



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-1946

Appeal PA-000187-2

Ministry of Health and Long-Term Care



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This is an appeal of a decision by the Ministry of Health and Long-Term Care (the Ministry) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*). The Ministry received a three-part request for access to information under the Ontario Drug Benefit Formulary program, and dealt with each as a separate request (“Application One”, “Application Two”, “Application Three”).

In response to the request under Application Three, the Ministry issued an interim decision together with a fee estimate of \$600.00. The requester, now the appellant, appealed the Ministry’s fee estimate under Appeal PA-000187-1. Appeal PA-000187-1 was resolved and the terms of settlement were set out in the Report of the Mediator as follows:

During mediation, the appellant narrowed the scope of application three of his request to records maintained by the Legal Services Branch only. The Ministry confirmed that it is not charging any fees for the search at this branch and agreed to issue a final decision to the appellant. The parties have agreed that the Ministry will have 30 days from the date of this report, to issue its final decision to the appellant. Accordingly, this resolved the appellant’s appeal as it relates to application three of his request.

The Ministry subsequently located four records as responsive to the narrowed request in Application Three. It issued a final decision letter advising the appellant that access to these records was denied in their entirety on the basis of the exemptions at sections 19 (solicitor-client privilege), 17 (third party information), 18 (economic and other interests of Ontario) and 21 (invasion of privacy) of the *Act*.

The appellant appealed the Ministry’s decision and a new appeal was opened, PA-000187-2. In his appeal letter, the appellant asserts that additional records should exist, outside the Legal Services Branch, and possibly in the “financial/contractual branch”. The Ministry’s position is that the narrowed request is clear and pertains only to records in the Legal Services Branch. Accordingly, the scope of the request is also at issue in this appeal.

Mediation was not successful and a Report of the Mediator was prepared and shared with the Ministry and the appellant.

I sent a Notice of Inquiry to the Ministry, initially, summarizing the facts and issues of this appeal. The Ministry returned representations, the non-confidential portions of which were shared with the appellant, together with a Notice of Inquiry. The appellant also returned submissions.

RECORDS:

There are four records at issue in this appeal. Records 1A/1B and 3A/3B consist of briefing notes and a retainer letter concerning private sector legal counsel. Records 2 and 4 each consist of a covering letter and a statement of account with respect to legal billings.

DISCUSSION:

SCOPE OF THE REQUEST

The Ministry submits that it:

... first received a three-part request for access to information under FIPPA. The Ministry dealt with each part, “Application One, Application Two” and “Application Three”, as separate requests. In response to the third request, the Ministry issued an interim decision together with a fee estimate of \$600.00. The requester appealed the decision which resulted in mediation. During mediation, the appellant narrowed the scope of “Application Three” to “**records maintained by the Legal Services Branch**” [emphasis added]. The Ministry confirmed that it would not charge fees for the search in this Branch and agreed to issue a final decision within 30 days of the date of the Mediator’s Report. A decision letter was issued by the Ministry indicating that it had located four records responsive to the narrowed request. The appellant stated that he believes that the scope of his narrowed request for documents in the Legal Services branch includes documents which may reside in the Ministry’s financial/contractual branch.

The appellant was given an opportunity to clarify his request. This resulted in the request for “records maintained by the Legal Services Branch”. It is the Ministry’s position that the narrowed scope of the request clearly identified “records maintained by the Legal Services Branch”. The appellant narrowed the scope of his request with emphasis added, clearly indicating that only records within the LSB were responsive to his request.

In his representations, the appellant submits that his “request was never totally limited to legal services to get the legal contract”, and that a fifth record should exist and may be located in another Ministry branch, specifically, the “financial/contractual branch”. He bases this belief on information which he received in April and June 2001, in the context of a separate appeal, Appeal PA-010193.

The Report of the Mediator for Appeal PA-000187-2 indicates that the appellant’s request with respect to Application Three was clarified during mediation. That is, the request pertains to:

1998, 1999, 2000 records on ministry contracts/agreements with outside legal firms on matters of drug benefit programs/procedures, policies; the contract amounts and invoices for payment and payments and the terms of reference for such consultancy work **maintained by the Legal Services Branch only**.

[emphasis in original]

The issue in the appeal before me has to be placed in the context of Appeal PA-000187-1 and the resolution of that appeal which was agreed to by the parties. The terms of the settlement in the

earlier appeal were clear in the Report of the Mediator in that the appellant agreed to have his request cover records maintained by the Legal Services Branch only. The Ministry and the appellant were invited to review the Report of the Mediator and to return a response "if there are any errors or omissions". There is no indication that either party contacted the Mediator, nor did the appellant raise any objections on receipt of the Ministry's final decision letter. It was only after the appellant received records in response to a separate request that he became aware that additional records might be located in another department.

Given the specific nature of the appellant's revised request and the actions of the parties during the course of dealing with the request and appeal, I find that any records which may be located outside the Legal Services Branch do not fall within the scope of the appellant's request. The appellant is not, however, precluded from making a separate request for such records.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that the exemption in section 19 applies to all four records at issue. This section 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.

Section 19 therefore 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's representations claim both solicitor-client communication privilege and litigation privilege. I will first consider the application of solicitor-client communication privilege.

Solicitor-Client Communication Privilege

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).

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)

The Ministry submits:

... that the responsive Records qualify for exemption under section 19 as Records 1 and 3 provide specific requests from the MOHLTC (client) to counsel. In the continuum of solicitor-client communication, Records 2 and 4 provide communications in the form of detailed billings whereby information is passed from the solicitor to the MOHLTC (client).

The appellant makes a general assertion that reliance on the exemption under section 19 is “extreme” and that “Severances apply.” He provides no further response to this issue.

Records 1 and 3

Record 1A is a briefing note from Ministry legal counsel to the Director of the Legal Services and Victim Support Division with respect to the retaining of private sector counsel. It sets out

the nature of the legal opinion required, the name of the outside legal counsel sought to be retained, and provides details about the terms of the retainer. The information in record 1A is repeated in record 1B, which is the retainer letter addressed to the named private sector counsel.

Record 3A is correspondence prepared by the Ministry to the named private sector counsel requesting that s/he provide a legal opinion to the Ministry. Part B of this record is a memo between senior representatives of the Legal Services Branch requesting to retain private sector counsel. It identifies the private sector counsel and the terms of the retainer.

From my review of records 1 and 3, I am satisfied that they meet the solicitor-client qualification test as set out above. They are confidential communications made between a client and its solicitor for the purpose of retaining private sector counsel and for the purpose of obtaining legal advice for the Ministry. As such, they are subject to solicitor-client privilege. In Order P-1631, Senior Adjudicator David Goodis considered a similar fact situation. He concluded that:

Record 140 is not a direct communication between a solicitor and client. Rather, it is communication from one Ministry official to another containing instructions to seek advice from counsel on a particular issue. However, I am satisfied that in the circumstances this communication was made confidentially for the purpose of obtaining legal advice from counsel and therefore qualifies for exemption under the solicitor-client privilege in section 19 of the *Act*. [*Descôteaux v. Mierzewski* (1982), 141 D.L.R (3d) 590 at 618 (S.C.C.)].

Based on the foregoing, I find that records 1 and 3 qualify for solicitor-client communication privilege and are exempt under section 19.

Records 2 and 4

Records 2 and 4 are accounts submitted by the named private sector counsel to the Ministry.

In Order PO-1714, Adjudicator Holly Big Canoe found that a blanket privilege applied to legal bills of account as confidential communications between a lawyer and a client. In doing so, she relied on the Federal Court of Appeal in *Stevens v. Canada (Privy Council)*, (1998) 161 D.L.R. (4th) 85, as applied in Order PO-1714. Adjudicator Big Canoe cited the following passage from the *Stevens* decision:

In the case at bar, I am satisfied that the narrative portions of the bills of account are indeed communications. 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. ... 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. (at pages 107-8)

Adjudicator Big Canoe concluded as follows:

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 with this conclusion and find that it applies to the legal accounts generated by the named private sector counsel. As statements of account, these records are properly considered, on their face, to be confidential written communications between external counsel and the Ministry which relate directly to the seeking, formulating or giving of legal advice (Order PO-1822).

I find that records 2 and 4 were properly withheld as subject to solicitor-client communication privilege at common law under section 19. Although the Ministry has also claimed that these records qualify for litigation privilege, because of my finding it is not necessary to consider the application of this head of privilege.

As I have found records 1, 2, 3 and 4 to be exempt pursuant to section 19, it is not necessary for me to consider the possible application of the exemptions claimed by the Ministry under either sections 17, 18 or 21 of the *Act*.

ORDER:

1. I uphold the Ministry's decision to deny access to the records.
2. I uphold the Ministry's decision that any records outside its Legal Services Branch are not responsive to Application Three of the appellant's request.

Original Signed By: _____
Dora Nipp
Adjudicator

September 13, 2001 _____