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

ORDER PO-1879

Appeal PA_000112_1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of nnformation and Protection of Privacy Act* (the *Act*), from a lawyer, for the following:

- all materials filed by the Crown in support of the application to declare a named individual a dangerous offender;
- any materials filed by the named individual in response to the application;
- copies of all documents made exhibits at the dangerous offender application;
- any other documentation in the Ministry's file relating to the named individual.

The Ministry identified one responsive record, consisting of a two-volume, 353-page package of documents, and denied access to this record in its entirety pursuant to the exemptions at sections 19 (solicitor-client privilege) and 21(1) (invasion of privacy) of the *Act*. The Ministry identified the presumption in section 21(3)(b) of the *Act* in support of the section 21(1) exemption claim.

In a supplementary decision letter, the Ministry identified section 15(b) (relations with other governments) as an additional exemption claim for page 331, and claimed that pages 71-75 fall outside the scope of the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

During mediation, the appellant identified the factor described in section 21(2)(d) as a relevant consideration in determining whether disclosure would constitute an unjustified invasion of personal privacy. The appellant also took the position that the Ministry's decision letter was inadequate, in that it failed to provide reasons for denying access under section 21(1), and thereby failed to satisfy the requirements of section 29(1)(b)(ii) of the *Act*.

Mediation was not successful, so the appeal proceeded to the adjudication stage. I sent a Notice of Inquiry initially to the Ministry, and received representations in response. I then sent the Notice to the appellant, together with the non-confidential portions of the Ministry's representations. The appellant did not provide representations.

RECORDS:

The record consists of a two-volume, 353-page package of documents pertaining to the dangerous offender application made by the Attorney General regarding the individual identified in the appellant's request.

PRELIMINARY ISSUE:

Adequacy of Decision Letter

Section 29(1)(b)(ii) reads:

> Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
>
> > where there is such a record,
> >
> > > the reason the provision applies to the record,

The Ministry's decision letter states the following in regard to section 21:

> Access to the record (approximately 353 pages) is denied pursuant to the following subsections and/or sections of the *Act*:
>
> - section 21 as the record contains personal information of other individuals and disclosure of that information would constitute an unjustified invasion of personal privacy; and
> - subsection 21(3)(b) as the personal information was compiled and is identifiable as part of an investigation into a possible violation of law.

The Ministry has chosen to simply use the language of the particular sections in order to explain why these provisions apply in the context of this appeal.

As stated in previous orders, the purpose of section 29(1)(b) is to put the requester in a position to make a reasonably informed decision on whether to appeal the head's decision (see, for example, Orders 158, P-235, P-324 and M-936). A restatement of the language of the legislation is generally not sufficient to satisfy the requirements in section 29(1)(b)(ii) (Order M-936). In future, I would encourage the Ministry to expand on the reasons it provides to requesters for denying access to records.

That being said, the appellant in this case is aware that a dangerous offender application was made by the Attorney General regarding the named individual and, as a lawyer, would be generally aware of the types of documents associated with an application of this nature and the type of personal information typically included. The appellant was also provided with a copy of all non-confidential portions of the Ministry's representations which, when combined with other information within the appellant's knowledge, is, in my view, sufficient information to enable him to address the issues in this appeal.

DISCUSSION:

Solicitor-Client Privilege

General

Section 19 of the *Act* 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.

The Ministry submitted the following in their representations.

> This exemption covers records subject to the common-law solicitor-client privilege (Branch 1) or those records prepared by or for Crown counsel or counsel employed or retained by an institution, for use in giving legal advice or in contemplation of or for use in litigation (Branch 2). The common law privilege applies to: (i) all communications, verbal or written, of a confidential character, between a client, or his or her agent, and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers directly related thereto); and (ii) papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated. Branch 2 can apply regardless of whether the common-law privilege applies."

I do not accept the Ministry's statement that "branch 2" of the section 19 exemption can apply regardless of whether the common-law solicitor-client privilege exists.

Many previous orders of this Office, beginning with Order P-52, have indicated that this section consists of two "branches". The first "branch" has been found to incorporate the common law concepts of solicitor-client communication privilege and litigation privilege; while the second "branch" relates to the closing words of the section (ie "... prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation").

The wording of section 19 raises the issue of whether the second "branch" is intended to create a privilege that is broader or more durable than that which is available at common law. This issue was considered in detail by Adjudicator Holly Big Canoe in Order P-1342. In that case, she concluded that waiver of privilege had occurred because of a disclosure by Crown counsel to the Law Society of Upper Canada, resulting in the loss of privilege at common law. She then went on to consider whether the closing words of the section allow the exemption to apply despite the loss of common law privilege through waiver.

To assist in making this determination in Order P-1342, Adjudicator Big Canoe reviewed the legislative history of section 19 in order to ascertain the legislature's intent. As she notes in that order, the closing words of the section were added to the *Act* while it was being considered by the Standing Committee of the Legislative Assembly. The following quotation from the Hansard record of the committee's proceedings explains the purpose of this change:

> **Hon. Mr. Scott**: As I said the other day, this is just to expand the coverage designed to ensure protection for solicitor-client material to crown counsel, who

> according to how you view the law, may or may not have a client and therefore may or may not have, technically, the benefit of solicitor-client privilege. I would have not thought the issue was contentious.
> ...
>
> To be fair, Mr. Chairman, I do not think it really extends section 19; it clarifies it. The use of the words, "for use in giving legal advice or in contemplation of or for use in litigation" really adds nothing because they would be within our understanding of what a solicitor-client privilege is anyway.
>
> The key words, and the words that clarify, are "crown counsel" because the case is made that crown counsel may not, in a highly theoretical sense, have a client. Because crown counsel has a kind of independent role that a normal lawyer does not have, a crown counsel may be thought, in a technical sense, not to have a client. The policeman is not the crown counsel's client, but as a matter of clarification it was recognized that opinions given by crown counsel should be producible or not in the same way as opinions given by any other crown lawyer.
>
> (Monday, March 30, 1987, Morning Sitting, pages M-1, M-3)

Adjudicator Big Canoe determined that the closing words of the section were added:

> ... 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.

She went on to conclude that this part of the section "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." Because waiver had occurred, she found that the exemption did not apply. In *Ontario (Attorney General)* v. *Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.), the Divisional Court upheld Order P-1342.

Adjudicator Big Canoe subsequently considered the same issue in Order P-1551. In that case, she found that where litigation had terminated, litigation privilege was no longer available at common law, and for this reason privilege could no longer be claimed under any part of the section 19 exemption. She stated:

> In my view, consistent with [*Ontario (Attorney General) v. Big Canoe*], other common law principles which define the scope of solicitor-client and litigation privilege should apply equally to both branches. This preserves for government institutions the full scope of the privilege extended to private litigants.

In essence, former Adjudicator Big Canoe in her two orders was rejecting the "branch 1/branch 2" distinction made by this Office in previous cases. In her view, which I share, the Crown has the right to claim the equivalent protection of solicitor-client privilege available at common law,

but the additional words added to the end of section 19 during legislative debate do not add to this right. In other words, if records in the custody or control of an institution which would have been protected by solicitor-client privilege at common law lose this protection through waiver or termination of litigation, then the fact that these records were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation has no bearing on the application of the doctrine of solicitor-client privilege. If privilege is lost or terminates at common law, then it is also lost or terminates in the context of a solicitor-client relationship involving Crown counsel.

In the present appeal, the Ministry claims that all the records are exempt under "branch 2" and states that "... the limitations of solicitor-client privilege do not apply to Branch 2 of s. 19". In effect, the Ministry is arguing that Orders P-1342 and P-1551 were wrongly decided.

The Ministry submits that it was implicit in the Court's ruling on the judicial review of Order P-1342 that the section 19 privilege did not end when the litigation in that case came to an end, or the court would not have considered waiver. I disagree with this position, which is not supported by anything in the decision. It was open to the Court, and to Adjudicator Big Canoe, to rely on waiver instead of termination of litigation as a basis for concluding that privilege no longer existed. The opening words of the endorsement are a succinct summary of the view taken by the Court:

> In our view any obligation that counsel for the Crown had to the Law Society did not obligate him to report anything that would entail a breach of solicitor-client privilege. Accordingly by reporting to the Law Society what was privileged, the Crown voluntarily waived privilege and that information is no longer shielded from disclosure under the *Freedom of Information and Protection of Privacy Act*.

The Ministry also submits that the statement in Order P-1342 that section 19 is not intended to create a privilege more durable than that which is available to "other solicitor-client relationships" fails to take account of the fact that private solicitors are not subject to requests under the *Act*. This submission implies that solicitors acting for institutions are entitled to a higher form of privilege than private sector counsel. This is in conflict with the legislative intent, as already canvassed, and unsupported by anything in the law of privilege itself. The Ministry also argues that "there is nothing in the plain meaning of the section that indicates that this exemption ends when litigation ends". Given the incorporation of common law concepts of privilege into section 19, I do not accept this argument.

Moreover, the approach taken by Adjudicator Big Canoe in Orders P-1348 and P-1551, relying on legislative history as a guide to legislative intent, is consistent with the modern rule of statutory interpretation. In *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)* (1996), 140 D.L.R. (4th) 577 at 640 (S.C.C.), Madam Justice L'Heureux_Dubé adopted the following passage from Professor R. Sullivan in *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), at p. 131:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the

> presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

Adjudicator Big Canoe's conclusion that common law principles limit the availability of section 19 is plausible given that this is a privilege-based exemption. It is also efficacious because it promotes the purposes of access under the *Act* identified at section 1, that "information should be available to the public" and that "necessary exemptions from the right of access should be limited and specific." Moreover, its outcome is reasonable and just because it achieves a result that is consistent with the availability of privilege at common law, and this important public policy goal is therefore protected and promoted.

The Ministry also argues that Orders P-1342 and P-1551 contradict past decisions of the Commissioner's Office. It is well known that the doctrine of *stare decisis* does not apply to administrative tribunals so as to make their own past decisions binding on them. This allows them to develop their interpretation over time, as has happened with the section 19 exemption. As stated by Justice Gonthier in *Tremblay v. Quebec (Commission des affaires sociales)* (1992), 90 D.L.R. (4th) 609 (S.C.C.):

> Ordinarily, precedent is developed by the actual decision-makers over a series of decisions. The tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges. This, of course, is a longer process; but there is no indication that the legislature intended it to be otherwise.

The type of approach described by Justice Gonthier is especially appropriate where the Commissioner is required to interpret and apply an external body of law, such as solicitor-client privilege, which is itself subject to change. In fact, the law of privilege has changed considerably over time. For example, in *Solosky v. R.* (1979), 105 D.L.R. (3rd) 745 (S.C.C.) and *Descoteaux v. Mierwinski* (1982), 70 C.C.C. (2d) 385 (S.C.C.), the Supreme Court of Canada clarified that solicitor-client privilege, formerly viewed as a rule of evidence, is also a substantive rule that could apply even in the absence of court proceedings. More recently, in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.), the Ontario Court of Appeal altered the scope of litigation privilege to require that, in order for a document produced with litigation in mind to qualify for litigation privilege, the dominant purpose for its preparation must be reasonably contemplated litigation, to bring litigation privilege in line with the modern trend of complete discovery. I applied this change in the law in Order MO-1337-I.

The recent evolution of the Commissioner's approach to the solicitor-client privilege exemption is primarily reflected in Orders P-1342 and P-1551. As indicated in those orders, the application of section 19 depends on the availability of common law solicitor-client privilege. It 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 "branch 1/branch 2" approach described in previous order of this Office, to the extent that it may be interpreted as being inconsistent with the scope of solicitor-client privilege described above, is not a useful analytical tool and should no longer be applied.

Solicitor-Client Communication Privilege

The Ministry claims that the record is exempt under section 19 on the basis that it was "... (1) created by or for Crown counsel in giving legal advice and (2) created by or for Crown counsel in contemplation of litigation."

At common law, 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).

In order for a record to be subject to the common law solicitor-client communications privilege, the institution must provide evidence that the record satisfies either of the following tests:

(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; [Order 49]

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, supra,* 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).

The Ministry submitted that the record constitutes legal advice given by Crown counsel to the Attorney General. Specifically, the Ministry states:

> This record was compiled for the Crown Law Office - Criminal for the purpose of giving legal advice to the Minister (re an application to declare a named individual a dangerous offender, s. 754 of the *Criminal Code*) and the record was created in contemplation of litigation (the dangerous offender application). The trial Crown compiled the record in order to seek the Attorney General's consent. The trial Crown and the Crown Law Office - Criminal based their advice to the Minister on the material in the application ...
>
> The records contain statements of civilians and police officers and synopsis and documentation that formed the Crown brief. The witness and victim impact statements were provided to the police and then the Crown with the implicit understanding that they would only be used for the prosecution of the criminal matters. In order not to inhibit future witnesses from coming forth and cooperating with the police and the Crown Attorney's Office it is essential that these documents retain their confidentiality. The brief was compiled in order to advise the minister with respect to a dangerous offender application and prepared for the prosecution of that matter.

From my review of the record and the Ministry's submissions, I find that the record meets the solicitor-client communication privilege test as set out above. It consists of a communication between Crown counsel and the Attorney General made for the purposes of advising and seeking the Attorney General's consent for the dangerous offender application. Based on the nature of the record and the context in which it was compiled, I am confident that this information was confidential as between the Crown and the Attorney General. Accordingly, I find that the record qualifies for exemption under the solicitor-client communications privilege component of section 19 of the *Act*.

Because I have found that the record is exempt under section 19, it is not necessary for me to address sections 15(b) and 21(1) of the *Act*.

ORDER:

I uphold the decision of the Ministry.

Original signed by: March 14, 2001
Tom Mitchinson
Assistant Commissioner