



**Information and Privacy  
Commissioner/Ontario**

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

# **INTERIM ORDER PO-2164-I**

**Appeals PA-020235-1 and PA-020236-1**

**Ministry of Finance**



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## **NATURE OF THE APPEAL:**

The Ministry of Finance (the Ministry) received two related requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from the same requester.

In his first request (request/appeal #1), the requester sought access to:

All records at the Ministry, excluding Ontario SuperBuild, on the contract awarded to [an identified law firm] for legal work on the proposed privatization of Hydro One.

The second request (request/appeal #2) asked for the same category of records held by the Ontario SuperBuild Corporation (Superbuild).

In response to request #1, the Ministry granted access to three records in their entirety and partial access to a fourth record. Access to the remaining 16 responsive records was denied on the basis of the exemption in section 19 of the *Act* (solicitor-client privilege). The Ministry also identified sections 13 (advice or recommendations), 21 (invasion of privacy) and 17 (third party information) as alternative exemption claims for two of the records.

For request #2, the Ministry granted access to three responsive records in their entirety and partial access to a fourth record. The Ministry denied access to the remaining four records on the basis of the section 19 exemption, and added sections 13 and 21 as alternative exemption claims for one record.

The requester, now the appellant, appealed both decisions.

Neither appeal was resolved through mediation, so both were transferred to the adjudication inquiry stage of the appeal process. Because the two appeals involve the same appellant, the same institution, and similar records and issues, I decided to combine them for the purpose of this inquiry.

I sent a Notice of Inquiry to the Ministry and the identified law firm (the affected party), inviting submissions on the issues raised in the appeals. Both parties provided submitted representations.

In its representations, the Ministry purported to expand the section 13(1) claim and to add section 18(1)(c) as a new exemption claim for portions of certain records. As a result, I added the late raising of discretionary exemptions as an issue in the inquiry.

I revised the Notice of Inquiry to accommodate these new issues, and sent it, along with a copy of the Ministry's representations, to the appellant. The appellant responded with representations.

## **PRELIMINARY MATTERS:**

### **Related appeal**

The appellant also made a third related request to the Ministry of the Attorney General. That request led to a third appeal (PA-020231-1), which I disposed of in Order PO-2154. This third

appeal included some records that are identical or virtually identical to some of the records at issue in the current two appeals. Specifically,

Record 2 in appeal #1 includes the same information as Record 4 in Order PO-2154  
Record 8 in appeal #1 is the same as Record 3 in Order PO-2154  
Record 15 in appeal #1 is virtually the same as Record 3 in Order PO-2154  
Record 20 in appeal #1 is the same as Record 4 in Order PO-2154  
Record 7 in appeal #2 is the same as Record 3 in Order PO-2154  
Record 6 in appeal #2 is virtually the same as Record 3 in Order PO-2154

For the same reasons outlined in Order PO-2154, I find that Records 2, 8, 15 and 20 in appeal #1, and Records 2, 6 and 7 in appeal #2, qualify for exemption under section 19 of the *Act*.

### **Duplicate records**

All of the remaining records in appeal #2 are duplicates of records in appeal #1. Specifically:

Record 1 in appeal #2 is the same as Record 19 in appeal #1  
Record 2 in appeal #2 is the same as Record 18 in appeal #1  
Record 5 in appeal #2 is the same as Record 9 in appeal #1

For ease of discussion, I will not address the various duplicate records in appeal #2, although I will include them in my order provisions.

### **Record 1 in appeal #1**

Record 1 in appeal #1 is a covering memorandum from the Ministry's Director of Legal Services to the Coordinator of Advisory Services of Superbuild. It states that statements of account for legal services rendered by the affected party are attached. The memorandum lists the various statement dates, the time periods covered by each statement, and the total fee charged for each statement.

Records similar to Record 1 have been the subject of other appeals with this office. For example, in Order PO-1922 I considered whether a record reflecting the total amount paid by the Ministry of the Attorney General to a number of lawyers representing two individuals in the context of certain prosecutions qualified for exemption under section 19 of the *Act*. For reasons outlined in that order, I found that the record did not qualify for exemption and ordered the Ministry of the Attorney General to disclose it. I dealt with a similar issue in Order PO-2128 involving Management Board of Cabinet. The information at issue in that appeal was the total cost figure paid by the government's legal services insurer to a number of unidentified "vendors" for services associated with a particular legal action, as reflected on a claims summary document. Again, after considering arguments put forward by Management Board of Cabinet and the insurer, I found that the total cost figure did not qualify for exemption under section 19, and ordered it to be disclosed. In both instances, the institution applied for a judicial review of my

order, and in the case of Order PO-1922, the application was heard and reserved by a panel of the Divisional Court on May 30, 2003.

Other courts have also dealt with cases involving the treatment of solicitor-client privilege in the context of legal accounts. In addition to the *Stevens* decision and two British Columbia judgements discussed later in this order, the Quebec Court of Appeal in *R. v. Charron* (2001), 161 C.C.C. (3d) 64 (also known as *Maranda c. Canada (Gendarmerie Royale) (Maranda)*) considered whether disclosing the payment of legal fees *per se* constituted a breach of solicitor-client privilege. In finding that it did not, the court characterized the amount paid to a lawyer as a “fact” and not a “communication”, and found that this “fact” did not, on its own, reveal confidential information arising from the solicitor-client relationship. The *Maranda* case was appealed to the Supreme Court of Canada, which heard argument during the week of May 26, 2003, and reserved its decision.

In the circumstances, I have decided that it is appropriate for me to defer my decision on Record 1 in this appeal, pending the outcome of the judicial review application in Order PO-1922 and the judgment of the Supreme Court of Canada in *Maranda*. Although the records at issue in these cases are not exactly the same as Record 1, in my view, they are similar enough to reasonably assume that the direction provided by the courts could be relevant to my finding here.

## **RECORDS:**

Twelve records in appeal #1, in addition to Record 1, remain at issue: Records 5, 6, 7, 9, 10, 11, 13, 14, 16, 17, 18 and 19 (in part).

Records 5, 6, 7, 10, 13, 14, 16, and 17 are all legal accounts, some with covering letters attached, submitted by the affected party to the Ministry under the terms of its retainer relating to the proposed privatization of Hydro One.

Record 9 is an e-mail message from the Director of Legal Services for the Ministry (the Director) to the affected party commenting on the retainer.

Record 11 is an e-mail message from the Director to the affected party commenting on a legal account submitted for payment.

Record 18 is a letter from the affected party to Superbuild summarizing the terms of its retainer.

Record 19 is a memorandum from an official at Superbuild to the Director, which is copied to a senior Superbuild official. It deals with the selection of the affected party to provide legal services to Superbuild. The only portion of this record that has not been disclosed to the appellant is the text in the “results” column on pages 2-3 that outline the author’s assessment of the various identified law firms under consideration for the assignment.

## **DISCUSSION:**

The Ministry claims section 19 of the *Act* as the basis for denying access to all remaining records.

### **SOLICITOR-CLIENT PRIVILEGE**

#### **General principles**

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.

Section 19 contains two branches. Branch 1 includes two common law privileges:

- solicitor-client communication privilege; and
- litigation privilege.

Branch 2 contains two analogous statutory privileges that apply in the context of Crown counsel giving legal advice or conducting litigation.

Here, the Ministry relies on solicitor-client communication privilege under both branches. The Ministry does not rely on litigation privilege under either branch. I will first consider the application of common law solicitor-client communication privilege under Branch 1.

#### **Common law solicitor-client communication privilege under Branch 1**

##### ***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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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 privilege applies to “a continuum of communications” between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

### ***The appellant's position***

The appellant's representations are general in nature and do not address any records specifically. He submits, in part:

It is our client's position that the records requested ought to be disclosed. However, because of the intensely fact-based analysis that must be done on the documents in order to make information representations on the exemptions the head has claims, and because our client and/or its counsel have not been provided with access to the documents, our client has no choice but to rely on [the Commissioner's Office] to carefully analyse the records to determine if all of the records requested indeed were created on an occasion of solicitor-client privilege.

...

It must be emphasised that we are dealing with a circumstance where considerable public funds have been expended and the public has thus far been denied access to records that would provide details of how much public money was spent, what it was spent on, and why.

Transparency relating to the expenditure of money on the failed Hydro IPO is both in the public interest and necessary for the public to have confidence in our process.

The appellant also points to the public interest override in section 23 of the *Act* as relevant in the context of these appeals.

### ***Records 5, 6, 7, 10, 11, 13, 14, 16, and 17***

#### **Ministry's representations**

The Ministry submits:

... the contents of [Records 5, 6, 7, 10, 13, 14, 16 and 17] relate in a tangible and direct way to the seeking, formulating or provision of legal advice. Given the detailed nature of the legal accounts, disclosing these legal accounts would reveal the subjects for which legal advice was sought, the strategy used to address the issues raised and the particulars of any legal advice provided.

In support its position, the Ministry states:

... it has been found by [the Commissioner's Office] that those portions of the legal account that describe the matters attended to or services rendered and would reveal the subject matter on which legal advice was sought or given are subject to the exemption in section 19 of [the *Act*] as being a confidential communication between the client and the legal advisor regarding legal advice. (Order #M-560; P-1115).

The Ministry also points to the Federal Court of Appeal judgment in *Re Stevens and Prime Minister of Canada* (1998), 161 D.L.R. (4<sup>th</sup>) 85 (Fed. C.A.) (*Stevens*), which dealt with the application of common law solicitor-client communication privilege to certain information contained in legal accounts. The Ministry relies of the statement by Mr. Justice Linden at page 106 of *Stevens*, where he finds that “a legal account is privileged in its entirety” and should be accorded “blanket protection”; and the following statement at page 101 of that decision:

From a psychological point of view, in creating an atmosphere in which a client can be forthright and at ease, the privilege protects the relationship from the prying eyes of the state or other parties. A solicitor's bills of account are at the heart of that relationship. In my view, the terms and amounts of the retainer; the arrangements with respect to payment; the types of services rendered and their cost – all these matters are central to the relationship. If the relationship is indeed worth protecting, these matters must be immune to any intrusion.

The Ministry also relies on two decisions of British Columbia courts that upheld the application of solicitor-client communication privilege to legal accounts (*Municipal Insurance Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. 134 (BCSC); and *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* [2001] B.C.J. no.201 (S.C.)).

Finally, the Ministry submits that the Commissioner's Office has applied *Stevens* in previous orders involving legal accounts, finding that they are subject to a blanket privilege and cannot be severed (Order MO-1408, MO-1371, and PO-1714).

## **Findings**

I find that the Ministry has established the requirements of the common law solicitor-client communication privilege component of section 19 with respect to Records 5, 7, 10, 13, 14, 16, and 17.

In Order PO-1714, former Adjudicator Holly Big Canoe dealt with the application of section 19 to legal bills of account. She concluded that this type of record was a confidential communication between a lawyer and client and, applying the reasoning from *Stevens*, she found that a blanket solicitor-client privilege applied. In summing up her finding, Adjudicator Big Canoe stated:

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.

(See also Order PO-1822)

Records 5, 7, 10, 13, 14, 16, and 17 are all legal accounts generated by the affected party and submitted to the Ministry for payment. They contain itemized lists of disbursements and general descriptions of the amount of time spent by various counsel performing specific legal tasks under the terms of the retainer. In my view, all of these records closely resemble the records at issue in PO-1714, PO-1822, and in *Stevens*, and are accurately characterized as direct communications between the affected party's solicitor and his Ministry client relating to the provision of confidential legal advice. Accordingly, I find that Records 5, 7, 10, 13, 14, 16, and 17 qualify for exemption under Branch 1 of section 19 of the *Act*.

Record 11 is an e-mail message from the Director to the affected party commenting on one of the legal accounts submitted for payment. For the same reasons as outlined above regarding Records 5, 7, 10, 13, 14, 16, and 17, I find that Record 11 also qualifies for exemption under the common law solicitor-client communication privilege component of Branch 1.

### ***Records 9 and 18***

Record 9 is an e-mail message from the Director to the affected party commenting on the retainer; and Record 18 is a letter from the affected party to an official from Superbuild summarizing the terms of the retainer.

The Ministry submits that both of these records form part of the continuum of communications between solicitor and client and qualify for exemption under section 19.

I concur. I find that Records 9 and 11 fall within the scope of the "continuum of communications" described by the court in *Balabel*. As such, they qualify for exemption under



the common law solicitor-client communication privilege component of Branch 1 of section 19 (See also *Legal Services Society, supra*)

### **Record 19**

Record 19 is described in the Ministry's index as a memorandum from an official at Superbuild to the Director, which is copied to a senior Superbuild official. It deals with the selection of the affected party to provide legal services to Superbuild. The only portion of this record that has not been disclosed to the appellant is the text in the "results" column on pages 2-3 that outline the author's assessment of the various identified law firms under consideration for the assignment.

The Ministry submits:

The Ministry is of the view that the redacted portions of Record 19 ... are subject to solicitor-client privilege as those parts of the document relate to the matters that were considered in determining the terms of the legal retainer and the cost of the services to be provided under the retainer. In *Descoteaux* it was held that "*all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys privilege*". The document also contains advice received from Ministry counsel and counsel at the Ministry of the Attorney General in respect of the retainer and as such was prepared for Crown counsel for use in giving legal advice. The retained of all outside counsel by Ministries much go through the Ministry of the Attorney General. [Ministry's emphasis]

Having reviewed the contents of Record 19, in my view, it forms part of the internal communications among counsel representing the Ministry, the Ministry of the Attorney General and Superbuild concerning the retention of the affected party to represent the Ministry in the proposed privatization of Hydro One. As such, I find that the undisclosed portions of this record fall within the scope of common law solicitor-client communication privilege for the same reasons as Records 2, 8, 15 and 20, as well as the various records at issue in Order PO-2154. Therefore, the undisclosed portions of Record 19 qualify for exemption under the common law solicitor-client communication component of Branch 1 of section 19.

In summary, I find that Records 5, 6, 7, 9, 10, 11, 13, 14, 16, 17, 18 and the undisclosed portions of Record 19 all qualify for exemption under section 19 of the *Act*. Accordingly, it is not necessary for me to consider the statutory solicitor-client privilege component of section 19, sections 13(1), 17(1), 21(1), or the issue of whether the Ministry is entitled to raise the additional discretionary exemptions during the course of this inquiry. It is also not necessary for me to consider section 23, because section 19 is not listed among the exemptions subject to the public interest override.

**INTERIM ORDER:**

1. I uphold the Ministry's decision to deny access to Records 2, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 20 and the undisclosed portions of Record 19 in Appeal PA-020236-1, and Records 1, 2, 5, 6, and 7 in Appeal PA-020235-1.
2. I remain seized of Appeal PA-020236-1 in order to deal with Record 1.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

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July 17, 2003