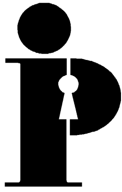
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2116

Appeal PA-020049-1

Ministry of the Environment

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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) seeking access to records relating to the contamination of a named property in the City of Toronto. The request stated:

> We hereby request access to information from the Central Region Office of the Legal Services Branch of the Ministry of the Environment (the "Ministry") respecting:
>
> 1. The known and suspected sources of perchloroethylene ("perc") contamination in the vicinity of the [specified property (the Property)] and the Adjacent Property;
>
> 2. Measures taken by the Ministry to identify and control such contamination, including orders, report(s) of provincial officers and prosecutions (we have a copy of the Director's Order dated April 21, 1998), but not the provincial officer's report in support of that order;
>
> 3. Measurement of concentrations of perc and other contaminants in the soil and groundwater at the Adjacent Property and other affected sites;
>
> 4. Communications between the Ministry and affected parties, including with the owner, former owner and any tenant or former tenant of the Adjacent Property;
>
> 5. The known or inferred direction of the groundwater flow in the vicinity of the Adjacent Property;
>
> 6. The particulars of any agreement or arrangement between the Ministry and any other party with respect to perc contamination at the Adjacent Property and other affected properties;
>
> 7. Information the identifies a source or sources other than the Adjacent Property with respect to perc contamination in the vicinity of the Adjacent Property; and
>
> 8. Internal memoranda, including legal opinions, or correspondence dealing with the issue of whether contamination at or from the Adjacent Property will result or is likely to result in an "adverse effect" as defined under the *Environmental Protection Act*.

The requester also submitted a Ministry Freedom of Information Request form for access to records relating to environmental concerns (general correspondence, occurrence reports, abatement), Orders, Spills, Investigations/prosecutions and

> Waste Generator number/classes from 1997 to the present in relation to the Adjacent Property.

The Ministry located a number of responsive records and initially provided the requester with a decision letter indicating that partial access to the records was being granted, subject to certain severances made under section 21(1) of the *Act* (invasion of privacy). The Ministry also provided the requester with a fee estimate of $254.80, which was paid by the requester.

On January 9, 2002, the Ministry issued a final decision in which it advised the requester that, following third party notification, it decided to provide partial access to the records requested with severances made pursuant to sections 13(1) (advice or recommendations), 19 (solicitor-client privilege), 21(1) (invasion of privacy) and 22 (information publicly available) of the *Act*. The Ministry also enclosed an index of records indicating its disclosure decision, and a package of records for which access had been granted in full (and which did not involve third parties).

The requester, now the appellant, appealed the Ministry's decision to deny access.

During the mediation stage of the appeal, the Ministry decided to disclose six records (Records 46, 50, 52, 66, 100 and 141) which were the subject of a third party appeal by a party whose interests may be affected by the disclosure of these records (the affected party). The affected party withdrew this appeal and the Ministry has disclosed these six records to the appellant.

Also during mediation, the Ministry decided to grant access to other records, and parts of records, subject to third party notification. The Ministry also agreed to withdraw its reliance on the discretionary exemption in section 22. As a result, this section is no longer at issue in the appeal. Additional clarification and discussion between the parties and the Mediator assigned to the file resulted in the removal of a significant number of records from the scope of the appeal.

There remain at issue 41 records, in whole or in part, which consist of letters, notes, lists, e-mails, draft orders and notices, a report and a memorandum. They are described more fully in the index which was attached to the Notice of Inquiry provided to the parties. The appellant objects to the Ministry's application of the section 19 exemption to Records 109 and 133 in its decision of May 9, 2002, arguing that the Ministry ought not to be entitled to apply a discretionary exemption after the expiration of the 30 day period (on April 10, 2002) described in the Confirmation of Appeal document.

As further mediation was not possible, the matter was moved into the Adjudication stage of the appeal process. I decided to seek the representations of the Ministry, initially, as it bears the onus of demonstrating the application of the exemptions claimed. The Ministry made representations, which were shared with the appellant. I decided to deny access to portions of the Ministry's submissions as I have concerns about the confidentiality of the information contained therein. The remaining submissions were forwarded to the appellant, along with a copy of the Notice of Inquiry. The appellant indicated that she would not be making representations in response to the Notice.

During the inquiry stage of the appeal, the affected party also consented to the disclosure of additional records to the appellant. Accordingly, as Records 44, 53, 63, 65, 67 and 68 have been disclosed to the appellant, they are no longer at issue in this appeal.

RECORDS:

The 35 records remaining at issue, in whole or in part, are described in the Index of Records which has been provided to the appellant and is dated June 28, 2002.

DISCUSSION:

LATE RAISING OF DISCRETIONARY EXEMPTION

The appellant objected to the fact that the Ministry applied the discretionary exemption in section 19 to Records 109 and 133 approximately one month following the expiration of the date set out in the Confirmation of Appeal for doing so. I note that Record 133 is no longer at issue in this appeal. Record 109 is a one-page letter to which is appended a number of witness statements sent to the Ministry by counsel for the affected party. All of Record 109, with the exception of the name of one of the witnesses, has been disclosed. As I have found in my discussion of the application of section 19 to Record 109 which follows, the exemption does not apply in any event. As a result, I find that I am not required to make a determination on this issue.

SOLICITOR-CLIENT PRIVILEGE

The Ministry takes the position that the majority of the records are exempt from disclosure under the discretionary exemption in section 19, which 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 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 establish that one or the other, or both, of these heads of privilege apply to the records at issue.

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].

The Supreme Court of Canada has described this privilege 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].

The Ministry's Representations

The Ministry takes the position that Records 74, 76, 77, 78, 86, 154, 157, 158, 159, 160, 161, 162, 166 and 167, comprised of draft Orders, are exempt as they contain information which falls within the ambit of solicitor-client communication privilege. It also notes that Record 128 is a copy of Record 29, which was disclosed to the appellant. Accordingly, the Ministry indicates that it is agreeable to the disclosure of Record 128 and I will order it to do so.

The Ministry submits that:

> The draft Orders implicitly contain and sought advice. The Ministry submits that the exchange of draft Orders and comments between Ministry program staff and counsel was intended to create an Order which could be enforced before the

> Environmental Appeal Board. Implicitly, the exchange of various documents was for the purpose of seeking and providing legal advice with respect to:
>
> (a) which individuals and companies should be named in the Order,
> (b) which facts support the Ministry's position, and
> (c) what remedies the Ministry should seek.
>
> The draft orders were created by or for Crown Counsel . . . In addition to counsel, other team members included the senior environmental officer, her supervisor, the regional director and others. On various versions of the drafts, comments (annotated order) were faxed or e-mailed to/from Counsel. For example, page 2 of Record 77 and page 1 of Record 166 are evidence that Crown counsel participated in the preparation, review and development of the draft Director's Orders.
>
> It is further submitted that the handwritten comments on Records 76, 158 appear to be those of the senior environmental officer's supervisor, reinforcing the Ministry position that these draft orders were, in their entirety prepared by a Ministry team in which all of the Draft Orders were prepared by or for Crown Counsel.
>
> As a result, the Ministry asserts that all of the draft orders and related materials were prepared by counsel, environmental officers or other Ministry staff working collectively as the Environmental Team. In fact, many of these records are direct work product of counsel.
>
> Based on the evidence provided above, the draft Orders reflect legal advice given by Crown counsel in a solicitor-client relationship with the Ministry, the Ministry asserts that branch one of the section 19 exemption applies. Therefore, the Ministry submits that the draft Orders have also the statutory basis against disclosure founded in section 19 of *FIPPA*.

The Ministry then goes on to address the application of the solicitor-client communication privilege component of the section 19 exemption to the undisclosed portions of Records 59, 69, 79, 81, 82, 84, 85, 110, 120 and 153. It argues that the disclosure of the information in these records, or parts of records, would reveal either confidential communications between a solicitor and client or the actual advice provided by counsel to the team preparing the draft orders with the assistance of the solicitor.

Findings

In my view, the Ministry has provided me with sufficient evidence to establish that the draft Orders which comprise Records 74, 76, 77, 78, 86, 154, 157, 158, 159, 160, 161, 162, 166 and 167 are subject to solicitor-client communication privilege and are, accordingly, exempt from disclosure under section 19. The draft orders were prepared by Crown counsel and contain her comments, views, opinions and considered judgement with respect to the issues addressed therein. The draft orders were then circulated amongst the members of the "Environmental

Team" with a view to eliciting their comments and ideas. I find that because of the unique consultative circumstances surrounding the preparation of these documents, they represent confidential communications between a solicitor and client for the purpose of giving or receiving legal advice.

Similarly, the undisclosed portions of Records 59, 69, 79, 81, 82, 84, 85, 110, 120 and 153 also reveal a series of communications of a confidential nature between a solicitor and her client relating to a legal issue, the drafting of a proposed Director's Order. These e-mail messages, memoranda and notes contain the legal advice sought or provided in the context of this solicitor and client relationship. I find that they too form part of the "continuum of communications" passing between counsel for the Ministry and members of the "Environmental Team" responsible for the drafting of the Director's Order. Accordingly, I find that these records are also subject to solicitor-client communication privilege and that they are exempt from disclosure under section 19.

Litigation Privilege

The Ministry takes the position that the undisclosed portion of Record 109 (consisting of an individual's name) and Record 114 are exempt on the basis that they are subject to the litigation privilege component of section 19. I will address the application of section 21(1) to the undisclosed name in Record 109 below. Because of my findings in that discussion, it is not necessary to consider whether this information also qualifies for exemption under section 19.

The Ministry submits that Record 114, a covering letter and draft Minutes of Settlement prepared by counsel to one of the parties who was subject to the Director's Order, is exempt from disclosure on the basis that, since it was prepared to assist in settlement negotiations, it is, therefore, exempt from disclosure under the litigation privilege aspect of the section 19 exemption.

In a recent decision, Order PO-2012, I found that settlement privilege (also known as "without prejudice" privilege) exists for different reasons from, and does not form part of, litigation privilege. Accordingly, I did not accept the submission that records which may be subject to settlement privilege, for that reason alone, qualify for litigation privilege. My reasoning is set out, in part, as follows:

> . . . [L]itigation privilege is meant to protect the adversarial process by preventing counsel for a party from being compelled to prematurely produce documents to an opposing party or its counsel.
>
> By contrast, settlement privilege exists for the purpose of encouraging parties to settle their disputes without recourse to litigation. As stated by Sopinka *et al.* in *The Law of Evidence in Canada* (above, at page 719):
>
>> It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or if an action has been commenced,

> encouraged to effect a compromise without a resort to trial. In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession that they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming . . .

There are several exceptions to settlement privilege. Prior to discussing these exceptions, Sopinka *et al.* explain the basis for them, and shed more light on the rationale for settlement privilege (at page 728):

> . . . The exceptions to the rule of privilege find their rationale in the fact that the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes.

In *Mueller Canada Inc. v. State Contractors Inc.* (1989), 71 O.R. (2d) 397 (H.C.J.), Doherty J. (as he then was) adopts the passage from Sopinka *et al.* at page 728 and states:

> The reference to establishing "liability or a weak case" must refer to liability in relation to matters which are the subject of the settlement . . . Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production . . .

Similarly, in the leading decision in *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737, the House of Lords stated:

> The "without prejudice" rule is a rule governing admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigation them to a finish . . .
>
> . . . [T]he underlying purpose of the rule . . . is to protect a litigant from being embarrassed by an admission made purely in an attempt to achieve settlement.

. . .

> In summation, litigation privilege is meant to protect the adversarial process, by preventing counsel for a party from being compelled to prematurely disclose "the fruits of his work" (*i.e.*, research, investigations and thought processes) to an opposing party or its counsel. By definition, the documents in question are not known to the other side or to the world at large, and the rule establishes a "zone of privacy" around the party.
>
> On the other hand, settlement privilege, a rule of admissibility of evidence, is meant to encourage settlement of disputes. It does so by precluding the admission into evidence of certain settlement communications, where the communication is being introduced to establish it as evidence of liability or a weak cause of action, or to "embarrass" the other party before the court. Although by definition both sides are aware of the contents of the settlement communication, the rule states that it cannot be put before the judge.
>
> Put in the context of the *Act*, there is a strong policy rationale for interpreting the phrase "solicitor-client privilege" as including the two common law concepts of "solicitor-client communication privilege" and "litigation privilege". In both cases, disclosure to a party outside the solicitor-client relationship is deemed to cause some type of harm: in the former case, harm to the public interest in allowing individuals to consult privately and openly with their solicitors; in the latter case, harm to the adversarial system of justice.
>
> However, there can be no comparable harm from disclosure in the case of settlement privilege. That privilege is designed to prevent a party from putting certain communications into evidence in a proceeding before a court or tribunal. A determination of whether the *Act* requires disclosure of the material is in no way determinative of the issue of admissibility before a court or tribunal, an issue that would be determined by a decision-maker in that other forum.

Record 114 comprises a covering letter to draft Minutes of Settlement prepared by counsel for one of the affected parties on a "without prejudice" basis. Although this record may be subject to settlement privilege, this is not a sufficient basis for concluding that it is subject to litigation privilege under section 19 of the *Act*.

Since Record 114 is a communication between opposing counsel, the "zone of privacy" rationale cannot apply, and it cannot be subject to litigation privilege [see order P-1561, quashed on other grounds in *Ontario (Attorney General) v. Big Canoe*, [2002] O.J. No. 4596 (C.A.)].

Accordingly, I find that Record 114 does not qualify for exemption under section 19. As no other exemptions have been claimed for this document, I will order that it be disclosed to the appellant.

ADVICE OR RECOMMENDATIONS

The Ministry has applied the discretionary exemption in section 13(1) to two portions of Record 150 (pages 6 and 8), a report prepared by the Ministry's District Engineer, described here as the "Provincial Officer" to the Senior Environmental Officer involved in this matter. This section states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

The Ministry submits that Record 150 is a report containing "explicit recommendations and a suggested course of action for the Ministry to deal with the environmental issues."

I have reviewed the contents of the severed information on pages 6 and 8 of Record 150 and the submissions of the Ministry. I find that page 8 contains "advice or recommendations" within the meaning of section 13(1) as it recommends to the recipient of the report that certain items and remedies be included in the Director's Order. The information in page 6 is simply a summary of the factual conclusions reached by the District Engineer in arriving at his recommendations and does not reveal any advice actually given. Accordingly, this information does not qualify as "advice or recommendations" for the purposes of section 13(1). Accordingly, only the information contained in page 8 of Record 150 is properly exempt under section 13(1).

PERSONAL INFORMATION/INVASION OF PRIVACY

The Ministry takes the position that the undisclosed information in Records 42 (which is the same as Record 103), 80, 83, 101, 109, 146, 150 and 152 constitutes "personal information" as defined in section 2(1) of the *Act*, which reads:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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;

The Ministry concedes that the information contained in page 8 of Record 150 does not qualify as "personal information" for the purposes of section 2(1) and is no longer objecting to the disclosure of this portion of the record on that basis. I have found above that this information qualifies for exemption under section 13(1).

The Ministry submits that the references in page 3 of Record 42 (duplicated at Record 103), Record 59 (which I have already found to be exempt under section 19), Records 83, 101, 146 and 152 to individuals who may be personally responsible for environmental damage at the subject property constitute the personal information of these individuals. It notes that these individuals were the directors or officers of the companies which owned the premises where the environmental accident took place and that under section 194(3) of the E*nvironmental Protection Act* (the *EPA*), directors or officers of a corporation may be personally charged and convicted of an offence under that section. For this reason, a number of individuals' names appear in the records and some of them were not ultimately charged with an offence.

The Ministry goes on to submit that these individuals' names appear on the records in their personal, as opposed to their professional, capacity. It argues that individuals found to be personally responsible under section 194(3) of the *EPA*, information relating to that responsibility is about that individual in his or her "personal capacity".

In addition, it submits that pages 5 and 6 of Record 80 describe an identifiable individual's assets, earnings and personal views, thereby qualifying as "personal information" under subsections (b), (e) and (h) of the definition in section 2(1).

The Ministry also submits that further information in Records 83 and 109 relate to another individual who was a witness to an environmental accident. It argues that this information qualifies as the personal information of this individual as his involvement in the accident was in his personal, not professional, capacity and was the same as if he "was a member of the public".

In my view, the fact that an individual's name appears in a Director's Order in their personal, as opposed to their corporate, capacity as a result of the operation of section 194(3) of the *EPA* renders that information to be "personal" in nature. I find that the fact that an individual is found to be culpable with respect to the offence charged is information which is personal to that individual and qualifies as that individual's personal information within the definition of that term in section 2(1)(h). Accordingly, I find that the references in page 3 of Record 42 (duplicated at Record 103) and Records 59, 83, 101, 146 and 152 to certain identifiable individuals who may be personally charged and convicted with an offence under the *EPA* qualifies as the personal information of those individuals for the purposes of section 2(1).

In addition, I find that the information relating to an identifiable individual on pages 5 and 6 of Record 80 qualifies as his personal information under paragraph (b) and (e) of section 2(1) as it describes in some detail his assets, income and personal views.

Finally, I agree with the position taken by the Ministry with respect to the individual mentioned as a witness in Records 83 and 109. I find that this information qualifies as the personal information of this individual under paragraph (h) of section 2(1).

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 (f) of section 21(1) applies. In my view, the only exception which might apply in the present circumstances is that set out in section 21(1)(f), which 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.

The appellant has not made any representations on this issue. I find that, in the absence of any evidence which would lead me to a different conclusion, the disclosure of the personal information at issue in this appeal which is contained in Records 42, 80, 83, 101, 103, 109, 146, 150 and 152 would constitute an unjustified invasion of the personal privacy of the individuals to whom this information relates. It is, accordingly, exempt from disclosure under section 21(1).

By way of summary, I have found all of the information at issue in this appeal to be exempt from disclosure under either sections 13(1), 19 or 21(1) with the exception of Records 114, 128 and page 6 of Record 150.

ORDER:

1. I order the Ministry to disclose Records 114, 128 and page 6 of Record 150 to the appellant by providing him with copies by **March 31, 2003** but not before **March 26, 2003.**

2. I uphold the Ministry's decision to deny access to the remaining records.

3. In order to verify compliance with the terms of Order Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant.

Original signed by: February 24, 2003
Donald Hale
Adjudicator