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

ORDER PO-2051

Appeal PA-010424-1

Ministry of Finance

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NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of Finance (the Ministry) made pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to:

> …a copy of the rulings in 2001 by the Ontario Retail Sales Tax – Tax Advisory Branch and the Ontario Retail Sales Tax – Legal Services Branch regarding the provision of Printing and Data Processing Services to [a named company] by [a named company].

The Ministry denied access to the requested information, pursuant to section 19 (solicitor-client privilege) of the *Act*. In its decision letter, the Ministry stated that section 19 applied in this case because the records at issue "…consist of a legal opinion provided by a solicitor of the Ministry's Office of Legal Services, and related correspondence".

The appellant appealed the Ministry's decision. The appellant believes that it ought to receive a copy of the rulings since the appellant had requested that the Ministry make them.

Prior to the start of the mediation stage of this appeal two records were identified as being at issue. During the mediation stage, the mediator identified a third record that had been attached to one of the initial two records. The appellant indicated during mediation that it was interested in gaining access to this third record as well.

Also during the mediation stage, the appellant indicated that it was relying upon section 10(2) of the *Act* to support its claim to partial access to the records at issue.

Further mediation was not possible and the appeal was referred to adjudication.

I sent a Notice of Inquiry setting out the issues in the appeal, initially, to the Ministry, which provided representations in response. I then sent the Notice of Inquiry, together with the Ministry's complete representations, to the appellant. The appellant submitted representations in response.

RECORDS:

The following three records are at issue in this appeal:

- Memorandum dated August 20, 2001 from the Legal Services Branch to the Retail Sales Tax Branch (13 pages) (Record 1);
- Memorandum dated January 9, 2001 from the Retail Sales Tax Branch to the Office of Legal Services (5 pages) (Record 2);
- Memorandum dated September 19, 2001 from the Retail Sales Tax Branch to the North York Regional Tax Office (9 pages) (Record 3).

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Introduction

The Ministry submits that the records qualify for exemption under section 19 of the *Act*, which reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

This exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege.

In the circumstances of this appeal, it appears that only solicitor-client communication privilege could apply. I will, accordingly, only address the possible application of the solicitor-client communication portion of the section 19 exemption.

Solicitor-client communication privilege

General principles

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].

Representations

The Ministry makes the following representations:

> …Record #1 is a legal memorandum prepared by counsel with the Legal Services Branch of the Ministry in response to a request to the Acting Director of the Legal Services Branch from the Retail Sales Tax Branch for a legal opinion regarding the application of retail sales tax to various activities of a company. The opinion sets out the facts and relevant agreements and analyzes the applicability of the *Retail Sales Tax Act* (the "RST Act") to the activities of the company. Various provisions of the RST Act are analyzed and legal advice is provided in respect of the applicability of retail sales tax.
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> …Record #2 is the memorandum from the Retail Sales Tax Branch to the Acting Director of the Office of Legal Services requesting a legal opinion regarding the application of retail sales tax to the activities of the company. Relevant correspondence and documents are included with the request. The memorandum provides an outline of the relevant facts, activities and agreements.
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> …The Ministry maintains that Records #1 and #2 are communications made within the framework of the solicitor-client relationship and accordingly the Ministry maintains that those records are covered by the exemption in section 19 of FIPPA. A request for legal opinion together with the resultant legal memorandum was held to be exempt under section 19 of FIPPA in Order #P-823.
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> …Record #3 is a memorandum prepared by the Manager of the Retail Sales Tax Branch to the Acting Regional Audit Manager of the North York Regional Tax Office which summarizes the August 20, 2001 legal opinion (Record #1). A reading of Record #3 shows that, in fact, Record #3 paraphrases most of the August 20, 2002 legal opinion. In Order #P-135, the IPC has found that a briefing

> note that summarizes the substance of an opinion given by an institution's legal counsel to an institution employee is privileged. Similarly, it was found in Order #P-417 that where a non-lawyer employee of an institution creates a record that quotes from a legal opinion provided by a lawyer to the institution, the quotes are exempt under this section 19 of FIPPA.

In its representations, the appellant does not directly address the applicability of section 19 to the records, although it does concede that the records ". . . are communications between legal counsel and a client . . ."

Analysis

Record 1 is a legal opinion given by a Ministry in-house lawyer to Ministry staff. Record 2 is a request for that opinion. Based on the representations before me and the information in the record itself, I am satisfied that Records 1 and 2 are confidential communications between an in-house lawyer and his clients, Ministry staff, made for the purpose of giving and receiving legal advice. Both of these records clearly fit within the *Balabel* "continuum of communications" between a lawyer and a client. Therefore, I find that Records 1 and 2 are subject to solicitor-client communication privilege under section 19 of the *Act*.

Record 3 is a briefing note from one staff person to another. I concur with the Ministry that this record essentially paraphrases the contents of Record 1. While Record 3 is not on its face privileged, since it is not a communication between a lawyer and a client, a record that would reveal a privileged communication nevertheless qualifies for exemption [see, for example, Orders P-417, P-1631 and PO-1848-F]. Accordingly, I find that Record 3 also qualifies for exemption under section 19 of the *Act*.

Severance

Introduction

Section 10(2) of the *Act* reads, in part:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 . . . the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

Representations

The Ministry does not offer submissions regarding the application of the section 10(2) severance provision.

The appellant provides the following representations in respect of the application of the severance provision in this case:

> The solicitor-client privilege exemptions falls within the specified sections (12 to 22) and therefore subsection 10(2) MANDATES that the head MUST sever the opinion and disclose facts and assumptions that [do] not constitute formal opinions or advice (ie. conclusions). In this connection, the use of the [word] SHALL indicates […] a mandatory direction to the head to sever the document between portions that are exempt and those that aren't.
>
> We requested Ontario Retail Sales Tax to obtain a ruling from the Legal Services Branch. It is important that the facts presented to legal counsel and/or assumed by legal counsel in drafting the legal opinion are the same as presented in communications between the taxpayer and the Audit branch. While we appreciate that the documents which are at issue are communications between legal counsel and a client, the granting of access to statements about facts or assumptions about facts is consistent with the policy of the Act and is not, in our submission, a derogation of the solicitor-client privilege.

Analysis

I agree with the appellant's assertion that the section 10(2) severance provision may apply in the context of section 19 (see, for example, Order P-1409). However, I do not accept the appellant's submission that the records should be severed so that the "facts and assumptions" are disclosed, and the advice, opinions and conclusions are not.

The Ontario Divisional Court has specifically rejected this approach. In Order P-771, former Assistant Commissioner Irwin Glasberg found that certain records, in part, qualified for exemption under section 19, but ordered the Ministry to sever and disclose "factual information". On judicial review, in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71, the court stated the following with respect to section 19 and severance (at pages 75-77):

> It is apparent that the Commissioner has interpreted s. 19 narrowly, effectively limiting its application to those portions of records which contain actual instructions to the legal counsel or legal advice rendered by her to the client. His decision was defended before us on the ground that the exemption in s. 19 must be read in light of the overall purposes of the *Act* set out in s. 1(a), namely "to provide a right of access to *information* under the control of institutions" [Divisional Court's emphasis]. Reference is also made to the provision of s. 1(a)(iii) that "exemptions from the right of access should be limited and specific", and to the severance provision, s. 10(2), which requires a head to "disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions" and which applies to s. 19 . . .
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> It was further submitted that at common law, solicitor-client privilege does not preclude compelled disclosure of facts contained in a document subject to solicitor-client privilege in certain contexts. Discovery rules in civil proceedings

require a party to disclose facts relevant to the action, and a party cannot resist disclosure on the ground that those relevant facts are found in a privileged document. Similarly, disclosure of facts may be compelled in criminal or professional discipline hearings and a party may not resist disclosure on the ground that those very facts have been communicated to counsel for the purpose of obtaining advice: see *Law Society of Upper Canada v. Baker*, [1997] O.J. No. 69 (Div. Ct.).

. . . . .

. . . [T]he Commissioner interpreted the scope of solicitor-client privilege in a manner that is fundamentally wrong in law. I accept the Ministry's submission that the exemption protecting solicitor-client privilege should be seen as "class-based". A "class-based" privilege is one that protects the entire communication and not merely those specific items which involve actual advice. This approach has been adopted with respect to a similar provision in the British Columbia *Freedom of Information and Privacy Act*, . . . s. 14: see *British Columbia (Minister of Environment) v. British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 at 74 (S.C.).

Solicitor-client privilege is a substantive right and not merely an evidentiary rule: *Solosky v. The Queen*, supra; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 873-875. The rationale for solicitor-client privilege was expressed in the following often quoted passage from the judgment of Jackett P. in *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 at 33:

> In so far as the solicitor-client communications are concerned, the reason for the rule, as I understand it, is that, if a member of the public is to receive the real benefit of legal assistance that the law contemplates that he should, he and his legal adviser must be able to communicate quite freely without the inhibiting influence that would exist in what they said could be used in evidence against him so that bits and pieces of their communications could be taken out of context and used unfairly to his detriment unless their communications were at all times framed so as not only to convey their thoughts to each other but so as not to be capable of being misconstrued by others. *The reason for the rule, and the rule itself, extends to the communications for the purpose of getting legal advice, to incidental materials that would tend to reveal such communications, and to the legal advice itself.* It is immaterial whether they are verbal or in writing [Divisional Court's emphasis].

In *Solosky v. The Queen*, supra, Dickson J. stated "the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right founded upon the unique relationship of solicitor and client." The rationale for the

> privilege is the need to ensure that one can make full disclosure of all the facts to one's counsel without fear of prejudice. Without the assurance of confidentiality, the client may be afraid to make full disclosure to the legal advisor and as a consequence will not have access to legal advice based upon all the facts.
>
> . . . . .
>
> The rules of discovery in civil actions and disclosure in criminal and quasi-criminal matters requiring the disclosure of relevant facts do not limit the substantive scope of solicitor-client privilege protected by the *Act*. Those rules merely provide that where there is a legal obligation to disclose facts, one cannot avoid that obligation on the basis that the facts were given to legal counsel. The distinction is an important one: a client can be asked to disclose facts relevant to a proceeding but that is not the same as forcing the client to divulge what he or she told legal counsel.
>
> It is apparent that the effect of the order under review is to compel the Ministry to disclose what it told its legal advisor to obtain legal advice. In my view, that constitutes a derogation of solicitor-client privilege and cannot be supported as a acceptable interpretation of s. 19. Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege.
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> I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision, for there may be records which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice. I would also emphasize that the privilege protects only the communication to legal counsel. If facts communicated to legal counsel are to be found in some other form in the records of the Ministry, those records are not sheltered from disclosure simply because those same facts were disclosed to legal counsel. Similarly, documents authored by third parties and communicated to counsel for the purpose of obtaining legal advice do not gain immunity from disclosure unless the dominant purpose for their preparation was obtaining legal advice: *Ontario (Attorney General) v. Hale* (1995), 85 O.A.C. 229 (Div. Ct.).

Applying these principles here, Records 1 and 2 clearly are discrete communications that are not severable, despite the fact that they contain factual and other material. It cannot be said that these records combine privileged communications with communications made for other purposes unrelated to legal advice.

Finally, Record 3, which paraphrases Record 1, also is not severable, since disclosure of any portion of this record would reveal, in part, the privileged communications in Record 1.

To conclude, I find that Records 1, 2 and 3 qualify for exemption under section 19 in their entirety, and the section 10(2) severance provision does not apply.

ORDER:

I uphold the Ministry's decision to deny access to the records at issue on the basis of section 19 of the *Act*.

Original signed by: September 30, 2002
Bernard Morrow
Adjudicator