Schools Act*, which the ministry was responsible for administering in 1976. In the Archives' view, the administrative and enforcement responsibilities under that statute qualify as law enforcement activities, thereby categorizing the ministry as an agency which has the function of enforcing and regulating compliance with a law.
>
> I do not agree with the Archives position. In my view, the investigation conducted by the Ministry was an internal investigation into the operation of a training school. Upon completion of the investigation, the Ministry was not in a position to enforce or regulate compliance with the *Training Schools Act* or any other law. Rather, it determined that the allegations warranted further investigation and forwarded the report to the local Crown Attorney's office. In my view, the Ministry had investigatory responsibility for ensuring the proper administration of the training school, but it was the police force and Crown Attorney's office which had regulatory responsibilities of law enforcement as envisioned by section 14(2)(a) of the *Act*.

The Ministry brought a judicial review application regarding this order. In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, the Divisional Court found this interpretation to be reasonable, quoting the passage above and stating:

> In this case, the Ministry of Correctional Services in conducting an investigation at the Grandview Training School was not engaged in an "external regulatory activity", but was rather conducting an internal investigation pursuant to s. 7 of the *Training Schools Act* . . . There is no regulatory offence that the Ministry was in a position to enforce following its investigation. The Commissioner's order is thus consistent with the established approachto s. 14(2)(a).

[This decision was reversed on other grounds by the Court of Appeal for Ontario; see *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 104 D.L.R. (4th) 454).]

Assistant Commissioner Mitchinson's approach to the third part of the section 14(2)(a) test has been followed in other decisions of this office, including Orders P-392 and M-315.

Accordingly, in my view, in order to satisfy part three of the test for exemption under section 14(2)(a), the agency in question must have had the function of enforcing and regulating compliance with the provisions of the particular law which were the focus of the law enforcement activity, inspection or investigation dealt with in the report.

Representations

The Ministry submits that the records at issue for which section 14(2)(a) was claimed meet the established three part test for exemption for the following reasons:

- This report was the official formal accounting of facts regarding the arson investigation which was conducted by the OFM. This report provided information and/or opinions gathered as a result of interviews with the subjects of the investigation. The information was assessed, evaluated and [was] then submitted as a report with a final disposition;

- The records at issue were gathered and prepared during the course of a law enforcement investigation undertaken by the OFM in accordance with Section 9(2)(a) of the Fire Protection and Prevention Act; and

- The records at issue were prepared or compiled by the OFM, an agency which has the function of enforcing and regulating compliance with the law, including the Fire Protection and Prevention Act.

With respect to the application of section 14(2)(a), the appellant submits:

> Section 14(2)(a) of the *Act* does not apply in the circumstances, because the reports in question were not prepared for the function of enforcing and regulating compliance with a law (no such law has been identified by the Ministry) . . .

Analysis

The records at issue in this appeal stem from an investigation undertaken by the OFM, originally pursuant to section 3(h) of the *Fire Marshals Act* (the *FMA*). That section reads:

> Subject to the regulations and for the prevention and investigation of fire, it is the duty of the Fire Marshal and he has power
>
>> to investigate the cause, origin and circumstances of any fire so reported to him and so far as it is possible determine whether it was the result of carelessness or design;

On October 29, 1997, during the course of the OFM's investigation, the *FMA* was superseded by the *Fire Protection and Prevention Act, 1997* (the *FPPA*). The analogous section in the new statute is section 9(2)(a) which reads:

> It is the duty of the Fire Marshal,
>
>> to investigate the cause, origin and circumstances of any fire or of any explosion or condition that in the opinion of the Fire Marshal might have caused a fire, explosion, loss of life or damage to property;

In my view, in conducting its investigation into the cause of the fire under either the old or the new statute, the OFM was not carrying out the function of enforcing or regulating compliance with a law. Neither the *FMA* nor the *FPPA* contains penalties or any other enforcement provisions which arise from this specific investigatory power (although there are such provisions in relation to enforcement of inspection orders and the fire code - see Part VII of the *FPPA*).

OFM investigations of this nature may reveal possible violations of law, but the law to be enforced in such a case would be the arson provisions of the *Criminal Code*. Most significantly, any criminal investigations or prosecutions in these circumstances are under the purview of the local police and the Crown Law Office - Criminal of the Attorney General for Ontario, not the OFM. If, for example, the OFM determined that a fire resulted from "carelessness or design", criminal charges could be laid, but they would be laid and prosecuted by the police and the Crown, as was the case here. Moreover, nothing would prevent the police and the Crown Law Office -Criminal from laying and prosecuting arson charges, even in the face of an OFM finding that arson was not a cause, or that the cause could not be determined. These distinct roles are borne out by my review of the court's reasons for judgment in this matter.

By this finding I do not suggest that the OFM cannot or does not routinely cooperate with the police and the Crown in certain cases, by sharing information at various stages throughout the criminal investigation and prosecution, and by providing expert testimony. However, the fact remains that, in this role, the OFM does not carry enforcement or regulatory responsibility. As in Order P-352, upon completion of its investigation, the OFM was not in a position to enforce or regulate compliance with the *FMA*, the *FPPA* or any other law in these circumstances.

Accordingly, I find that the records for which section 14(2)(a) was claimed do not qualify for exemption under this section.

The Ministry refers to previous orders of this office in which it states that investigations by the OFM were found to fall under the definition of "law enforcement" (Orders P-1150, P-1449, PO-1650 and PO-1719). These decisions are distinguishable from this case. Each of these orders applied sections 14(1)(a) and (b), but did not consider section 14(2)(a), and also involved a concurrent police investigation. Sections 14(1)(a) and (b) contain a "harms test", requiring that disclosure interfere with a law enforcement matter or a law enforcement investigation. In those cases, it was found that disclosure would interfere with an on-going police investigation. Unlike section 14(2)(a), these sections do not require that the agency in question be one which has the function of "enforcing and regulating compliance with a law."

The Ministry also refers to Order MO-1211 of Adjudicator Donald Hale, which it states also supports the proposition that OFM investigations into the cause of fires are "law enforcement" investigations. Order MO-1211 involved the application of the presumption, contained in the personal privacy exemption, for information compiled as part of an investigation into a possible violation of law, not the law enforcement exemption. In that decision, Adjudicator Hale stated:

> I have been provided with no evidence to conclude that the records were compiled as part of an investigation into a possible violation of law. On its face, the document is a routine report, prepared by the fire department, of the location details of the fire, the equipment used, as well as observations about the fire itself. While it appears that such reports are prepared by firefighters for the purposes of determining the cause or "mechanics" of the fire, they may be distinguished from reports detailing investigations conducted by the police and/or the Fire Marshall who are responsible for determining if a fire resulted from criminal wrongdoing and, if so, for laying charges with respect to possible violations of the law. Accordingly, I conclude that the presumed unjustified invasion of personal privacy found in section 14(3)(b) does not apply.

Adjudicator Hale made no finding in respect of Fire Marshal reports, since no such documents were before him and, therefore, his statements in this regard are *obiter dicta*.

Even if the previous orders relied on by the Ministry can be taken as standing for the proposition that in investigating the cause of fires the OFM is "enforcing and regulating compliance with a law", the Commissioner is not bound by the principle of *stare decisis*, and thus is entitled to depart from earlier

interpretations [see Order PO-1709, and *Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 D.L.R. (2d) 482 (Ont. C.A.); *Portage la Prairie (City) v. Inter-City Gas Utilities* (1970), 12 D.L.R. (3d) 388 (Man. C.A.)].

Conclusion

Records 1-9, 10-11, 70-71, 111, 112, 130-131, 132-133, 136, 137-138, 147-148, 151-152, 179-180, 181-182 and 187-188 do not qualify for exemption under section 14(2)(a) of the *Act*.

Interference with law enforcement/right to a fair trial: sections 14(1)(a), (b) and (f)

The Ministry claims that all of the records at issue in this appeal qualify for exemption under sections 14(1)(a) and (b), which read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;

In order to establish that the particular harm in question under section 14(1)(a), (b) or (f) "could reasonably be expected" to result from disclosure of the records, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order PO-1772; see also Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

The Ministry submits:

> . . . [D]isclosure of the records at issue would interfere with an active law enforcement matter/investigation undertaken by the OFM and the [police] with respect to the circumstances of [the fire]. The records document the investigation and detailed findings which concluded that the fire was an arson.

> While the OFM is no longer actively investigating the fire and the OFM file is presently closed, the [police] have laid Criminal Code charges against an accused and the Criminal trial is set to commence on [specified date].
>
> Release of the OFM file would convey to the appellant (and anyone else [it] chooses to share the information with) confidential information about the source of the fire, the spread of the fire and the nature and extent of the evidence that has been compiled by the OFM and police in connection with the arson. Release of the information at issue might provide the suspect or other involved parties with the opportunity to tamper with evidence which may exist but may not be known to police at this time and subsequently prejudice a fair trial which is scheduled to commence on [specified date].
>
> The Ministry submits that the release of the records at issue would seriously interfere with an ongoing law enforcement investigation. Public dissemination of the information in the records, at this point in time, could lead to the suppression or destruction of evidence and could alert the suspect or others about the extent and nature of the evidence compiled by the OFM and the police which could hinder or in any way be seen or perceived to prejudice the right of the accused to a fair trial.

The appellant submits:

> The expectation of harm referred to in s. 14 of the *Act* must be based on reason. There must be some logical connection between disclosure and the potential harm which the Ministry seeks to avoid by applying th exemption. The onus is on the Ministry to provide evidence to substantiate the reasonableness of the expected harm.
>
> With respect to s. 14(1)(a), disclosure of the records could not possibly interfere with a law enforcement matter. We believe that the Ministry's records will have already been disclosed to the Crown, and through Crown disclosure requirements, to [the accused's] defence counsel.
>
> With respect to section 14(1)(b), disclosure of the records will not interfere with an investigation, since the investigation is already *complete*. Charges have already been laid, the accused . . . has undergone a preliminary hearing, and has been committed to stand trial. Law enforcement proceedings are not "likely to result" (in the words of the section) - they have already resulted.
>
> With respect to section 14(1)(f), disclosure of the records will not deprive [the accused] of a fair trial. We believe that the records have already been disclosed to the Crown and the defence. (In any event, even if the records have not been disclosed, they should be disclosed. Anything less than full disclosure of the Ministry's records would not permit a fair trial for [the accused].) [appellant's emphasis]

In Order P-1584, involving a request for records of the Coroner's Office compiled by the Ontario Provincial Police (OPP), Assistant Commissioner Mitchinson stated:

> Turning first to section 14(1)(b), the Ministry has advised this office that the OPP investigation has been completed and the appellant's daughter has been charged under the *Criminal Code of Canada*. Because the law enforcement matter has now reached the prosecution stage, I am not persuaded that disclosure of the record could reasonably be expected to interfere with an *ongoing* investigation. Therefore, I find that section 14(1)(b) is no longer applicable.
>
> As far as section 14(1)(a) is concerned, the Ministry states that disclosure would interfere with an active law enforcement matter undertaken by the OPP, but its representations focus almost exclusively on how disclosure would interfere with the OPP investigation. The Ministry submits:
>
>> The Ministry is of the view that release of the coroners records *at this point in time* [i.e. before completion of the OPP investigation] could lead to the suppression of potential evidence and would alert the involved parties about the extent and nature of the evidence compiled by the Ontario Provincial Police, a circumstance which would hamper the conduct of the ongoing police investigation into the baby's birth and death.
>> [emphasis in original]
>
> As previously indicated, the investigation is completed, and charges have been laid. For this reason, and based on the evidence provided by the Ministry and my review of the record, I am not persuaded that disclosure of the record could reasonably be expected to interfere with a law enforcement matter, and I find that section 14(1)(a) is not applicable.
>
> Accordingly, I find that the requirements of sections 14(1)(a) and (b) have not been established by the Ministry, and therefore, the record does not qualify for exemption under section 49(a) of the *Act*.

As in Order P-1584, the law enforcement matter in this case has progressed beyond the investigation stage, and is now in the prosecution phase. In the absence of any evidence to the contrary, I conclude that there is no current investigation of the matter, and therefore section 14(1)(b) cannot apply.

With respect to section 14(1)(a), although the trial has been completed, the matter is currently under appeal, and it is conceivable that a new trial may be ordered. In the circumstances, I am satisfied that the law enforcement "matter" is continuing. However, the Ministry has failed to provide detailed and convincing evidence to establish that disclosure could reasonably be expected to interfere with a law enforcement matter. Presumably, some of the records in question would have been provided to the Crown Attorney

and, in turn, the accused prior to the trial. The Ministry has not provided any explanation of the extent to which these records have or have not been disclosed to the accused, which would put me in a position to determine whether the disclosure of any particular record could reasonably be expected to interfere with this matter. The Ministry's generalized assertion is not "detailed and convincing".
With respect to section 14(1)(f), I find similarly that the Ministry has failed to provide detailed and convincing evidence to support the application of this exemption. I cannot accept a generalized assertion that disclosure could reasonably be expected to interfere with the accused's right to a fair trial, in the absence of more detailed evidence and argument.

Accordingly, based on the evidence and arguments provided by the Ministry and my review of the records, I am not persuaded that disclosure of the records could reasonably be expected to interfere with the law enforcement matter or investigation in question, or deprive the accused of the right to a fair trial.

As a result, I find that none of the records is exempt under section 14(1)(a), (b) or (f). Since I also found that section 14(2)(a) was not applicable in the circumstances, I will order disclosure of all of the records, unless I find that some or all of them are exempt pursuant to the section 19 solicitor-client privilege exemption or the section 21 personal privacy exemption.

SOLICITOR-CLIENT PRIVILEGE

Introduction

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 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 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the Ministry must demonstrate that one or the other, or both, of these heads of privilege apply to the records at issue.

The Ministry states that it is relying on "branch two" in this appeal, but does not clearly state which of the two heads of privilege applies to the records at issue. Because the Ministry uses language in its representations which suggest that both may apply, I will consider the application of solicitor-client communication and litigation privilege, with reference to the common law.

Litigation privilege

Introduction

In Order MO-1337-I, Assistant Commissioner Mitchinson discussed the scope of litigation privilege, particularly in light of a recent landmark decision of the Court of Appeal for Ontario in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321:

> In *General Accident*, the majority of the Court of Appeal questioned the "zone of privacy" approach and adopted a test which requires that the "dominant purpose" for the creation of a record must have been reasonably contemplated litigation in order for it to qualify for litigation privilege . . .
>
> . . . . .
>
> In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:
>
> > The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
> >
> > > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
> The test really consists of three elements, each of which must be met. First, it must have been *produced* with contemplated litigation in mind. Second, the document must have been produced for the *dominant purpose* of receiving legal advice or as an aid to the conduct of litigation - in other words for the dominant purpose of contemplated litigation. Third, the prospect of litigation must be *reasonable* - meaning that there is a reasonable contemplation of litigation.
>
> Thus, there must be more than a vague or general apprehension of litigation.

Applying the direction of the Courts and experts in the area of litigation privilege, in my view, a record must satisfy each of the following requirements in order to meet the "dominant purpose" test:

1. The record must have been created with existing or contemplated litigation in mind.

2. The record must have been created for the dominant purpose of existing or contemplated litigation.

3. If litigation had not been commenced when the record was created, there must have been a reasonable contemplation of litigation at that time, i.e. more than a vague or general apprehension of litigation.

In applying this test, it is necessary to bear in mind the time sensitive nature of this type of privilege, and the fact that, even if the dominant purpose for creating a record was contemplated litigation, privilege only lasts as long as there is reasonably contemplated or actual litigation.

In Order MO-1337-I, Assistant Commissioner Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief. This aspect of litigation privilege arises from a line of cases that includes *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.) and *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.). As the Assistant Commissioner points out in his analysis, the test for this aspect of litigation privilege from *Nickmar* was quoted with approval by two of the three judges in *General Accident*. As a result, the Assistant Commissioner

concluded that this aspect of privilege remains available after *General Accident*, and he adopted the test in *Nickmar*:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

The Assistant Commissioner then elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere", and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief". Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation under the *Nickmar* test and should be tested under "dominant purpose".

I agree with the Assistant Commissioner's approach to litigation privilege as set out above, and I will apply it for the purpose of this appeal.

Representations

The Ministry submits:

> The record at issue in this appeal, was compiled by the OFM as a result of their investigation into an incendiary fire. When the OFM determines that a fire was not accidental but caused by a Criminal Act it does prepare the report in contemplation of litigation, that being, a Criminal charge being laid and subsequent trial. It is the position of the Ministry that the record at issue forms part of the brief/evidence which was then submitted to the Crown Attorney for the purposes of litigation, the laying of charges contrary to the Criminal Code, a Federal Statute. The records compiled would form part of the brief prepared by the [police] for the Crown counsels providing them with advice during the investigation. The record of the police findings into the investigation includes evidence from the OFM and is the normal manner through which police communicate to Crown counsel when determining whether charges will be laid. This brief is the communication between the police and Crown counsel which is used by the police to seek advice on whether reasonable grounds exist to lay charges and on what charges are appropriate to lay. The brief is used by Crown counsel in the formulating and provision of advice with regard to the laying of charges. The record does not contain underlying factual

> material and consideration in relation to giving legal advice for this investigation. In this circumstance a Criminal charge was laid and presently before the courts.
>
> In Order 225, Commissioner Tom Wright, found that records which were prepared for use at a criminal trial qualified for exemption. The Ministry submits that similar reasoning applies with respect to this prosecution.

The appellant submits:

> Neither the statements nor the reports in issue can be considered solicitor-client communications, because they are not direct communications to a solicitor or a solicitor's agents or employees.
>
> The Ministry bears the onus of proving that the records in issue are subject to privilege. If the Ministry can show that the records in issue are subject to litigation privilege, they could only be privileged as "ordinary" work product, and not as "opinion" work product, since they do not reflect the options of Crown counsel. The rationale behind litigation privilege is to protect the adversary system of justice. Disclosure of the records in issue would have no effect on the adversary system, particularly if the records are not "opinion" work product. The records are required to be disclosed to the defence as part of the Crown disclosure requirements in any event.

Application of litigation privilege

The majority of the records at issue (Records 1-11, 26-46, 51, 68, 70-71, 76, 107-112, 128-138,146-148, 151-152, 179-180, 181-182, 187-1889) were prepared by the OFM for the purpose of its own investigation. Consistent with my findings above under the heading "law enforcement", I find that these records were prepared for the dominant purpose of the OFM discharging its statutory duty to investigate the cause of the fire under the *FMA* and/or the *FPPA*. As a result, they do not meet the "dominant purpose" test for litigation privilege.

Records 47-50 and 56-67 consist of witness statements of staff of the OFM and CFS. Although it appears that they were prepared either by the police or the Crown Attorney for the purpose of litigation, the copies under consideration here are those in the custody of the OFM. The court in *General Accident* found that, although copies of such a statement in the hands of a party litigant, or its counsel, would satisfy the dominant purpose test and qualify for litigation privilege, they were not privileged in the hands of the individual who made the statement, who was not at that time a party to the litigation. The fact that he later became a defendant by counterclaim did not alter this conclusion. The court stated (at p. 340):

> Pilotte [the individual who gave the statement] was merely a witness who was under no apparent threat of litigation. If events had proceeded in the normal course without a counterclaim and he was called as a witness at trial he would have no more reason to refuse

> production of the statement than any witness to a motor vehicle accident who has been provided with a witness statement to refresh his or her memory before giving evidence. The cross-examiner would be entitled to its production and claims of litigation privilege would be hollow.
>
> The fact that Pilotte became a defendant by counterclaim did not change the status of the statement in his hands.

In my view, the statements in the hands of the OFM are analogous to the copy of Pilotte's statement that was in his possession. The individuals who gave these statements were not parties to the litigation, and there is no information before me to suggest that they are or ever were under any "apparent threat" of becoming so. On this basis, I find that Records 47-50 and 56-67 do not qualify for litigation privilege.

I also find that the remaining records, although prepared by other parties (including the CFS and the local fire department) and later compiled by the OFM, do not meet the dominant purpose test. For example, in the case of CFS records (Records 52-55), the dominant purpose for their creation was to assist the OFM in carrying out its function. In the case of Records 77-87 and 116-127, prepared by the local fire department, these records were prepared for the dominant purpose of reporting on its involvement with the fire, as a matter of routine [see Order M-1211]. The Ministry has not satisfied me that any of the remaining records were prepared for the dominant purpose of existing or contemplated litigation.

Regarding the *Nickmar* test for documents that find their way into the lawyer's brief, in my view, this aspect of litigation privilege can only apply to the copies of records that are actually in the possession of the lawyer. This conclusion arises in part from the way courts have described the kinds of records that can qualify (for example, "public documents", "documents that can be obtained elsewhere", as outlined in the extract from Order MO-1337-I reproduced above). I also note that in *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworths: Toronto, 1993), the authors state (at p. 103) that this aspect of privilege applies to a "collection of documents":

> In essence, there is a separate head of privilege for a collection of documents as a whole, even where some of those documents individually would not meet the test for privilege. The key is that the lawyer's knowledge, skill and research went into the formation of the collection.

The records at issue in this appeal are in the possession of the OFM, which is not a party to any litigation. These particular copies of the records are not in the possession of counsel for a party to litigation or contemplated litigation. In my view, this means that they cannot qualify under this head of litigation privilege since they are not part of litigation counsel's "collection of documents", nor were the OFM's copies assembled as the result of the application of litigation counsel's skill or knowledge. In my view, that is sufficient to dispose of this issue. In addition, however, I have not been provided with sufficient evidence to demonstrate that any of these records actually form part of *any* lawyer's brief for litigation or, if they are in such a brief, that they were "selectively copied" or placed there as a result of the exercise of skill or

knowledge by the lawyer. Therefore, I find that the "collection of records" test in *Nickmar* does not apply in the circumstances of this appeal.

The Ministry has not claimed that any of the records at issue are subject to litigation privilege in relation to the civil proceedings, which is not surprising given that neither the Ministry nor the Attorney General is a party to those proceedings. In the circumstances, I find that none of the records is subject to litigation privilege with respect to the civil proceedings.

As a result, I find that none of the records at issue qualifies for litigation privilege.

Although this office has refined its approach to litigation privilege in light of the Court of Appeal decision in *General Accident*, I also would have found that the records at issue would not qualify under this head of privilege under the Commissioner's previous approach, for the same reasons outlined above. As outlined in Order P-1551, the Commissioner's previous interpretation indicated that litigation privilege would only apply to documents "where the *dominant purpose* for which they were created or obtained is existing or reasonably contemplated litigation" (emphasis added). I have found that none of the records at issue was created for the dominant purpose of litigation or contemplated litigation. Moreover the approach I have taken to collections of records is based on the law as it previously existed, because *General Accident* did not modify this aspect of litigation privilege (Order MO-1337-I).

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).

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].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

In my view, none of the records at issue in this appeal can be characterized as confidential communications between a lawyer and client made for the purpose of providing legal advice. As found above, these records were created or compiled by the OFM for the purpose of discharging its statutory duty to investigate the fire, and they do not contain, nor would they reveal, confidential communications between a lawyer and client for the purpose of obtaining legal advice.

Conclusion

The Ministry has not persuaded me that any of the records qualify for either solicitor-client communication privilege or litigation privilege. Therefore, the exemption at section 19 does not apply.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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 [paragraph (h)].

The Ministry submits that the responsive records "consist of recorded personal information about the appellant's client and other identifiable individuals in accordance with section 2(1) of the *Act*." The Ministry's position appears to be that all of the records in their entirety constitute personal information.

The appellant submits that the records may contain names and addresses of individuals "which may qualify as personal information." The appellant further submits:

> . . . We note that an individual's name only qualifies as personal information where it appears with other personal information relating to that individual, or where the disclosure of the name would reveal other personal information about the individual. We doubt that disclosure of the names of the persons who gave statements would constitute disclosure of personal information in the circumstances, so long as those individuals' addresses are not also disclosed.
>
> "Personal information" means recorded information *about an identifiable individual*. To the extent that the [witness] statements include observations made by the persons giving the statements, we submit that this is not personal information within the definition of the *Act*. Observations are different from opinions or views.
>
> We doubt that the report prepared by [named OFM Fire Protection Engineer] and the "fire investigation follow up reports" contain personal information. The reports concern observations of property and professional engineering opinions. This information would not fit within the definition of personal information because it is not information "about an identifiable individual". If the reports contain names, addresses and credentials of persons, that information may fit the definition of personal information, but the substantive observations and conclusions in the reports would not [appellant's emphasis].

I do not accept the Ministry's position that the records as a whole constitute personal information. Much of the information in the records is non-personal in nature, including information about individuals in their employment or professional capacities [see Reconsideration Order R-980015]. However, it is clear that the records do contain some information about identifiable individuals in their personal capacity, including the names of the accused and the owner of the house, as well as information about their involvement in the events surrounding the fire. In addition, I do not accept the appellant's submission that the names of individuals providing statements in their personal capacities do not constitute personal information. Disclosure of the names alone would reveal other personal information about these individuals, in the circumstances. Therefore, some of the information in the records qualifies as personal information within the meaning of the definition in section 2(1) of the *Act*.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (h) of section 21(1) applies. The appellant takes the position that the exception at section 21(1)(f) applies. That section 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 institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that 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) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In support of its position, the appellant submits that it requires the records because they "are important to [the appellant's] defence in the litigation." This submission suggests the application of the factor favouring disclosure at section 21(2)(d) which reads:

> 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,
>
> > the personal information is relevant to a fair determination of rights affecting the person who made the request;

Assistant Commissioner Tom Mitchinson stated the test for the application of section 21(2)(d) in Order P-312 [upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)]:

> In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:
>
> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

I am not persuaded that the appellant's submissions with respect to the determination of the accused's rights meet the threshold under section 21(2)(d), since the person making this request is not the accused. Moreover, while some of the personal information in the records may be relevant to the issues to be determined in the civil litigation, the appellant has not provided a sufficient basis for me to conclude that this information is required in order to prepare for the proceeding or to ensure an impartial hearing. The appellant has retained specialized insurance litigation counsel for the purpose of those proceedings, and I am not convinced that discovery mechanisms available to the appellant would be insufficient to ensure a fair hearing.

In addition, I find that no other factors favouring disclosure of personal information apply here. As a result, the exception at section 21(1)(f) does not apply, and the personal information in the records is therefore exempt under section 21.

PUBLIC INTEREST OVERRIDE

Section 23 of the *Act* reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, *21* and 21.1 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption [emphasis added].

In order for the section 23 "public interest override" to apply, two requirements must be met: there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [Order P-1398, cited above].

The appellant submits:

> . . . [T]here is a compelling public interest in the disclosure of the records, pursuant to s. 23 of the *Act*. [The accused] is alleged to have committed arson and fraud, thereby endangering the lives of firefighters, and the lives and property of neighbours, and the property interests of his insurer, [the appellant]. [The appellant] has denied coverage under the insurance policy on the grounds of arson and fraud and is being sued under the policy. The records in issue are important to [the appellant's] defence in the litigation. [The

> appellant's] ability to mount a defence is not only relevant to its own property interests, but is also relevant to the interests of all of its insurance policyholders who should not be required to subsidize arson. The interests of all these parties constitutes a compelling public interest.

In my view, the appellant's arguments under section 23 are not persuasive. The appellant's interest in this matter is primarily private in nature, and I am not convinced that any public interest which might exist in disclosure of this information would be such that the "compelling" threshold is met. As a result, I find that section 23 does not apply to override the application of the section 21 exemption.

ORDER

1. I uphold the Ministry's decision to withhold the personal information in the records as identified in the highlighted copy of the records included with the Ministry's copy of this order.

2. I do not uphold the Ministry's decision to withhold the balance of the information in the records.

3. I order the Ministry to disclose the records to the appellant, with the exception of the information highlighted on the copy of the records to be severed included with the Ministry's copy of this order, by **December 4, 2000**.

4. In order to ensure compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the material sent to the appellant.

Original Signed By: November 10, 2000
David Goodis
Senior Adjudicator