



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2154

Appeal PA-020231-1

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 Information and Protection of Privacy Act* (the Act) for access to:

All records at the Ministry on the tender awarded to [an identified law firm] for the legal work associated with the proposed privatization of Hydro One.

The Ministry identified 5 responsive records and denied access to all of them pursuant to section 19 (solicitor-client privilege) of the Act. The Ministry also claimed section 17 (third party information) as an alternative exemption for portions of Records 4 and 5.

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

During mediation, the Ministry identified sections 13(1) (advice and recommendations) and 18(1)(c) (economic and other interests) as alternative exemption claims for portions of Records 2, 3, 4 and 5. The Mediator added these discretionary exemptions to the scope of the appeal.

Mediation did not resolve the issues in dispute and the file was transferred to the adjudication stage of the appeal process. 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 appeal. Both parties submitted representations.

In its representations, the Ministry purported to expand the 13(1) claim to additional portions of Records 4 and 5, and section 18(1)(c) for additional portions of Records 3, 4 and 5. As a result, I added the late raising of discretionary exemptions as an issue in the inquiry. The Ministry also identified the possible application of the mandatory section 21 exemption (invasion of privacy) for certain described portions of Records 4 and 5.

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 brief representations.

RECORDS

The 5 records at issue in this appeal consist of 22 pages, including e-mails, memoranda and a routing form. Specifically, they can be described as follows:

Record 1: 1-page e-mail chain between Ministry officials re retention of private sector counsel.

Record 2: 1-page cover sheet with note concerning named senior Ministry official; 1-page Ministry Routing Form re retention of private sector counsel; and 3-page signed and partially approved memorandum from Director of Legal Services, Ministry of Finance, to Acting Assistant Deputy Attorney General re retention of private sector counsel.

- Record 3: 1-page e-mail from Director of Legal Services, Ministry of Finance, to Acting Assistant Deputy Attorney General re retainer approval; 2-page draft memorandum from Director of Legal Services, Ministry of Finance, to Acting Assistant Deputy Attorney General re retention of private sector counsel; and 3-page draft memorandum from Director of Legal Services, Ministry of Finance, to Acting Assistant Deputy Attorney General re retention of private sector counsel.
- Record 4: 1-page e-mail from Director of Legal Services, Ministry of Finance, to Acting Assistant Deputy Attorney General re retention of private sector counsel; and 3-page draft memorandum from Director of Legal Services, Ministry of Finance, to Acting Assistant Deputy Attorney General re retention of private sector counsel.
- Record 5: 1-page e-mail chain between government officials re retention of private sector counsel; and 4-page draft memorandum from Director of Legal Services, Ministry of Finance, to Acting Assistant Deputy Attorney General re retention of private sector counsel.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that all of the records at issue are exempt under section 19 of the *Act*.

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.)].

Representations

The appellant submits:

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 informed representations on the exemptions the head has claimed, 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.

The Ministry submits:

... all of these records relate to the retention of private sector counsel. They are all communications between solicitor and client and are made confidentially for the

purpose of giving or seeking legal advice. The memos are from the Director of the Office of Legal Services, Ministry of Finance and analyze the legal issues involved in this matter. The memos provide legal advice relating to the need for retention of private sector counsel, and seek instructions with respect to that retention. These memos relate directly to how the Crown, as client, manages its legal affairs. The emails and routing slip constitute the mechanism through which legal advice and instructions are communicated between solicitor and client and relate directly to the seeking or giving of legal advice. All of these communications were made within the framework of the solicitor-client relationship.

The Ministry relies on Order PO-1946 to support its position. The Ministry states that Order PO-1946 “involved, in part, a briefing note from counsel with respect to the retaining of private sector counsel, and a memo between senior representatives of a Legal Services Branch requesting the retention of private sector counsel” and that in that order former Adjudicator Dora Nipp held that these documents qualified for exemption under section 19 of the *Act*.

The Ministry also submits that:

... the records at issue are privileged even if they are not characterized as direct communications between the client and its legal advisor. They are still privileged as confidential communications made within the framework of the solicitor-client relationship.

On this second point, the Ministry relies on Order PO-1631 where Senior Adjudicator David Goodis dealt with internal communications relating to the retention of counsel that were not direct communications between the client and its legal advisor. The Ministry states that in that order, “Senior Adjudicator Goodis nonetheless concluded that the records at issue were confidential communications made for the purpose of obtaining legal advice, and were thus subject to s. 19.”

Findings

Based on the Ministry’s representations and my review of the records, I find that all of the records qualify for exemption under section 19 because they are subject to common law solicitor-client communication privilege.

The following pages of records are all similar in nature:

Record 2	-	pages 3, 4 and 5
Record 3	-	pages 2, 3, 4, 5 and 6
Record 4	-	page 2, 3, 4 and 5
Record 5	-	page 2, 3, 4 and 5

These pages consist of a signed (Record 2) and draft (Records 3, 4 and 5) versions of a memorandum prepared by the Director of Legal Services at the Ministry of Finance and sent to the Acting Assistant Deputy Attorney General outlining the rationale for recommending the

retention of private sector legal counsel to represent the Ministry of Finance and SuperBuild Corporation in negotiations regarding the sale of Hydro One. Page 5 of Record 2 indicates partial approval of the Director's recommendation. The memorandum sets out the nature of the legal opinion required, the reasons why outside legal counsel is requested, the name of the outside counsel sought to be retained, and details about the terms of the retainer. In my view, it is reasonable to conclude that these communications were intended to be confidential. The various versions of the draft memorandum represent confidential written communications made within the continuum of communications between a client (the Ministry of Finance) and its legal advisor (the Ministry of the Attorney General) leading to the signed version of the memorandum authorizing the retention of private sector counsel for the purpose of providing legal advice to the client.

Accordingly, and consistent with Orders PO-1946 and PO-1631, I find that the above-referenced pages of Records 2, 3, 4, and 5 all fall within the scope of common law solicitor-client communication privilege and qualify for exemption under Branch 1 of section 19.

The first pages of Records 3, 4 and 5 consist of e-mail messages transmitting the attached draft memoranda; page 2 of Record 2 is a General Routing Form formally transmitting the attached signed version of the memorandum; and Record 1 is an e-mail chain dealing with the status of the retainer request. I find that these pages were created and used as part of the "continuum of communications" outlined in *Balabel*, and qualify for exemption under the common law communication privilege portion of Branch 1 of section 19 for that reason.

The only remaining page is page 1 of Record 2. It appears to be some sort of cover sheet with a brief statement concerning a senior Ministry official. It is clear from the content of this page that it forms part of the package of documents comprising Record 2 and that it was created in the context of the Ministry of Finance's request for approval to retain the services of the privacy sector legal counsel. As such, I find that it is also part of the "continuum of communications" outlined in *Balabel*, and qualifies for exemption under section 19 of the *Act* for the same reasons as page 2 of that record.

In summary, I find that all portions of Records 1, 2, 3, 4 and 5 qualify for exemption under section 19 of the *Act*. Accordingly, it is not necessary for me to consider the statutory solicitor-client privilege under Branch 2 of section 19, sections 13(1), 17(1), 18(1)(c) and 21(1), or the issue of whether the Ministry is entitled to raise the additional discretionary exemptions during the course of this inquiry.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

June 10, 2003