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

ORDER PO-2392

Appeal PA-040260-1

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 records relating to a complaint made by the requester about the manner in which a prosecution involving the requester was conducted, along with specific complaints about a named Crown Attorney. The Ministry located the responsive records and granted partial access to them. Access to the remaining records, or parts of records, was denied pursuant to the following exemptions contained in the *Act*:

- advice or recommendations – section 13(1);
- law enforcement – section 14(1)(a);
- solicitor-client privilege – section 19;
- discretion to refuse requester's own information – section 49(a); and
- invasion of privacy – section 49(b)

The requester, now the appellant, appealed the Ministry's decision. The appellant also raised the possible application of the "public interest override" provision in section 23 of the *Act*.

During mediation, the appellant narrowed the scope of his request to include only Records 1, 2, 3, 4, 14, 26 and 45. Further mediation was not possible and the appeal was moved to the Inquiry stage. I sought and received the representations of the Ministry, the non-confidential portions of which were shared with the appellant, who also provided me with submissions. I then shared the appellant's representations with the Ministry, who provided additional representations by way of reply.

RECORDS:

The records at issue are described in the Ministry's Index as:

- Record 1 – an action memo dated December 18, 2003;
- Record 2 – an undated note;
- Record 3 – a chain of email messages dated December 18 and 19, 2003;
- Record 4 – two of the emails in Record 3 with additional notes and an action memo dated December 18, 2003;
- Record 14 – a facsimile cover page with notes dated December 24, 2003;
- Record 26 – a chain of email messages dated January 9, 2004; and
- Record 45 – a Correspondence Routing Slip dated December 31, 2003

DISCUSSION:

PERSONAL INFORMATION

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of "about" the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official

or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Representations of the parties

The Ministry submits that the records contain the personal information of the individuals whose names appear in them because of the serious allegations made by the appellant about these persons. It also argues that Records 3, 4 and 26 represent "correspondence sent to an institution by an individual that are both implicitly and explicitly of a private and confidential nature, pursuant to s.2(f)." In addition, the Ministry submits that the records contain the personal information of the appellant as they "reflect the Ministry's treatment of the applicant's initial complaints, and thus the Ministry personnel's 'views or opinions about another individual' [s.2(g)]."

The appellant submits that the records do not contain the personal information of any Ministry employees as they were acting solely in their professional capacities with respect to their handling of his complaints. He argues that any records created by those charged with processing his complaints ought to be viewed only as "documents produced by [a] public servant in the performance of their duties."

Findings

The records at issue relate directly to complaints made by the appellant of criminal or tortious behaviour on the part of certain Ministry employees in the manner in which his prosecution was being conducted. While the complaints relate to activities engaged in during the course of their employment with the Ministry, they are of a personal nature, speaking to the honesty and integrity of the identified individuals. Owing to the personal nature of the allegations brought by the appellant against certain Ministry officials that are reflected in the records, I find that the records relate to these individuals in a personal, as well as in a professional capacity. I find that the records contain information that qualifies as the "personal information" of the Ministry employees about whom the allegations were made.

In addition, the records contain information that relates to complaints brought by the appellant. I find that this information qualifies as the personal information of the appellant within the meaning of section 2(h). Record 1 also contains the appellant's home telephone number (section 2(d)) and information relating to an appearance he is to make in court in relation to a criminal matter (section 2(b)). I find that this information also qualifies as the appellant's personal information. The records also contain information relating to the views or opinions of Ministry personnel pertaining to the appellant and this information qualifies as his personal information under section 2(g).

To summarize, I find that all of the records contain the personal information of both the appellant and the Ministry employees who are the subject of his complaints.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

I have found above that each of the records contain information that qualifies as the personal information of both the appellant and other identifiable individuals. Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this case, the Ministry relies on section 49(a) in conjunction with sections 13(1), 14(1)(a) and 19. I will first address the possible application of section 49(a), taken together with section 19, to the information contained in each of the records.

SOLICITOR-CLIENT PRIVILEGE

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 as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

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.)].

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.)].

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.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for Crown counsel for use in giving legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

Representations of the parties

The Ministry submits that "these records were prepared by and for Crown counsel for use in giving legal advice, and because they were prepared in contemplation of use in litigation." It goes on to add that:

> These records were produced in the midst of criminal proceedings and in direct response to a letter written by the accused [the appellant in this appeal] that put forth a number of serious accusations with respect to the conduct of his trial. The records constitute legal advice, provided by one Crown Counsel to another, with respect to how to proceed in the face of the applicant's demands and allegations.

> The records were also prepared 'in contemplation for use in litigation', because any decisions with respect to how to respond (or not respond) could have instantly become an issue at trial in any number of ways.

The Ministry also points out that "termination of litigation does not negate the application of Branch 2 statutory litigation privilege", relying on the decision of the Ontario Court of Appeal in *Attorney General (Ontario) v. Big Canoe et al.* [2002], O.J. No. 4596.(C.A.). The Ministry submits that:

> These records came into existence as a result of litigation. The records at issue pertain to matters involving witnesses, or potential witnesses, in respect of litigation being conducted. They concern allegations and implicit demands made against these individuals and detail the internal process that Crown counsel went through in determining how to respond to these allegations and demands. The Ministry claims privilege for any and all records relating in any manner to Crown witnesses in respect of contemplated or actual litigation. The Ministry submits that Branch 2 of section 19 is specifically designed to protect information prepared by or for Crown counsel in connection with proceedings being conducted by Crown counsel on behalf of the government and that this claim has no temporal limit. The Ministry submits that section 19 can and must afford exemption to a wide range of materials obtained and prepared for litigation.

The Ministry also indicates that it not aware of any circumstances that may have given rise to a claim that the privilege that exists in the records has been waived.

The appellant suggests that there can be no solicitor-client relationship present because "there is no client." He argues that "the denied documents should not be seen as being documents in preparation for litigation. The documents being sought are in response to a complaint and a reply letter to the complaint, being [a memorandum dated January 7, 2004]."

Findings

The records remaining at issue consist of various "action memos", telephone messages, emails, handwritten notes, a facsimile cover page and a Minister's Correspondence Routing Slip relating to the Ministry's response to certain allegations made by the appellant about a Crown Attorney. These records all pertain directly to the formulation of a response by the Ministry in order to address the concerns raised by the appellant. Each of the documents, with the exception of Record 45, is a communication between Ministry counsel or between other Ministry staff and Ministry counsel. All of these communications address the Ministry's reaction to the allegations make by the appellant which relate directly to a legal issue.

In my view, the "actions memos" comprising Records 1, 2 and part of Record 4; the emails that make up Records 3, another portion of Record 4 and Record 26; the facsimile transmission cover page at Record 14 and the notes that form yet another part of Record 4 and a portion of Record

14 all represent confidential communications about a legal matter between a solicitor, in this case Crown counsel, and client, in this case either another Crown counsel or a Ministry employee. The communications took place between the solicitor and his clients, Ministry employees or other Crown counsel employed by the Ministry, which is the client in this situation. The context involved the seeking and obtaining of legal advice about a legal problem, in this case the Ministry's response to the legal issues raised by the appellant's complaints. The communications focussed on the seeking or giving of legal advice by the Crown counsel involved in addressing the legal problems present in the situation. I find that these communications were made for the purpose of seeking, formulating or giving legal advice as described in each document.

Accordingly, I find that Records 1, 2, 3, 4, 14 and 26 qualify for exemption under the solicitor-client communication component of Branch 2 of section 19. These records are privileged communications prepared by or for Crown counsel for use in giving legal advice, thereby meeting the requirements of that branch of the exemption. Because the records contain the personal information of the appellant, I find that they are exempt under section 49(a), taken in conjunction with the solicitor-client exemption in section 19.

However, based on the information provided to me by the Ministry and my own examination of Record 45, I am unable to agree that this record represents a confidential communication between a solicitor and his or her client. Rather, I find that I have not been provided with sufficient evidence to enable me to determine the author of this document or its intended recipient and whether a solicitor-client relationship exists between these individuals. As such, I cannot agree that it meets the criteria for solicitor-client communication privilege. In addition, without the benefit of knowing who created it and who it was intended for, it is not possible to make a finding that it is subject to litigation privilege under either Branch 1 or Branch 2 of section 19.

ADVICE OR RECOMMENDATIONS

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-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)]

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 PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)]

The Ministry submits that while Record 45 "does not on its face constitute the advice or recommendations of a public servant", its disclosure "would permit anyone to know who the letter was sent to in order to formulate advice and solicit recommendations with respect to how the Minister should proceed".

In my view, Record 45 cannot qualify for exemption under section 13(1) for the very reason conceded by the Ministry; it does not contain either advice or recommendations. Information about how the Ministry's internal process of responding to correspondence operated at the time this transaction took place is not, on its own, information that meets the criteria for non-disclosure under section 13(1). Accordingly, I find that Record 45 is not exempt under section 49(a), taken in conjunction with section 13(1).

INVASION OF PRIVACY

I found above that Record 45 contains the personal information of both the appellant and other identifiable individuals who are Ministry employees. 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 exemptions from this right. Under section 49(b), where a record contains personal information of both the appellant and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the

requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 21(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 49(b) is met. The Ministry argues that all of the records, including Record 45, contain information that falls within the ambit of the presumption in section 21(3)(b) as they were created in direct response to certain allegations of wrong-doing by Ministry counsel brought by the appellant. The Ministry goes on to submit that the presumption in section 21(3)(b) applies because the records were "compiled and are identifiable as part of what, at least in part, constituted an investigation into a possible violation of law."

In my view, the Ministry has not provided me with sufficient evidence to allow me to make a finding that Record 45 was prepared or is identifiable as part of a "law enforcement investigation". Rather, in my view, it simply reflects the manner in which the Ministry chose to respond to the appellant's allegations. Its disclosure would not reveal the contents of the communications passing between Ministry staff, only that such communications took place. I find that the information contained in Record 45 was not compiled and is not identifiable as part of an investigation into a possible violation of law, as is required under section 21(3)(b). As such, I find that the presumption does not apply to this information.

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]

- the requester was present when the information was provided to the institution [Order P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

I note that the personal information contained in Record 45 either relates directly to the appellant himself or is information which identifies that the appellant has complained about certain unnamed Ministry staff. This information is, accordingly, within the knowledge of the appellant as he is the person who brought the allegations of wrongdoing to the Ministry's attention. In my view, an absurd result would flow should the information in Record 45 not be disclosed to the appellant. Accordingly, I find that it does not qualify for exemption under section 49(b).

PUBLIC INTEREST IN DISCLOSURE

I have found above that Records 1, 2, 3, 4, 14 and 26 are exempt from disclosure under section 49(a), taken in conjunction with section 19. The appellant submits that there exists a public interest in the disclosure of this information within the meaning of section 23 of the *Act*, which states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 23 does not apply to records that are exempt under section 19. Therefore, I am unable to examine whether section 23 ought to apply to those records that I have found to be exempt under sections 49(a) and 19.

ORDER:

1. I order the Ministry to disclose Record 45 to the appellant by providing him with a copy by **June 24, 2005** but not before **June 20, 2005.**

2. I uphold the Ministry's decision to deny access to Records 1, 2, 3, 4, 14 and 26.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the Ministry to provide me with a copy of the record that is disclosed to the appellant.

Original signed by: May 20, 2005
Donald Hale
Adjudicator