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

ORDER PO-2205

Appeal PA-020352-1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The appellant is the mother of two children and was involved in a custody and access dispute with the father of the children in 1997. In this context, a clinical investigator was hired by the Office of the Children's Lawyer (the OCL) to prepare a report pursuant to section 112 of the *Courts of Justice Act*. This report was filed with the Ontario Court (General Division) in December 1997.

The appellant made a request to the Ministry of the Attorney General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records relating to her file with the OCL between October 1997 and the date of the request.

The Ministry identified 31 pages of responsive records, and provided the appellant access to 23 pages in full and 2 in part. The remaining pages and partial pages were withheld on the basis that they qualified for exemption under section 49(a) (discretion to refuse requester's own information). The Ministry identified one or more of the following sections in support of this exemption claim:

- 13(1) (advice or recommendations)
- 19 (solicitor-client privilege)
- 20 (danger to safety or health)

The Ministry also claimed that one page qualified for exemption under section 21(1) of the *Act* (invasion of privacy)

The appellant appealed the Ministry's decision.

During the course of mediation with this office, the Ministry agreed to disclose additional portions of page 19.

Mediation did not resolve the appeal, so it was transferred to the adjudication stage of the appeal process. I sent a Notice of Inquiry to the Ministry and received representations in return. I then sent the Notice to the appellant along with the non-confidential portions of the Ministry's representations. The appellant chose not to provide representations.

RECORDS:

There are eight pages of records at issue in this appeal.

Page 1 is a cover letter dated December 1, 1997 that was sent by the clinical investigator to the Ontario Court (General Division). The letter itself has been disclosed, but handwritten notations on the page were withheld on the basis of section 49(a) in conjunction with sections 19 and 20.

Pages 16 and 17 are, respectively, a fax cover sheet dated December 1, 1997 sent by the Ministry to an individual involved in the litigation and a fax confirmation receipt. The pages were withheld in full on the basis of section 49(a), in conjunction with sections 19 and 20.

Page 19 is a fax cover sheet dated December 5, 1997, sent by a law firm to the OCL and to the clinical investigator. The typewritten portions of the page as well as some handwritten notes have been disclosed, but other handwritten notes were withheld on the basis of section 49(a) in conjunction with sections 13 and 19.

Page 25 consists of an invoice submitted by the clinical investigator to the OCL, dated January 27, 1998. The page was withheld in full on the basis of section 49(a), in conjunction with section 19. The Ministry also claims that this page qualifies for exemption under section 21(1).

Page 28 is a handwritten note dated April 12, 1999, and page 29 is an undated handwritten record of a telephone conversation. These pages were withheld in full on the basis of section 49(a) in conjunction with section 19.

Page 31 consists of handwritten "notes to file", dated November 26. It was withheld in full on the basis of section 49(a) in conjunction with sections 13, 19, and 20.

DISCUSSION:

PERSONAL INFORMATION

Section 49 can only be relied on to deny access to information that qualifies as "personal information" of a requester/appellant. Therefore, I must first assess whether the relevant records contain the appellant's personal information and, if so, whether they also include personal information of any other identifiable individual.

"Personal information" is defined, in part, to mean recorded information about an identifiable individual, including information relating to financial transactions in which the individual has been involved [paragraph (b)], and 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)].

In its representations, the Ministry's submits that pages 28, 29 and 31 contain the appellant's personal information, but makes no reference to the other pages of records. However, the fact that the Ministry relies on section 49 of the *Act* as the basis for denying access would suggest that it has concluded that all pages contain the appellant's personal information.

Having reviewed the various pages, I find that all of them contain the appellant's personal information. They were all created in the context of litigation involving the appellant and the OCL. With the exception of page 17, they all identify the appellant by name, and the information contained in the records is clearly about the appellant and her relationship with the OCL in the context of a litigation that took place in 1997.

The Ministry submits that page 25 contains the personal information of the clinical investigator, specifically her address, telephone number and social insurance number that appears on the invoice. I concur. I also find that:

- the dollar figures contained on page 25, that represent the billing rates charged by the clinical investigator for her services constitute "information relating to financial transactions in which the individual has been involved", as provided in paragraph (b) of the definition of "personal information" in section 2(1);

- individuals other than the appellant are identified by name on page 25, and these names in conjunction with the activities undertaken by the clinical investigator relating to them, which are also identified on page 25, constitutes the personal information of these other individuals;

- the personal information of the clinical investigator and the other individuals can easily be severed from page 25, and, once severed, the portions that remain contain the personal information of the appellant only.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information. However, section 49 provides a number of exceptions to this general right of access. Under section 49(a), an institution has discretion to deny an individual access to his or her own personal information if certain listed exemptions apply, including sections 13, 19 and 20 of the *Act*.

Solicitor-Client Privilege

The Ministry claims that all of the pages qualify for exemption under section 49(a)/19, so I will consider this claim first.

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 the statutory litigation privilege under Branch 2.

Statutory Litigation Privilege

The Ministry submits:

> The sole purpose for the creation of the documents was litigation. The records assisted The Children's Lawyer in determining how to conduct this case on behalf of the children, about whom an investigation and report was being prepared pursuant to section 112 of the *CJA* [*Courts of Justice Act*]. The records also show what services were rendered by the OCL during the course of the case.
>
> In-house staff and the clinical investigator retained by the OCL to handle the case prepared all of the records. The Children's Lawyer is a member of the bar of Ontario, as required by section 89(2) of the *CJA*. As such, he or she is Crown counsel, and this is accepted in Order P-1115. The records were prepared so that The Children's Lawyer, in the exercise of the statutory mandate to provide services to children in custody/access cases, could provide an investigation and report to be filed with the court in the litigation between the parents. The records were therefore all prepared by or for Crown counsel, for use in the ongoing custody/access proceeding.
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> In the Divisional Court decision in *Ontario (Attorney General)* v. *Big Canoe* (2001), 208 D.L.R. (4th) 327, which was affirmed by the Ontario Court of Appeal at [2002] O.J. No. 4596, the Court held that Branch 2 of section 19 constitutes a statutory privilege that is separate and distinct from the common law solicitor-client privilege reflected in Branch 1 of section 19. The court held that the language of section 19 is clear: a head may refuse to disclose "a record that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of, or for use in, litigation". If the conditions of Branch 2 are met, the section 19 exemption applies to the records at issue, even if the records are not subject to the common law solicitor-client privilege. The Branch 2 statutory discretion to refuse disclosure is not to be confused with common law solicitor-client privilege. The Court also held that records exempt under this statutory privilege are exempt for all time, even after the litigation ends.
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> Order P-2119, cited in the Notice of Inquiry, is currently the subject of an application for judicial review. The Ministry disagrees with the conclusions therein with respect to the interpretation by the Court of Appeal of the Divisional Court decision in *Ontario (Attorney General)* v. *Big Canoe*. The Ministry submits that the Ontario Court of Appeal has not overruled the statement in the Divisional

> Court decision in *Ontario (Attorney General)* v. *Big Canoe*, that the language in branch 2 is clear and unambiguous. It is therefore, the Ministry's submission that, based on the judicial interpretation of section 19 that has been upheld by the Ontario Court of Appeal, the OCL has the discretion to refuse to disclose any documents prepared by or for Crown counsel in contemplation of or for use in litigation.

Branch 2 of section 19 only applies to records that were prepared by or for Crown counsel. In Order PO-2006, Senior Adjudicator David Goodis dealt with a case involving records held by the OCL. He concluded that certain records did not qualify for litigation privilege under sections 49(a)/19 and ordered that they be disclosed. On judicial review of Order PO-2006 (*Ontario (Children's Lawyer)* v. *Ontario (Information and privacy Commissioner)*, [2003] O.J. No. 3522 (Div Ct.)), the Divisional Court upheld Adjudicator Goodis' decision. The judgement includes a lengthy discussion of the role of the Children's Lawyer and the impact of the *Big Canoe* judgment on the application of Branch 2 of section 19 to records held by the OCL.

The Court in *Ontario (Children's Lawyer)* concluded that Branch 2 is not available to the OCL because the OCL does not act as Crown counsel. In reaching this conclusion, the Court stated:

> Obviously, the actual words are the key indicator of the intention of the Legislature. A consideration of the possible meanings of the phrase "Crown counsel" is an essential element of the analysis. This phrase has sometimes been equated with "any legal advisor to the Crown", and it was urged on us that any lawyer employed or retained by the Crown would qualify. As already noted, Crown counsel is not defined, but the word "counsel" carries an unmistakable element of giving advice, and in the context, it must be advice to the Crown. Any definition involving the giving of legal advice to the Crown will not capture the CLO because it is not an accurate description of the actual function of the CLO, who, although a public servant, is in the business of advising her non-governmental clients and not the Ministry, on legal matters. Even when reviewing a proposed settlement on behalf of a minor, the CLO does not advise the Minister, she advises the court. In her role, she incurs legislated obligations and common law obligations that are fiduciary and which require her to devote her loyalty exclusively to those clients. That requirement of loyalty precludes her adopting the role of advisor to the Crown, certainly in respect of any matter in which she has a non-government client. In such a role, the CLO simply cannot act as Crown counsel.
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> It may be that the CLO cannot in practice act for or advise the Crown in any case involving minors, because she will often litigate for her clients against the government, no doubt including the very Ministry under whose wing her independent office is found. If at the same time she is advising the Crown, presumably in her area of expertise, the potential for conflict and for the reasonable apprehension of conflict of interest is very real. It is not necessary to

> go that far; it is enough to say that the CLO, when appointed to represent a minor, or as litigation guardian of, or lawyer for, a minor, or in approving a settlement on behalf of a minor, does not act as Crown counsel and does not have the section 19, second branch, statutory privilege. Since those functions largely describe the work of the CLO, there is no point in limiting the exclusion of the CLO from the section in any way. To the limited extent the office of the CLO might advise the Ministry on matters of policy, there are other privileges in [the *Act*] which can more appropriately be called upon to protect documents relating to that function.
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> …
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> It does no violence to the text of section 19, nor to the actual role of the CLO, to rule that the phrase `Crown counsel' in section 19 simply does not include the CLO. She does not fall within the meaning which ought reasonably to be given to that phrase. Such an interpretation actually enhances her ability to perform her functions and maintain the confidence of her clients and the public that her actions are solely devoted to the welfare of her clients. …

The summing up its various findings, the Court stated:

> In summary, interpreting section 19's reference to Crown counsel as not including the CLO, meets the criteria for a modern interpretation set out by *Driedger* and adopted by the Supreme Court. Such a reading does no violence to the actual language; it is in accord with the purpose of [the *Act*]; it appropriately balances the right of the clients to know and the right of government to keep its governmental secrets; it does not disturb government's section 19 privileges in its own litigation; it avoids putting the CLO into a serious conflict between her fiduciary and legislated duties to her clients and the discretion that may be exercised by the head; it avoids the absurdity of denying clients the right to know what their lawyer has done for them; it appropriately acknowledges the unique function of the CLO as public servants performing essentially private law duties for persons under the legal disability of childhood; and it does not purport to exempt these lawyers from obligations to their clients that are not only common to, but vital to the profession.

The findings in *Ontario (Children's Lawyer)* are equally applicable to the present appeal. The role of the OCL in the 1997 litigation involving the appellant and her husband was to represent the interests of their children as litigation guardian. As the Court points clearly states, the OCL is not acting as "Crown counsel" in this context, and Branch 2 of section 19 has no application.

Although not claimed by the Ministry, it should also be noted that the records at issue in this appeal would not qualify for exemption under common law litigation privilege. At common law (under Branch 1 of section 19), litigation privilege may be lost through termination of litigation or the absence of reasonably contemplated litigation (Order P-1551; see also *Ontario (Attorney*

General) v. Big Canoe (2002), 62 O.R. (3d) 176 (C.A.), *Boulianne V. Flynn*, [1970] 3 O.R. 84 at 90 (Co. Ct.), and *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (H.C.)).

Because the section 49(a)/19 exemption is the only one claimed for pages 28 and 29, these two pages do not qualify for exemption and should be disclosed to the appellant.

Danger to Safety or Health

The Ministry claims section 49(a)/20 as one basis for denying access to pages 16, 17, 31 and the undisclosed portions of page 1.

Section 20 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably expected to" lead to the specified result. To meet this test, the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated (*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Ministry of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)).

An individual's subjective fear, while relevant, many not be sufficient to establish the application of the exemption (Order PO-2003).

The Ministry states that the report prepared by the clinical investigator (which has been provided to the appellant) indicates concerns about the appellant's mental health, as well as for the children's safety if allowed to have unsupervised access with the appellant. The Ministry submits that disclosing the withheld information on pages 1, 16, 17 and 31 could reasonably be expected to seriously threaten the safety or health of certain identified individuals. The confidential portions of the Ministry's representations outline the rationale for taking this position.

In the particular circumstances of this case, I accept the Ministry's submissions as they relate to the identified information on pages 1, 16 and 17 and certain portions of page 31. In my view, the Ministry has demonstrated that there is a reasonable basis for believing that endangerment will result from disclosure, and its reasons for resisting disclosure are not frivolous or exaggerated. As far as page 31 is concerned, in my view, portions of the handwritten notes of the clinical coordinator that appear near the bottom of the page, as well as one statement of the clinical investigator which reflect certain actions to be taken by the clinical investigator also qualify for exemption under section 20 for the same reasons. The remaining portions of page 31 do not contain information that would give rise to a reasonable expectation of harm under section 20.

Therefore, pages 16, 17, the undisclosed portions of page 1 and the identified portions of page 31 qualify for exemption under section 49(a)/20 and should not be disclosed.

Advice and Recommendations

The Ministry claims section 49(a)/13(1) as one basis for denying access to the undisclosed handwritten note on page 19 and all of page 31.

Section 13(1) 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.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders P-1037, P-1631, PO-2028]

The Ministry submits that the content of pages 19 and 31 reflects the deliberations and recommendations of the Clinical Coordinator, an employee of the OCL, in the context of the 1997 litigation and in providing supervision to the clinical investigator involved in the appellant's case.

I do not accept the Ministry's position.

I dealt with a similar situation in Order P-363, involving records exchanged between an employee and supervisor. I stated:

> Record 5 consists of a July 18, 1990 memo from the investigating human rights officer to her supervisor, together with the supervisor's reply, dated August 14, 1980. The July 18, 1980 memo simply seeks direction regarding how the investigation should be handled which, in my view, places it outside the ambit of section 13(1). As for the August 14, 1980 response, it just outlines the supervisor's direction on how the investigation should proceed. It does not contain any information that can properly be characterized as "advice or recommendations" as these words are used in section 13(1). The supervisor does not set out a suggested course of action which may be either accepted or rejected in the deliberative process; he simply provides direction to the officer under the terms of the Commission's governing legislation. In my view, the August 14, 1980 response also does not qualify for exemption under section 13(1).

The same reasoning applies to the handwritten note on page 19. The clinical coordinator does not set out a suggested course of action that may be either accepted or rejected by the clinical investigator; she simply provides direction to the investigator on how to deal with a particular fact situation in accordance with established procedures. Accordingly, the undisclosed portion of page 19 does not qualify for exemption under section 49(a)/13(1).

I have already determined that portions of the handwritten notes of the clinical coordinator that appear on page 31 qualify for exemption under section 49(a)/20. The remaining portions do not qualify for exemption under section 49(a)/13(1). They do not set out suggested course of action that may be either accepted or rejected by the clinical investigator; rather, they constitute an instruction to the clinical investigator to take certain action in response to information gathered by the clinical investigator and outlined on page 31. The rest of page 31 consists of handwritten "notes to file" made by the clinical investigator. With the exception of the one statement that qualifies for exemption under section 49(a)/20, the rest of the notes are factual in nature and contain no information that could accurately be described as advice or recommendations for the purpose of the section 49(a)/13(1) exemption claim.

Therefore, the undisclosed portion of page 19 and the portions of page 31 that do not otherwise qualify for exemption under section 49(a)/20, do not qualify for any of the exemptions claimed by the Ministry and should be disclosed.

Invasion of Privacy

I have determined that portions of page 25 contain the personal information of the clinical investigator and certain other identifiable individuals. The Ministry has denied access to this information under section 21 of the *Act*, which prohibits the disclosure unless one of the various exceptions listed in section 21(1) are present.

None of these individuals has consented to the disclosure of their personal information and, in the absence of any evidence to suggest that disclosing it would not constitute an unjustified invasion of privacy, I find that it would.

Therefore, I find that the portions of page 25 that contain the personal information of the clinical investigator and other identifiable individuals qualify for exemption under section 21 of the *Act* and should not be disclosed. The rest of page 25 contains the personal information of the appellant and should be provided to her. I will attach a highlighted copy of page 25 with the copy of this order sent to the Ministry, identifying the portions that qualify for exemption.

Exercise of Discretion

Section 49 is a discretionary exemption. Therefore, once it is determined that a record qualifies for exemption under section 49(a), the Ministry must exercise discretion in deciding whether or not to disclose it. An institution's exercise of discretion must be made in full appreciation of the facts of the appeal and upon proper application of the applicable principles of law. It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion (Orders 58, MO-1286-F and MO-1287-I).

The Ministry's representations include a section outlining reasons why the OCL exercised its discretion under section 49(a). It is clear from these representations, some of which were not shared with the appellant due to confidentiality considerations, that the OCL considered a number of factors, including the particular circumstances of the appellant's case and her relationship to the OCL, her children and their father. It should also be noted that the Ministry has provided the appellant with most of the responsive records, and she will receive more of them as a result of this order. As far as the withheld portions are concerned, I find nothing improper in the way the Ministry has exercised its discretion.

ORDER:

1. I uphold the Ministry's decision to deny access to pages 16 and 17, the undisclosed portions of pages 1, the portions of page 25 containing the personal information of individuals other than the appellant, and the portions of page 31 that qualify for exemption under section 49(a)/20. I have attached a highlighted version of pages 25 and 31 with the copy of this order sent to the Ministry, identifying the portions that qualify for exemption and should **not** be disclosed.

2. I order the Ministry to provide the appellant with a copy of pages 28 and 29, the undisclosed portions of page 19, and the portions of pages 25 and 31 not covered by Provision 1, by **December 9, 2003.**

3. I reserve the right to require the Ministry to provide me with a copy of the pages disclosed to the appellant pursuant to Provision 2.

Original signed by: November 18, 2003
Tom Mitchinson
Assistant Commissioner