



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2784

Appeal PA07-212

Ministry of the Attorney General



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BACKGROUND

The Office of the Children's Lawyer (the OCL) is a law office in the Ministry of the Attorney General (the Ministry) charged with the responsibility of rendering services on behalf of children in both custody/access and child protection matters before the Ontario Court of Justice or the Family Court of the Superior Court of Justice (the Court). Section 89(3.1) of the *Courts of Justice Act (CJA)* and section 38 of the *Child and Family Services Act (CFSA)* combine to give the Court the authority to order that a child be given legal representation by the OCL where the Court determines that legal representation is desirable to protect a child's interests. Section 112 of the *CJA* gives the OCL the authority to conduct an investigation and to report and make recommendations to the Court on all matters concerning custody of or access to that child and his or her support and education.

With regard to this appeal, the Ministry states that the OCL was asked to provide services to a child involved in a custody/access dispute between the requester and the child's mother. The OCL determined that legal representation was the appropriate service to be provided in this case, and the matter was assigned to a lawyer on the OCL's Personal Rights Legal Panel. The Ministry indicates that the custody/access dispute has now been completed.

NATURE OF THE APPEAL:

The Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "a copy of protocols and guidelines provided to OCL lawyers..."

The Ministry granted partial access to the requested information, denying access to the withheld portions pursuant to section 19(a) (solicitor-client privilege).

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

The parties were not able to resolve the appeal through the mediation stage of the appeal process and the file was transferred to the adjudication stage for an inquiry.

The file was put on hold pending the outcome in another file involving the OCL and similar records (PA06-382). In September 2008 I issued Order PO-2719, which disposed of the issues in appeal PA06-382. Accordingly, I am now proceeding with this appeal.

In Order PO-2719, I found that the section 19(a) solicitor-client communication privilege exemption applied to the withheld information contained in two training manuals used by OCL investigators and lawyers. In light of my findings in that case, I decided to first seek representations from the appellant and I enclosed a copy Order PO-2719 with my Notice of Inquiry. The appellant responded with representations.

I then sought representations from the Ministry and enclosed with my Notice of Inquiry a complete copy of the appellant's representations. The Ministry responded with representations.

As the Ministry's representations raised issues in response to those submitted by the appellant, I decided to seek reply representations from the appellant. The appellant chose not to submit reply representations.

RECORDS:

There are 126 pages of records at issue, consisting of internal OCL policy and procedure documents provided to OCL lawyers.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19

The discretionary exemption in section 19 contains two branches. The Ministry is relying on both branches of the exemption to deny access to the withheld portions of the records. Accordingly, the Ministry must establish that one or the other (or both) branches apply.

The relevant parts of section 19 state as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

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. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

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.”

Order PO-2719

As alluded to above, in Order PO-2719 I concluded that the withheld portions of the two records at issue in that case, the Office of the Children’s Lawyer Personal Rights Nuts and Bolts Manual dated April 2006 and a Policy and Procedural Manual for Clinical Investigators Office of the

Children's Lawyer, qualify for exemption under the solicitor-client communication head of privilege in branch 1. In reaching my conclusion I applied the interpretation of the Divisional Court in *Ontario (Ministry of Community and Social Service) v. Ontario (Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 680, finding that the circumstances in that case are analogous to those in Order PO-2719. In particular, I stated:

In [*Ontario (Ministry of Community and Social Service)*], the Divisional Court found that the legal advice covered by solicitor-client communication privilege is not confined to a solicitor telling his or her client the law. The type of communication that is protected "must be construed as broad in nature, including what should be done, legally and practically." In addition, the privilege is not lost once the documents in question are created to the extent that the ultimate receivers of the communication are applying the instructions provided in the records. Finally, the records need not relate to particular proceedings or to a particular legal context in order to be exempt under section 19.

In discussing the scope of the common law communication privilege in the circumstances of that case, the Divisional Court states:

An examination of the records in dispute reveals that the documents were created by legal counsel at the instruction of the Director. Without getting into any specific discussion that would necessarily divulge the contents of the documents, all of the documents include instructions and advice as to how and when s. 41 default proceedings should be commenced and how they are to proceed. Among other things, they include discussions of the statutory requirements of these proceedings and the evidentiary requirements of such cases; they include a discussion of criteria to be considered when deciding to proceed with these types of cases; they include an examination of options to be considered, depending on how the default hearings unfold before the court; and, they include a discussion of how the enforcement officers should interact with the panel lawyers on these matters.

In finding that the communication privilege continues after the creation of the documents in question and the provision of instructions by the Director to FRO's in-house counsel, the Divisional Court states:

The Commissioner appears to recognize that the communications between the Director and her legal counsel and/or her staff (all being agents of the Director) may be privileged in the preparation of the documents. We fail to see how that privilege can be lost once the documents are completed. Based on the court's examination of the records, the documents are clearly the product of those confidential communications. In the unique

circumstances of this case, the fact that the Director then instructs the in-house counsel to share the documents for the purpose of instructing its enforcement officers and the panel lawyers, all of whom are clearly agents of the Director, in our view does not change the source of those documents as arising from confidential communications from legal counsel. In essence, through the medium of those documents, the agents of the Director are receiving the instructions of the Director with respect to how s. 41 default proceedings are to be conducted in the name of the Director, as the Director has been so instructed by its legal counsel. There is no basis in law for terminating the solicitor-client privilege on these facts.

In concluding that the phrase “particular legal context” need not be confined to a particular matter, the Divisional Court states:

We are also of the view that the Commissioner’s interpretation and application of the term “particular legal context” cited in the cases on which the Commissioner relied was too narrow. It need not be limited to a single discrete transaction or particular litigation. In this, the Commissioner appears to have been confusing litigation privilege with solicitor-client communication privilege...While the advice and instructions found in the documents in question can apply to many individual cases brought before the courts by the many agents of the Director throughout the province, all of the cases will be s. 41 default proceedings under the *FRSAEA* on which the Director had sought legal advice from her in-house counsel. The s. 41 default proceedings are one of the litigation tools accorded the Director under the *FRSAEA* in order to fulfill its legislative mandates on which it has sought legal advice. It can, therefore, be considered a “particular legal context” as described in the case of *Balabel and Another v. Air India*, [[1988] 2 W.L.R 1036].

In reaching its conclusion, the Divisional Court also distinguished the circumstances of that case from those in Order PO-1928. In Order PO-1928, Adjudicator Dora Nipp found that training materials prepared by the staff of the OCL, to be given to both lawyers and social workers with the help of clinicians, such as psychologists or psychiatrists, provided generic information for trainees to follow when interviewing children. In addressing the different circumstances in Order PO-1928, the Divisional Court states:

[The records in PO-1928] were indeed generic training materials on a non-legal subject. [...] [T]he documents in this case are very different. Contrary to the Commissioner’s findings, the

conclusions reached in PO-1928 are not similarly applicable in this case.

Applying the Divisional Court's reasoning in *Ontario (Ministry of Community and Social Service)* to the circumstances in this case, I make the following findings:

- the records contain instructions and advice as to how and when to conduct custody/access and child protection cases on behalf of the OCL including
 - discussions of the statutory requirements of these proceedings and the evidentiary requirements of such cases
 - legal advice and directions regarding recommended processes to follow when conducting an investigation or preparing a report
 - communication protocols
 - precedent materials
- the records are the product of confidential communications between counsel and management at the OCL
- the information contained in the records is legal in nature and has been provided in confidence to the OCL investigators, its in-house lawyers and agents to apply the advice and instructions provided in the records
- the advice and instructions found in the records can apply to many individual cases; accordingly, it is irrelevant that the litigation in which the appellant in this case has been involved has concluded, since all cases – past, present or future – fall into the “particular legal context” of access/custody and children protection matters

In conclusion, I am satisfied that the withheld information in the records is exempt pursuant to the application of the common law solicitor-client communication privilege in section 19.

Representations

As stated above, in light of the apparent similarities between the records in this case and those in Order PO-2719, I first sought representations from the appellant and invited him to distinguish the circumstances in this case from those in Order PO-2719.

The appellant submits that in contrast to Order PO-2719 his request sought information provided to a named lawyer who he states was “trained by the OCL and retained by the OCL to act on their behalf as a contract employee not as a solicitor.” The appellant further notes that this

named lawyer's task was to "complete an investigation in a similar manner that a lawyer employed by the OCL would complete." The appellant states that based on the information provided in Order PO-2719, it is unclear whether information that was requested in that case pertained to an OCL lawyer, clinical investigator or both.

The appellant contends that the "OCL investigator is a contract employee of the OCL and solicitor-client privilege is not applicable." The appellant submits that the solicitor-client privilege exemption should be reserved for cases "where a lawyer is retained by a client." The appellant fails to see how the training of employees and the creation of employee training materials can be considered solicitor-client privileged. The appellant asserts that the information at issue is "general" in nature and "does not pertain to [the provision] of specific legal advice [dispensed] between [a] solicitor and client." The appellant also argues that since the information "does not relate to an ongoing legal proceeding", the solicitor-client privilege exemption does not apply. The appellant fears that the Ministry is using the solicitor-client privilege exemption to improperly withhold information and avoid being open, transparent and accountable to the public regarding its processes.

In response, the Ministry states:

The records consist of excerpts from the Nuts and Bolts Training Manual, as well as additional policies and procedures, established after the distribution of the Nuts and Bolts Training Manual, containing instructions and advice to agents about how to conduct cases on behalf of the Children's Lawyer. All of the documents contain directions to in-house counsel and the panel lawyers about how to conduct litigation and/or provide services on behalf of the Children's Lawyer. The documents are therefore either the identical documents to those found to be subject to solicitor-client privilege in Order PO-2719, or identical in nature, purpose, and proposed recipient, and all are exempt from disclosure.

The Ministry adds that although the appellant's litigation is concluded, the records at issue continue to be subject to solicitor-client privilege communication privilege.

Analysis and findings

Having carefully reviewed the records at issue and the parties' representations, I am satisfied that the circumstances in this case are analogous to those in Order PO-2719. Accordingly, I find that my analysis and findings in Order PO-2719 is directly applicable in this case.

I concur with the Ministry that the records at issue contain detailed instructions and advice issued by the OCL to panel lawyers and in-house counsel about how to conduct litigation and/or to provide legal services on behalf of the OCL. I am satisfied that the records are the product of confidential communications between counsel and management at the OCL and that the information contained in the records is legal in nature and has been provided in confidence to OCL staff and agents to apply the advice and instructions provided in the records. Each page of every document is marked "privileged and confidential" and, in my view, this supports my

conclusions regarding the confidential nature of the contents of these records. In addition, as I said in Order PO-2719, it is irrelevant that the litigation in which the appellant in this case has been involved has concluded, since all cases – past, present or future – fall into the “particular legal context” of access/custody and child protection matters. Accordingly, the advice and instructions that are found in the records can apply to many individual cases and continue to garner the protection of the solicitor-client communication privilege exemption. Contrary to the appellant’s view, the nature of the relationship between the panel lawyer in this case and the appellant’s child is irrelevant. The solicitor-client privilege exemption arises due to the nature of the information in the records and the confidential manner in which it was created and communicated to OCL panel lawyers and in-house counsel.

In conclusion, I am satisfied that the withheld information in the records is exempt pursuant to the application of the common law solicitor-client communication privilege in section 19(a).

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, 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)].

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

In addressing this issue, the Ministry relies on the submissions it made in Order PO-2719. It reiterates the sensitive and highly contentious nature of custody/access and child protection litigation and the need for the OCL to be able to provide direction and advice to staff and agents about the conduct of cases on behalf of children, without concern that a parent will be able to view training documents. The Ministry states that the nature of the work done by the OCL since the issuance of Order PO-2719 has not changed.

I am satisfied that the Ministry has properly exercised its discretion, taking into account relevant considerations and not taking into account irrelevant considerations. I am satisfied that in the circumstances, involving a sensitive and highly contentious area of litigation and the best interests of children, the Ministry properly exercised its discretion by denying access to information that I have found exempt under section 19. Accordingly, I uphold the Ministry's exercise of discretion.

ORDER:

I uphold the application of the section 19 exemption to the information at issue in the records.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ May 26, 2009