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

ORDER PO-2162

Appeal PA-020301-1

Ministry of Labour

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NATURE OF THE APPEAL:

The Ministry of Labour (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act)* for access to all records relating directly or indirectly to the decision to lay charges under the *Occupational Health and Safety Act* (the *OHSA*), against the requester's clients. Specifically, the requester sought access to:

> … copies of all records, including, but not limited to, correspondence, memos, notes, reports, e-mails, opinions or recommendations…copies of all records in the offices of the Minister and his staff, the Deputy Minister and his staff, the Investigation, Inspection and Enforcement Secretariat, the Legal Services Branch, the Occupational Health and Safety Branch, the Northern Region office, the Sault Ste. Marie District Office (or any satellite office) and the Policy and Communications Division.

The Ministry identified 16 responsive records located in two program areas: the Sault Ste. Marie District Office and the Legal Services Branch. The Ministry denied access to all of these records, claiming that they qualify for exemption under section 19 of the *Act* (solicitor-client privilege).

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

During mediation the Ministry revised its decision and granted access to two records.

Mediation did not resolve the remaining issues, and the file was transferred to the adjudication stage of the appeal process. I sent a Notice of Inquiry to the Ministry, inviting submissions on the application of section 19. I also added section 21 and/or 49 of the *Act* to the scope of my inquiry.

Before the Ministry submitted its representations, the appellant was provided with access to seven of the records in the context of disclosure proceedings relating to the *OHSA* prosecution. These records are no longer at issue in this appeal.

The Ministry then provided representations in response to the Notice of Inquiry. I sent these representations to the appellant, along with a copy of the Notice, and he responded with representations.

RECORDS:

Records 3, 6, 7, 8, 9, 13,and 14 have been disclosed to the appellant and are no longer at issue in this appeal.

The remaining seven records (Records 1, 2, 4, 5, 10, 11, and 12) consist of e-mail messages and handwritten notes, as described in an Index of Records prepared by the Ministry and provided to the appellant and this office.

DISCUSSION:

PERSONAL INFORMATION/RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Introduction

"Personal information" is defined, in part, to mean 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)].

All of the records at issue in this appeal relate to individuals who are the subject of charges under the *OHSA*. Some individuals are identified by name in the records and, as far as I can determine, at least some of them are represented by the appellant. As such, I find that the records contain the personal information of the appellant's clients as defined in section 2(1) of the *Act*.

Right of access to requester's own personal information

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) of the *Act*, the institution has the discretion to deny an individual access to their own personal information in instances where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that information.

The Ministry claims that all remaining records qualify for exemption under section 19. Should I find that this exemption applies, I must also satisfy myself that the Ministry has properly exercised discretion under section 49(a) in denying access to any exempt records.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that all of the records fall within the scope of the section 19 exemption.

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 common law solicitor-client communication privilege and common law litigation 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 Ministry submits that all of the records involve confidential communications between a Ministry counsel and his client or were prepared for giving advice to the client. The Ministry's representations include an affidavit sworn by the counsel outlining his roles and responsibilities and the context in which the records were created. He deposes:

> That the items not disclosed include communications between myself and the Ministry of Labour Inspector in charge of the investigations leading to the prosecution, his District Manager, and/or officers of the Ontario Provincial Police; handwritten notes made by myself relating to communications with the above parties or to the drafting of charges; and draft informations.
>
> That all of the withheld documents relate in some way to the decision to lay charges against [the appellant's clients], and are either solicitor-client privileged, or are covered by work product privilege.
>
> That on April 8, 2003, The Hon. Mr. Justice J. Keast, who is the trial Judge for the above-referenced prosecution, ruled that all of the outstanding items are privileged and are not to be disclosed to the defence. …

The appellant states in his representations that Justice Keast did not review the records before making his determination in the *OHSA* matter, and points out that Justice Keast's ruling is not determinative of the application of section 19 of the *Act*. The appellant submits:

> It is respectfully submitted that to determine this appeal the Commissioner should review the document in issue in detail to determine independently of [Ministry counsel] whether the documents in issue fall within the ambit of solicitor-client privilege.

The appellant acknowledges in his representations that if the communications between Ministry counsel and his client were for the purpose of providing legal advice, then the records would qualify for solicitor-client communication privilege. However, he submits that by using the phrase "relate in some way" in his affidavit, Ministry counsel "leaves open the possibility that some of the documents, or parts of those documents, may pertain to matters that do not relate to the provision of legal advice". In particular, the appellant states that if the records "relate to factual information relating to the charges that are within the knowledge of [the Ministry client], that such documents or the relevant parts thereof would not be covered by section 19".

In addition, the appellant takes the position that any records reflecting communications between Ministry counsel and the Ontario Provincial Police "would not be for the purpose of providing legal advice to [the Ministry client] or his department and would not be subject to solicitor-client privilege".

Having carefully reviewed the contents of the records, in my view, Records 1, 2, 4, 5 and 11 all fall squarely within the scope of common law solicitor-client communication privilege. Each of them is an e-mail communication (some with attached draft charges) created by Ministry counsel and sent directly to his Ministry client. The content of each record relates to the provision of legal advice, specifically his intended approach to prosecutions under the *OHSA* stemming from the investigation undertaken by the Ministry client. It is reasonable, in the circumstances, to conclude that both counsel and client would treat communications of this nature confidentially.

Accordingly, I find that Records 1, 2, 4, 5, and 11 qualify for exemption under section 19 of the *Act*.

Record 10 is a 6-page series of handwritten notes made by the same Ministry counsel during the course of his work on the *OHSA* prosecution. They reflect conversations with his client and others and, in my view, are accurately described as "working papers" as the term is used in *Susan Hoisery*. For this reason, I find that Record 10 also satisfies the requirements of common law solicitor-client communication privilege, and qualifies for exemption under section 19 of the *Act*.

Record 12 is different than the other records at issue in this appeal. It is a 1-page e-mail chain between Ministry counsel and a member of the Ontario Provincial Police (the OPP). The OPP officer originates the communication by asking for the counsel's legal opinion on a particular aspect of the *OHSA* matter and the counsel responds with his legal advice. In my view, this record consists of a direct communication between two individuals made for the purpose of obtaining and giving professional legal advice and, given the nature of the content of the e-mail exchange, it is reasonable to conclude that this communication was confidential. The only issue is whether the communication was made in the context of a solicitor-client relationship.

Adjudicator Sherry Liang recently dealt with a similar issue in Order MO-1663-F, which involved a record documenting a communication between a Crown prosecutor and a member of a municipal police force. Adjudicator Liang considered the application of the Supreme Court of Canada's decision in *R. v. Campbell*, [1999] 1 S.C.R. 565, which, in my view, is relevant to my consideration of Record 12 in this appeal:

> In *R. v. Campbell*, 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*. In addition, in Order PO-1779, in relation to the OPP, Assistant Commissioner Tom Mitchinson analysed the relationship between the OPP and the Crown as follows:

> However, there is one further aspect to consider before concluding that solicitor-client communications privilege is established. In Order P-613, section 19 was not applied on the basis that there is no solicitor-client relationship between Crown counsel and the OPP. However, in my view, this interpretation is no longer supportable as a result of the recent Supreme Court of Canada decision in *R. v. Campbell*, [1999] 1 S.C.R. 565. In that case, the Court concluded that a solicitor-client relationship did exist between counsel with the federal Department of Justice and the R.C.M.P. The decision sees the R.C.M.P. as a "client department" of the Department of Justice and, therefore, it is difficult to see how the same conclusion could not apply vis à vis the Ministry of the Attorney General and the OPP. In my view, a solicitor-client relationship exists between the OPP and Crown counsel.

This analysis has been followed in subsequent orders applying the solicitor client privilege under the provincial *Act* to communications between the OPP and Crown counsel.

The circumstances described in Order PO-1779 do not apply to the relationship between a municipal police force and Crown counsel. Even the Police in this case do not assert that they can be viewed as a "client department" of Crown counsel. Therefore, whether a solicitor-client relationship can be established in a particular instance depends on the application of the functional definition set out in *Descôteaux v. Mierzwinski* and approved in *R. v. Campbell*, above. …

Adjudicator Liang went on to apply the "functional definition" of solicitor-client privilege and determined, on the facts, that there was insufficient evidence to establish that the communications reflected in the records at issue in that appeal occurred within the framework of a solicitor-client relationship.

Applying this same "functional definition" to Record 12, I have reached the opposite conclusion. It is clear from the content of this record that the sole purpose for the communication was to seek

and give legal advice on a specific aspect of the *OHSA* prosecution. The OPP officer, who was involved in the events leading to the prosecution, turned to the Ministry counsel in his capacity as the lawyer responsible for the prosecution, for the purpose of obtaining his legal opinion, and counsel responded accordingly. There is no ambiguity in this regard. In my view, the role played by Ministry counsel in the *OHSA* prosecution is analogous to the role of Crown counsel in a criminal prosecution and, applying the reasoning from *R. v. Campbell*, I find that Record 12 satisfies the requirements of common law solicitor-client communication privilege, and qualifies for exemption under section 19 of the *Act*.

In summary, I find that Records 1, 2, 4, 5, 10, 11 and 12 all meet the requirements of common law solicitor-client communication privilege under Branch 1 of section 19. I have also reviewed the approach taken by the Ministry in exercising discretion to deny access to these records, and find nothing improper. Accordingly, I find that all of these records qualify for exemption under section 19 and/or section 49(a) of the *Act*.

ORDER:

I uphold the Ministry's decision.

Original signed by _____ July 11, 2003

Tom Mitchinson
Assistant Commissioner