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

ORDER PO-2475

Appeal PA-040314-1

Ministry of the Environment

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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act (Act*) for all documents related to an application for a permit to take water submitted by the requester.

The Ministry granted partial access to responsive records and denied access to the remaining information, citing sections 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

During the mediation stage of the appeal process, the mediator had settlement discussions with the appellant's representative and with the Ministry. During the course of mediation, the appellant's representative advised that the appellant was not interested in seeking access to the portions of the responsive records severed pursuant to section 21(1) of the *Act*. Accordingly, this information was removed from the scope of the appeal.

The parties later engaged in a mediated teleconference regarding the applicability of the section 19 exemption to the information remaining at issue. During the teleconference, the Ministry confirmed that the record, denied pursuant to the solicitor-client exemption, is a six-page email communication between a Ministry lawyer and a Ministry staff person.

Following this meeting, the appellant's representative expressed concern that additional records should exist and he questioned the reasonableness of the Ministry's search, stating his belief that intra-office records, such as e-mails, memoranda or notes should exist but had not been located.

The Ministry responded that it objected to the appellant raising reasonable search as an additional issue during mediation, which it described as a "late stage" of the appeal process. I will deal with this objection in my discussion of "reasonable search", below. The Ministry also suggested that the appellant had failed to demonstrate a reasonable belief that additional records exist.

Following the conclusion of the telephone mediation meeting, the appellant's representative advised that the appellant wanted this matter to proceed to adjudication.

As further mediation was not possible, the matter was transferred to the adjudication stage of the appeal process. The issues remaining in dispute are reasonable search and the application of the section 19 solicitor-client privilege exemption to the one record at issue.

I commenced my inquiry by sending a Notice of Inquiry to the Ministry, seeking representations on the reasonable search and section 19 issues. The Ministry submitted representations in response and agreed to share the non-confidential portions with the appellant.

I forwarded the Ministry's non-confidential representations to the appellant and sought representations. The appellant chose not to submit representations.

RECORDS:

There is one record at issue, a six-page email communication exchange between a Ministry lawyer and a Ministry staff person.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

General

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, common law privilege and statutory privilege. The institution must establish that one or the other (or both) branches apply. In this case, the Ministry takes the position that the information at issue falls within both branches of the solicitor-client exemption.

I will first deal with the application of the branch 1 common law solicitor-client communication privilege exemption.

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.)].

Confidentiality is an essential component of the privilege. Therefore, the Ministry 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 states that the record at issue is comprised of "communication" of a "direct nature" between counsel for the Ministry and a hydrogeologist employed by the Ministry regarding the appellant's application for a permit to take water. The Ministry describes the exchange as a "continuum of communication" between solicitor and client, where the hydrogeologist summarizes legal advice provided by counsel and several days later asks counsel to confirm whether he has accurately interpreted the legal advice in regard to three specific issues.

The appellant did not make representations on the application of the section 19 exemption.

Analysis and findings

Based on my review of the Ministry's representations and the record itself, I am satisfied that the record at issue is protected under the solicitor-client communication privilege exemption in section 19. In my view, this record contains an exchange of direct communications between a Ministry lawyer and a Ministry staff person that was intended to be confidential in nature, for the purpose of soliciting and receiving legal advice regarding the appellant's application for a permit to take water. I agree with the Ministry's characterization of this exchange as a "continuum of communication" between counsel and the staff person aimed at keeping both informed so that advice could be sought, given and confirmed. There is no evidence before me that this privilege has been terminated or waived. The record is therefore exempt under branch 1 because it is subject to common law solicitor-client communication privilege. It is therefore not necessary to consider branch 2.

Exercise of discretion

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, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner 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

In either case this office may send the matter 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)].

Regarding its decision to invoke the use of section 19 and deny access to this information, the Ministry states that it considered and rejected the notion of releasing the record "due to the nature of the specific advice given in the record…"

Once again, the appellant did not make representations.

I am satisfied that the Ministry took into account relevant considerations, specifically the nature of the specific advice given in the record, and properly exercised its discretion in the circumstances of this case.

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

As alluded to above, the appellant raised a concern at the mediation stage of the appeal process that additional records should exist. The issue of reasonable search was therefore added as an issue in the Mediator's Report and I have sought representations from the parties on this issue.

As noted above under "Nature of the Appeal", the Ministry objects to the appellant raising the search issue during the mediation stage of this appeal. The Ministry takes the position that the appellant should not have been permitted to raise this issue at such a late juncture in the appeal process. The Ministry stands by the adequacy of its search but also suggests that to ask Ministry staff to swear an affidavit regarding their search efforts so long after its access decision has been issued is "patently unfair and breaches the principles of administrative fairness."

With reference to section 6.03 of this office's *Code of Procedure* (the *Code*), the Ministry states that the purpose of mediation is to "narrow the issues that proceed to the Adjudication stage." The Ministry therefore objects to the appellant's expansion of the scope of the appeal approximately four months after the decision date.

With reference to section 11.01 of the *Code*, the Ministry also addresses what it perceives as a "double standard" for the raising of new issues during the course of an appeal. Section 11.01 provides for a 35-day limitation period for the raising of new discretionary exemptions by an

institution after the Notice of Appeal has been issued. The Ministry objects to the appellant's apparent ability to add a new dimension to the appeal, such as adequacy of search, at the mediation stage.

The Ministry also submits that the onus is on the appellant to provide a reasonable basis for concluding that additional records exist and it is the Ministry's position that the appellant has failed to provide any evidence in support of its position.

Again, the appellant has not made representations with regard to the adequacy of search issue. The appellant's views on this subject are reflected in the Mediator's Report, as set out in the "Nature of the Appeal" section of this order.

While I acknowledge the Ministry's frustration, I do not accept its preliminary objection to the raising of the adequacy of search issue. In my view, it is perfectly acceptable for the appellant to have raised the search issue at the stage it did in this appeal. There is no rule regarding the raising of search issues because an appellant will often not become fully aware of the possible existence of additional records until going through the mediation stage and learning more about the nature of records at issue and the institution's search efforts. At that point an appellant may decide to refine or narrow the appeal or raise a reasonable search issue. Therefore, in my view, the appellant's raising of the search issue is fair and reasonable in the circumstances of this case.

I also do not accept the Ministry's "double standard" argument. This argument attempts, in effect, to apply the 35-day rule for claiming additional discretionary exemptions to the different question of whether an appellant can raise the issue of reasonable search during the mediation stage of an appeal. While this attempted analogy may appear persuasive on a superficial view, it is untenable. The 35-day limitation period for the raising of discretionary exemptions requires institutions to consider which exemptions to claim at the request stage, or at the latest, during the initial stages of an appeal, in order to avoid unnecessary delays which would often result in unfairness or prejudice to the appellant. It is not unfair or prejudicial to require institutions to do this; they have the records and all other information necessary to decide which exemptions to claim.

This stands in marked contrast to requesters, who are often uniformed as to the institution's record holdings, and may well obtain information well after their request and the institution's response that leads them to conclude that additional records likely exist. It would, in fact, be manifestly unfair to refuse to allow a requester in the appellant's situation to raise the issue of reasonable search during the mediation of an appeal. This issue must be addressed on a case-by-case basis, but in my view, it would be unfair to refuse to allow the appellant to raise this issue at mediation in the circumstances of this case.

Despite my finding on the fairness of raising reasonable search as an issue, I find that the appellant has not provided a reasonable basis for concluding that such additional records exist. As well, on my review of the evidence before me, including the record at issue, I am satisfied that the search carried out by the Ministry was reasonable in the circumstances. Accordingly, I will uphold the Ministry's decision.

ORDER:

I uphold the Ministry's decision and its search for responsive records.

Original Signed by: May 31, 2006
Bernard Morrow
Adjudicator