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

ORDER PO-2364

Appeal PA-040031-1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (MAG) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the Deloro Mine Site Clean-Up Project. Specifically, the requester wrote:

> [Requester's named organization] has received much assistance from the MOE [Ministry of the Environment] but was unable to obtain a copy of a brief that was prepared by the Investigation and Enforcement Branch (IEB) [of the MOE] as part of the investigations of the Deloro site. [MOE] indicated that the brief was prepared for and used by the Ministry of the Attorney General but was never entered into the public record and the MOE, therefore was unable to supply us with a copy.
>
> [Requester's named organization] is monitoring the progress of the Deloro Mine Site Clean-Up Project and would like the brief so as to keep our file complete and updated. …

MAG located 50 responsive records and denied access to them in accordance with sections 13(1) (advice or recommendations), 14(2)(a) (law enforcement), and 19 (solicitor-client privilege) of the *Act*.

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

During mediation, the appellant narrowed the scope of the appeal to include 2 of the 50 responsive records identified by MAG.

The parties were unable to arrive at a mediated settlement and the file was transferred to Assistant Commissioner Tom Michinson for adjudication. With Assistant Commissioner Michinson's retirement, I have taken over responsibility for the adjudication of this appeal.

Assistant Commissioner Michinson began his inquiry by sending a Notice of Inquiry, setting out the facts and issues on appeal, to MAG. He received representations in response. Assistant Commissioner Michinson then sent the Notice of Inquiry, along with a copy of MAG's non-confidential representations, to the appellant, inviting representations. The appellant also submitted representations in response. The Ministry was given an opportunity to reply to the appellant's submissions, and the appellant provided a sur-reply.

RECORDS:

The records remaining at issue in this appeal are described in MAG's Index of Records as:

- Record 2 – MOE [Ministry of the Environment] In`vestigations and Enforcement Branch Report (pp. 4-23)
- Record 3 – MOE Initial Occurrence Report (pp.24-27)

DISCUSSION:

The two records at issue are part of a brief prepared by the Investigations and Enforcement Branch of the Ministry of the Environment and provided to the Ministry of the Attorney General in aid of a prosecution under the federal *Fisheries Act* and the provincial *Ontario Water Resources Act* (OWRA). The charges were privately laid, but the Crown eventually took carriage of the matter and conducted the prosecution. The Crown prosecutor was a private-practice lawyer who was retained by the Ministry of the Attorney General in order to conduct this particular prosecution. The case was somewhat unusual in that the defendant was the Ministry of the Environment, which was responsible for the Deloro Mine Site.

The Ministry relied on sections 13(1), 14(2)(a) and 19 of the *Act* to deny access in full to the two records. I will first look at the applicability of section 19 to the records.

SOLICITOR-CLIENT PRIVILEGE

The Ministry relies on the discretionary exemption in section 19 to deny access to both Records 2 and 3.

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. MAG argues that the statutory exemption under Branch 2 applies in that the record was prepared by or for Crown counsel for use in giving legal advice in contemplation of or for use in litigation.

Branch 2: Statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

MAG relies on the litigation privilege component of Branch 2 to support its position that the records are exempt from disclosure under section 19. In this context, Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

Statutory litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO- 2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Representations

MAG submits that Branch 2 applies to both records 2 and 3:

> [B]oth of these records are part of the brief used by the Crown prosecutor during the trial on the charges against the Ministry of the Environment. They were prepared in contemplation of the litigation regarding the charges. The nature of the contents of the documents themselves demonstrate this fact, as both documents deal with the specific allegations in the charges. The Ministry of the Attorney General is not aware of any actions having been taken that would constitute waiver of privilege with respect to these records.

The appellant submits that records 2 and 3 do not meet either of the tests set out in section 19. With regard to the applicability of Branch 2 of the section 19 test, the appellant submits that records 2 and 3 were neither prepared for, or by, Crown Counsel:

> …The occurrence report [record 3] was prepared by the Investigations and Enforcement Branch of the Ministry of Environment as a matter of routine procedure. Record 2 was also prepared by the Ministry of the Environment. The Crown prosecutor confirmed this during the trial: *"[Named individual] did an investigation in this matter [the due diligence issue] and has produced hundreds, if not thousands of pages of documents… He's a Ministry of Environment Investigator*. [Named lawyer] confirmed the Crown's statements by noting that [named individual] was, indeed, an employee of his client.
>
> …Record 3 was prepared for the Ministry of the Environment, not for the Ministry of the Attorney General, pursuant to s.3.0 of the Ministry's *Compliance Guideline F-2: " When the provincial officer is of the opinion that a violation has occurred, the suspected violation and a recommendation regarding enforcement action shall be recorded on the occurrence report. The signed original report shall be forwarded to the Investigations and Enforcement Branch."*
>
> …Record 2 was initiated at least one year before the Ministry of the Attorney General intervened in the case.
>
> In its submission, the Ministry of the Attorney General suggests that both Records 2 and 3 were prepared "in contemplation of litigation regarding the charges." This statement may be misleading. The charges in question were part of a private prosecution and had already been laid by the time both of the records were completed; it is not logically possible for documents to be prepared in contemplation of an action that has already occurred.
>
> Further, Record 2 deals with a period of time after the delict period for the charges at trial. Thus, it had no bearing on the validity of the charges laid in November 1997. For this reason, it also fails to meet the dominant purpose test, "there must be more than a vague or general apprehension of litigation, " (Quoted from IPC's Notice of Inquiry)
>
> The peculiar facts in this case must also be taken into account: both records were prepared by the accused in the matter at trial. When the Ministry of Environment released Records 2 and 3 to the Ministry of the Attorney General – the prosecution – it did not have a reasonable expectation of privacy.

In reply to the submissions of the appellant, MAG provided the following:

> The Appellant's arguments that records 2 and 3 were not prepared for Crown counsel would suggest that in order for section 19 of [the *Act*] to apply, the creator

> of the documents would have to have the subjective intent to address the documents directly to Crown counsel, with no other intervening addressee. The Appellant has also argued, at paragraph 40, that the records logically could not have been prepared in contemplation of litigation regarding the charges because the charges in question had already been privately-laid by the time the records were completed. These arguments assume an excessively narrow interpretation of the meaning of section 19. The words "in contemplation of or for use in litigation" in Branch 2 of section 19 do not in any way restrict the time period covered by section 19 to the period before the laying of a charge. Records prepared at any stage in contemplation of, or for use in, the litigation regarding the charges, must be covered, *including* records prepared after the charges were laid and before the trial on the charges was held.
>
> As previously submitted by the Ministry of the Attorney General, records 2 and 3 were part of the Crown brief provided to the Crown prosecutor for the litigation on the charges. The fact that they were not directly addressed to Crown counsel at the time of their creation should not take them out of the scope of section 19 of [the *Act*]. This situation may be analogous to one in which police investigators might take photographs or notes during the course of a criminal investigation, with the immediate purpose of simply documenting the investigation for a superior officer's consideration. However, when the Crown brief is ultimately prepared for Crown counsel before trial including those photographs or notes, it is submitted that section 19 of [the *Act*] would apply. In *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer),* the Court of Appeal's interpretation of Branch 2 of section 19 included the following: "[i]n fact those words describe the work product or litigation privilege which covers material going beyond solicitor-client confidences and embraces such items as are the subject of this proceeding, photographs and a video gathered in the preparations for litigation".
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> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (Ont. C.A.) at 172.

On sur-reply the appellant submits:

> [P]rivilege does not apply to the records, since the communications were neither confidential, nor between a client (or his agent) and a legal advisor. In the first case, common law holds that communications between opposing parties, even in contemplation of litigation, are not considered privileged unless made with a view to settlement: "*The denial of privilege operates on principles similar to those in waiver of privilege, in that by communicating to the other side, the communicating party could be said to have waived privilege with respect to that communication."* (p-1561) Thus, disclosure of the records by the Ministry of the Environment constitutes a waiver of confidentiality. In the second case, the relationship between the Investigations and Enforcement Branch (IEB) of the Ministry of the Environment is not that of solicitor and client. IEB officers are

> not the clients of the Crown Attorney, and the Crown Attorney, who is an employee of the provincial government, is not "employed or retained" by the IEB. (See for example, Order M-52).
>
> In its reply submission, the Ministry of the Attorney General suggests that the fact that the records, "*were not directly addressed to Crown counsel at the time of their creation should not take them out of the scope of section 19 of [the Act*]." On the contrary, the IPC has explicitly stated that a record must have been created by or for counsel in order to qualify for exemption under Branch 2. Neither record was prepared by or for counsel- to suggest that any document, prepared by any government agency for any reason, can be withheld from the public simply because it was at one time shared with the Ministry of the Attorney General contravenes both the spirit and legal purpose of [the *Act*].

Analysis and Findings

As described above, MAG identifies Record 3 as an occurrence report prepared by MOE staff that documents a complaint into an alleged breach of the provincial *OWRA* and Record 2 is a document prepared by the investigator of the MOE's Investigations and Enforcement Branch who looked into the complaint documented by the occurrence report.

MAG is relying on the statutory litigation component of Branch 2 to support its position that the records are exempt from disclosure under section 19. To rely on this exemption, MAG must demonstrate that the records were prepared for Crown counsel "in contemplation of or for use in litigation". As noted above, the litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation. As set out in Order MO-1337-I, to meet the dominant purpose test, there must be more than a vague or general apprehension of litigation.

On reviewing the records and the representations of the parties, I am satisfied that the statutory exemption under Branch 2 of the section 19 exemption is applicable in this circumstance. I have reached this conclusion based on the fact that both records are part of the brief used by the Crown prosecutor during the trial of the Ministry of the Environment. The records are the direct result of the charges laid against the Ministry of the Environment and the potential prosecution of those charges by the Crown. The fact that charges had already been laid against the Ministry, albeit privately, is significant in this regard. Record 3 contains a clear suggestion for a recommended course of action on whether to follow up on the allegations made by the complainant. Record 2 is the report generated by Investigations and Enforcement Branch, and provides support for the potential prosecution of the Ministry by a Crown prosecutor. In the event, the prosecution proceeded and, as one would expect, both Records were included in the Crown brief that was forwarded to the prosecutor. I find that there was more than a vague or general apprehension of litigation. In fact, at the time the records were created, the expectation was that, should the Crown proceed with the charges, both Record 2 and Record 3 would be forwarded to the prosecuting Crown as part of the Crown brief.

The appellant maintains that neither record was prepared by or for Crown counsel. While it is true that the records were prepared by Ministry of the Environment staff, I find that there was every reason for Ministry staff to contemplate that, should charges proceed to prosecution, the records would be used by a Crown prosecutor to support that prosecution. This view is supported by the excerpt from the "Legal Emissions" publication, found at Appendix E of the appellant's representations. That excerpt describes the process for proceeding with environmental prosecutions. The following portions are relevant to this appeal:

> If, following an investigation, the IEB decides to lay charges, it prepares and sends to the Legal Services Branch a Crown brief on the case. A brief is in effect a case, and can comprise one or more defendants and charges. The brief contains statements of proposed witnesses, photographs taken, the results of sample analysis and expert opinion, as appropriate. The brief also contains a synopsis which is the investigator's narrative of how the proposed evidence is related to the alleged violation.
>
> A Crown Prosecutor reviews the Crown Brief against the MAG Crown Policy Manual requirements for charge screening which establish the test for determining whether to initiate or continue a prosecution…After the screening, the Crown Prosecutor then informs the IEB of his/her view as to whether it is or is not appropriate to proceed to lay charges. The decision to lay a charge is made by the IEB, not the Crown Prosecutor.
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> If a charge is laid by the IEB, the Crown Brief is then handled by the Legal Services Branch which conducts the case according to MAG directives. The Crown at this stage has absolute and independent control over the charges including the authority to withdraw it or proceed with the prosecution. Thus, whether the case actually proceeds to trial is within the exclusive province of the Crown Prosecutor handling the case, who proceeds solely in the interests of the administration of justice.

It is clear from this excerpt that, although the decision to lay charges rests with Ministry of the Environment staff, responsibility for prosecuting the charges resides with the Crown Prosecutor. To support that prosecution, investigative staff of the Ministry forward a Crown brief to the prosecutor. The Crown brief is comprised of documents relevant to the alleged offence, including the initial Occurrence Report and the Investigation and Enforcement Branch report. At the time of creating these documents, there would be every expectation that Records 2 and 3 would be included in the Crown brief should the prosecution proceed.

In this particular fact situation, the charges were not laid by Ministry of the Environment staff, but rather by a private citizen. Also, the Crown Prosecutor was a lawyer who, at the time, had been in private practice, but who had been retained by MAG in order to conduct this particular prosecution on behalf of the Crown. Neither of these issues changes my view that both records qualify under Branch 2 of the section 19 exemption. Regardless of who initiated the charges, in my view both records were clearly prepared within the context of a potential prosecution by the Crown. Whether the charges were prosecuted by a Crown Attorney, or a lawyer retained by the

Crown for that purpose is immaterial. As I have noted earlier, at the time that both records were created, it could reasonably be expected that, should the charges proceed, the records would be included in the Crown Brief that would be forwarded to the Crown Prosecutor.

EXERCISE OF DISCRETION

General Principles

The section 19 exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so. In addition, this office may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

If any of these circumstances are present, the matter may be sent back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons

- whether disclosure will increase public confidence in the operation of the institution

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person

- the age of the information

- the historic practice of the institution with respect to similar information

With regard to its exercise of discretion, the Ministry submits:

> Among the factors considered by the Ministry of the Attorney General in claiming the section 19 exemption for these records is the fact that these records contain recommendations and/or clearly express the evaluations and assessments of information from the investigation, that were to be communicated to, and considered by, the Crown prosecutor. Disclosure of records to a requester under FIPPA is, potentially, disclosure to the world at large. It is crucial to the Crown's ability to prosecute cases fairly and knowledgeably that Crown counsel and investigators be able to exchange information, opinions, and advice about a case frankly and fully without being inhibited by the prospect of disclosure of such records to the public at large. For example, some of the exchange of information and advice which could potentially be inhibited could be the creation of any records discussing deficiencies or problems in the evidence or investigation. The free exchange of such information between the investigator and Crown counsel is extremely important to the just and effective handling of investigations and prosecutions.
>
> Furthermore, another significant consideration is that the Crown brief records in issue contain references to the complainants and other witnesses interviewed in this case. The effective prosecution of alleged offences is highly dependent on the cooperation of members of the public in being willing to come forward to report offences and give law enforcement officials information that would assist in investigations. In the 1993 *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (The "*Martin Committee Report*"), it was stated that "The effective investigation of crime depends, in large measure, on the support and co-operation of the public. However, it is said that sources of information about criminal wrongdoing would dry up unless the police and the Crown are able to take some steps to protect the privacy of persons who supply them with information. The Committee agrees that this is a serious concern."

In my view, the considerations outlined by the Ministry are appropriate factors consistent with a proper exercise of discretion. The Ministry has weighed the possible harm that could arise from disclosing information contained in Crown briefs against potential benefits to the public or the appellant from releasing the information and has decided against release.

For all of these reasons, I find that there has been a proper exercise of discretion in this case, and that Records 2 and 3 qualify for exemption under section 19 of the *Act*.

In light of this finding, I do not need to consider the section 13(1) and section 14(2)(a) exemption claims.

ORDER:

I uphold MAG's decision.

Original signed by: January 25, 2005
Brian Beamish
Assistant Commissioner