



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

# **ORDER PO-2203**

**Appeal PA-020361-1**

**Ministry of the Attorney General**



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## **BACKGROUND:**

As a result of a dispute relating to a business arrangement, the requester (now the appellant) asked the Ottawa Police Service (the Police) to investigate and lay charges against an individual. The Police responded to the request by identifying that they had investigated the matter, but had determined there were insufficient grounds to lay any charges.

The appellant was not satisfied with the decision of the Police, and subsequently proceeded with the charges herself, by having an information laid. The appellant also contacted various individuals with the Ministry of the Attorney General (the Ministry) regarding the dispute and the decision not to lay charges. One of these individuals was an Assistant Crown Attorney, who sought and received, by email, background information about the Police investigation into the matter. The Assistant Crown Attorney then wrote to the appellant advising that the Crown would not be assisting the appellant in prosecuting the charges.

The appellant then also wrote to the Attorney General's office concerning the matter, and the Assistant Deputy Attorney General's Legal Counsel sent an email to the Assistant Crown Attorney, asking for more information about the matter, to which the Assistant Crown Attorney replied by email.

## **NATURE OF THE APPEAL:**

The Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the two email exchanges described above.

The Ministry responded by stating as follows:

This is to advise you that two pages are responsive to your request. Access to these pages is denied under subsection 49(a) (discretion to refuse requester's own information) of the *Act* in conjunction with section 19 of the *Act* as the record was prepared by or for Crown counsel for use in giving legal advice or in contemplation of litigation.

The exempt material consists of e-mails of counsel.

The appellant appealed the Ministry's decision.

Mediation did not resolve this issue, and the appeal proceeded to the inquiry stage. I sent a Notice of Inquiry to the Ministry, initially, and received representations in response. In its representations, the Ministry took the position that some information in the records was the personal information of individuals other than the appellant. As this raised the possible application of section 49(b) (invasion of privacy), I decided to include this issue in the Notice of Inquiry.

I then sent the revised Notice of Inquiry, along with a copy of the Ministry's representations, to the appellant, who provided representations in response.

## **RECORDS**

There are two records at issue in this appeal.

Record 1 is an email exchange in April 2001 between an officer with the Police and an Assistant Crown Attorney regarding the police investigation into the appellant's complaint and the decision of the Police not to proceed with charges.

Record 2 is an email exchange in October 2001 between the Assistant Crown Attorney and Legal Counsel with the office of the Assistant Deputy Attorney General, Criminal Law. The Legal Counsel asks the Assistant Crown Attorney for further information about the decision not to proceed with charges, and the Assistant Crown Attorney replies with the additional information.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

The personal privacy exemption in section 49 applies only to information that qualifies as personal information. The term "personal information" is defined in section 2(1) of the *Act*, in part, as recorded information about an identifiable individual, including 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 [paragraph (h)].

I have considered the records at issue and the representations of the parties. I find that both records contain the personal information of the appellant. As well, portions of both records contain some personal information of other identifiable individuals.

Both records relate to actions taken in response to questions raised by the appellant. They also include information relating to the appellant's allegations against other identifiable individuals. The information includes the views or opinions of one individual about another individual [paragraphs (e) and (g)], as well as other personal information about the individuals [paragraph (h)]. In addition, one sentence in Record 2 contains the personal information of one of the authors of the record.

### **DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION**

While section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution, section 49 provides a number of exceptions to this general right of access.

Under section 49(a), the institution has the discretion to deny an individual access to his or her own personal information where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

Under section 49(b), where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

In this case, the Ministry applied both sections 49(a) and (b) in refusing access to the records. In my analysis, I will consider first the applicability of section 49(a).

The Ministry relies on section 49(a) in conjunction with section 19 to withhold the Records.

## **SOLICITOR-CLIENT PRIVILEGE**

### **Introduction**

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
- litigation privilege.

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

I will first consider the application of Branch 1 solicitor-client communication privilege to the records.

### **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 of the Parties***

The Ministry takes the position that the records were used in the formulation and provision of advice with regard to the laying of charges and whether to participate in a prosecution.

The appellant identifies that she was bringing a private prosecution in a criminal matter, and therefore has a right to certain information relied on by individuals at the Crown office. She also identifies her concern that certain information provided to her by the Police appears to be inconsistent with information she has received from the Ministry, and questions the accuracy of certain information provided to her in the course of the mediation of this file. Furthermore, she identifies that the section 19 exemption is a discretionary exemption, and that she should be granted access to the records in this case.

### ***Findings***

The question of whether a communication between Crown counsel and a member of a police force can be protected by solicitor-client communication privilege has been addressed in several previous orders. In Order MO-1663-F, Adjudicator Sherry Liang summarized these decisions, stating:

In *R. v. Campbell* [reported at [1999] 1 S.C.R. 565 (S.C.C.)], the Supreme Court of Canada adopted what it described as the “functional” definition of solicitor-client privilege set out in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at p. 872:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance

permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

The Court found that the consultation by an officer of the Royal Canadian Mounted Police (the RCMP) with a Department of Justice lawyer over the legality of a proposed “reverse sting” operation by the RCMP fell squarely within the functional definition. The Court emphasized that it is not everything done by a government (or other) lawyer that attracts solicitor-client privilege, providing some examples of different responsibilities that may be undertaken by government lawyers in the course of their work. The Court stated that

[w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

*R. v. Campbell* has been applied in orders of this office, such as in PO-1779, PO-1931 and MO 1241. In each of these orders, a solicitor-client privilege was found on the basis that the police (a municipal police service or the Ontario Provincial Police) sought legal advice from Crown counsel. All communications within the framework of this relationship were found to qualify for solicitor-client privilege under either section 12 of the *Act*, or section 19 of the provincial *Act*.

I agree with this approach. In the present case, the records on their face are clearly communications to or from Crown counsel concerning a possible prosecution. I am satisfied that these records consist of either confidential communications between Crown counsel and a municipal police officer, or Crown counsel’s working papers, in connection with Crown counsel providing legal advice. Accordingly, applying the functional analysis referred to in *Campbell*, I find that these records are subject to solicitor-client communication privilege. I will now review my basis for concluding that each of the records meets the requirements for this type of privilege.

Record 1 contains specific information concerning the decision not to lay charges, and legal advice given on that subject. The parties have provided me with a copy of the subsequent letter from Crown counsel to the appellant, advising the appellant of the decision by the Crown Attorney’s office not to intervene in the prosecution of the private matter. It is clear that the Crown’s decision not to intervene is based, in part, on the information set out in Record 1. Accordingly, I am satisfied that this record is part of the continuum of communications referred to in *Balabel*. It also forms a part of counsel’s working papers relating to the seeking, formulating or giving of legal advice (see *Susan Hosiery*, referenced above). Record 1 is therefore protected by solicitor-client communication privilege and qualifies for exemption under section 19 on that basis.

The Ministry takes the position that Record 2 “contemplates an ongoing police investigation, and is an inquiry into whether further investigation is required and whether charges should be laid”.

Record 2 was clearly created some time after the Crown initially decided not to participate in the prosecution, in response to further information provided by the appellant, and in response to queries received from her. It summarizes the legal advice previously provided by Crown counsel, and reviews the background and reasoning behind that advice.

In Order PO-1931, former adjudicator Irena Pascoe reviewed the application of the solicitor-client privilege to correspondence between Crown counsel. She stated:

Although the Ministry did not make any specific submissions with respect to solicitor-client communication privilege, from my review of the records, I find that Records . . . meet the solicitor-client communication privilege test as set out above. These records consist of internal communications between Crown counsel, made for the purpose of seeking, formulating and/or giving legal advice with respect to the various stages of the appellant's husband's prosecution. Based on the nature of these records and the context in which they were created, I am satisfied that this information was treated as confidential as between the Crowns. Accordingly, I find that [the records] qualify for exemption under the solicitor-client communications privilege component of section 19 of the *Act* and are, therefore, exempt from disclosure under section 49(a).

I adopt the approach taken by Adjudicator Pascoe, and apply it to the communications between Crown counsel in this appeal. Based on the nature of Record 2 and the context in which it was created, I am satisfied that this record was treated as confidential as between the Crowns. Accordingly, I find that it qualifies for exemption under the solicitor-client communications privilege component of section 19 of the *Act*

The appellant takes the position that the privilege in the documents was waived, as this matter was brought to criminal court by the appellant. The Ministry identifies that it is not aware of any steps that would constitute waiver in respect of these documents. I find no support for the position that the privilege in these records was waived.

To conclude, the records qualify for exemption under the Branch 1 solicitor-client communication aspect of section 19.

Since the records qualify for exemption under section 19, I find that they are exempt under section 49(a) of the *Act* in the circumstances of this appeal, subject to any finding I may make below on the exercise of discretion.

### ***Exercise of Discretion***

The Ministry identifies the factors it considered in deciding to exercise its discretion not to disclose the records in this appeal. The Ministry's representations on this issue were shared with the appellant.

Having reviewed the reasons and rationale provided by the Ministry for exercising discretion under section 49(a) in conjunction with section 19 of the *Act*, I find nothing improper in the manner in which the Ministry exercised its discretion.

Accordingly, I uphold the Ministry's decision to withhold the records under section 49(a) of the *Act*.

Having found the records to be exempt from disclosure under section 49(a), it is not necessary for me to review the possible application of section 49(b).

**ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ November 13, 2003