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

ORDER PO-2800

Appeal PA07-393

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:

> …the province's contract, instructions and correspondence with [a named lawyer] regarding the issue of compensation in the [named individual] case.

The Ministry issued a decision denying access to the records, citing section 19 (solicitor-client privilege) of the *Act*.

The requester, now the appellant, appealed this decision.

During mediation, the mediator and the Ministry determined that although there was correspondence between the Ministry and the lawyer, there were no records relating to the other parts of the request relating to the contract and any possible instructions. The Ministry also confirmed that it was relying on sections 19(a) and (b) of the *Act*.

Also during mediation, the appellant asked if the Ministry would be agreeable to expanding the scope of the request to include all records created up to November 30, 2007. The Ministry accepted this expansion of the scope of the request, and agreed to undertake another search.

On completion of this new search, the Ministry identified a number of additional records, and issued a new decision denying access to these records, citing sections 19(a) and (b) (solicitor-client privilege) and 21(1) (personal privacy).

The appellant indicated that she would like to include this new decision in the appeal, and asked that the file be moved to adjudication. The appellant also submitted that there exists a compelling public interest in the disclosure of these records. Accordingly, section 23 was added as an issue in the appeal.

Further mediation was not possible and the file was moved to adjudication, where an adjudicator conducts an inquiry under the *Act*.

I began my inquiry by sending a Notice of Inquiry to the Ministry and an individual whose interests may be affected by the outcome of the appeal (the affected person) which sets out the facts and issues in the appeal. Both the Ministry and the affected person provided representations.

I then sent the appellant a Notice of Inquiry, along with a complete copy of the Ministry's representations. The appellant provided representations in response.

I then provided the Ministry with a complete copy of the appellant's representations and invited it to make representations by way of reply. The Ministry provided reply representations.

RECORDS:

The records at issue consist of 1239 pages, including a retainer agreement and correspondence with attachments including summaries, media scans and reports.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that the records contain information that is privileged as solicitor-client communication under section 19 of the *Act*. Section 19 of the *Act* states:

> 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; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19(c) has no application in this appeal. Sections 19(a) and (b) contain two branches as described below. In this case, the Ministry argues that the records contain information that is either subject to solicitor-client privilege or was prepared by or for Crown counsel for use in giving legal advice.

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.)].

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."

Representations

In support of its position that the information is privileged as solicitor-client communication, the Ministry submits that all of the records at issue are communications between the Ministry and the affected person (its lawyer) which were made in confidence for the purpose of either obtaining or providing legal advice thereby qualifying for exemption under the solicitor-client communication privilege under Branch 1 of section 19. The Ministry also argues that the records were "prepared by or for Crown counsel for use in giving legal advice" and therefore exempt under the litigation privilege aspect of Branch 1 of section 19. Further the Ministry submits:

> Whether a document is solicitor-client privileged depends more on its purpose than on its content. If the purpose of the communication is to give or receive legal advice "then privilege attaches even if the communication entails no more

than the passing of factual information."

> *British Columbia (Minister of Environment)* v. *British Columbia (Information and Privacy Commissioner)*, [1995] B.C.J. No. 2594 at para. 67 (B.C.S.C)

The enclosures to the correspondence between the Ministry and [named lawyer] are as privileged as the correspondence itself and form an integral and un-severable component of the communication. The privileged nature of enclosures to solicitor-client correspondence was noted by Thackray J. of the British Columbia Supreme Court:

> The first document on the list is shown as a memo from a College employee to the College's lawyer "enclosing documents from Eyelogic systems Inc." The memo is clearly privileged. There is nothing confidential about the material enclosed but portions of it have been highlighted by the employee. Furthermore, divulgence of the enclosures indicates where the College might be directing its lawyer. Consequently, the whole of the document is privileged.
>
> *College of Opticians of British Columbia* v. *Moss*, [2000] B.C.J. No. 1825 at para. 21 (S.C.)

The confidentiality of the correspondence is in many instances evident on the face of the communication, but even where this is not the case, confidentiality must be necessarily implied from the nature of the solicitor-client relationship and the terms of the retainer.

The enclosures to the correspondence provided to [named lawyer] by the Ministry contain facts and information that the Ministry deemed necessary to share with its solicitor to aid him in providing the legal advice for which he was retained. This includes relevant background history, facts and developments, legal analysis prepared by or for Crown counsel, and relevant work product gathered by a Crown counsel employed by the Ministry of the Attorney General in relation to issues within [the lawyer's] mandate.

In addition, some of the enclosures to the correspondence provided to [named lawyer] by the Ministry are solicitor-client privileged records which were created or gathered by Crown counsel for the purpose of providing legal advice to the Ministry in matters not directly related to [named case]. As evidenced in the chain of correspondence between the Ministry and [named lawyer], these records were shared with [named lawyer] with an express and clear expectation and understanding that the confidentiality of the record and the Ministry's solicitor-client privilege over the records would be maintained. Further, other enclosures

> to the correspondence from the Ministry to [named lawyer] were provided under cover of letter stating that they were not public records and that they were being provided with the permission of the authors but on the understanding that they remained confidential. These items are further specified in **Appendix A**.
>
> The enclosures to [named lawyer's] correspondence to the Ministry, likewise, contain facts and information that were shared by [named lawyer] for the purpose of informing his client, obtaining instructions and providing the Ministry with legal advice…
>
> Furthermore, the retainer agreement between the Ministry and [the named lawyer's] law firm is also a solicitor-client privileged communication. The retainer outlines the nature of the legal opinion required by the Ministry and the terms and conditions of the retainer. It is an agreement which was entered into with an expectation of confidentiality and which expressly provides for confidentiality in its terms. The document is also evidence on its face of the fact that all correspondence and communications between [named lawyer], his law firm, and the Ministry are and were intended by the parties to the retainer to be confidential.

The affected person submits that he was in a solicitor-client relationship with the Ministry in regard to the records in issue in the appeal. Further, he states that any communication he had with the Ministry was in regards to the legal advice he was providing to the Ministry.

The appellant submits that the section 19 of the *Act* does not apply to exempt the records from disclosure. The appellant submits that the lawyer hired by the Ministry was not hired for the purpose of providing legal advice but was hired in regard to the matter of compensation for an identifiable individual.

In response, the Ministry submits that the lawyer was retained to provide confidential legal advice and legal services related to the compensation of an identifiable individual. Further, the Ministry argues that the issue of compensation to this individual is a matter that raises legal considerations. The Ministry submits that the contents of the retainer agreement between itself and the lawyer are evidence of this fact.

Finding

Based on my review of the records at issue, I find that the records are exempt from disclosure under Branch 1 of section 19 of the *Act* as solicitor-client communication privileged. The appellant's characterization of the "non-legal" relationship between the Ministry and the lawyer (affected person) is without basis. The representations of the Ministry and the affected person, as well as the retainer agreement in the records, contradict this argument.

The records at issue, other than the retainer, consist of various correspondences between the Ministry and the lawyer, who was working on the basis of a retainer. I find that each of these correspondences includes enclosures which were communicated solely for the purpose of informing the lawyer of the legal advice sought. I concur with the reasoning in the case cited by the Ministry in *British Columbia (Minister of Environment)* which states that the solicitor-client communication privilege attaches even if the communication entails no more than the passing of factual information." In addition, I find that the retainer sets out the confidential nature of the advice sought and given.

I agree with the Ministry that the correspondence and the enclosures are direct communications between the solicitor (the named lawyer) and the client (the Ministry) made for the purpose of obtaining or giving legal advice. In addition, I find that the correspondence and enclosures are also privileged under the "continuum of communications" between the solicitor and client and are, therefore, also exempt under the solicitor-client communication aspect of Branch 1 of section 19 on that basis.

Accordingly, I find that all the records at issue are exempt under section 19 of the *Act*. As I have found the records to be exempt under section 19, there is no need for me to consider the possible application of section 21(1) to them.

As the appellant claims that section 23 of the *Act* applies, I will now consider whether there is a compelling public interest in the disclosure of the record that clearly outweighs the purpose of the section 19 exemption.

COMPELLING PUBLIC INTEREST

Section 23 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.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

Representations

The appellant submits that there is a compelling public interest in transparency in both the spending of public money and openness of the legal process.

In response, the Ministry submits that the appellant has not established that there is a compelling public interest in disclosure of the records that clearly outweighs the section 19 exemption. The Ministry states:

> While it is not disputed that openness and transparency of government is laudable and necessary, there is no evidence that the disclosure of the information contained in the solicitor-client privileged records would "serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices".
>
> The appellant refers to the public interest in "openness about the legal process". The Ministry's retainer of [the lawyer] for legal advice is not a "legal process"; it is a matter internal to the Ministry. [The lawyer] is not adjudicating the issue of compensation or heading a public inquiry.
>
> The Ministry again submits that there is a significant public interest in the non-disclosure of the records as their disclosure would undermine the Ministry's solicitor-client relationship with [the lawyer] as well as with any and all other legal counsel retained by the Ministry to provide legal advice.

Finding

Based on my review of the records and the representations, I find that the appellant has not established that there is a compelling public interest in the disclosure of the records at issue.

The appellant cites transparency in the spending of public funds as the compelling public interest in the records. The records at issue consist of correspondence between the Ministry and its lawyer regarding the compensation of an identifiable individual. The records also include the retainer agreement between the Ministry and the affected person. The amount of compensation to be given to the identifiable individual is now a matter of public knowledge and I am unable to find that there continues to be a compelling public interest in the amount awarded. Nor am I able to find that there is a compelling public interest in the amount paid to the lawyer to render his legal services. The appellant has not provided me with evidence of the compelling public interest in the expenditure of public funds for the lawyer's fees paid by the Ministry to outside counsel. In summary, I find that the appellant's argument that the compelling public interest in the records is transparency over the expenditure of public money to be unfounded.

Secondly, the appellant argues that there is a compelling pubic interest in the openness of the legal process. I agree with the Ministry's submissions on this issue. The only legal process that is represented in the records at issue is the solicitor-client relationship between the Ministry and its lawyer. The lawyer (affected person) was not acting in an adjudicative manner, nor was there a public inquiry or a hearing into the matter of the compensation for the identifiable individual. I find that there is no compelling public interest in the solicitor-client relationship between the Ministry and its lawyer. Accordingly, I find that the appellant's argument that there exists a compelling public interest in the records is openness in the legal process is also without basis in the circumstances of this appeal.

As I have found that there is no compelling public interest in disclosure of the records, I find that section 23 of the *Act* does not apply.

ORDER:

I uphold the Ministry's decision.

Original Signed By: June 30, 2009
Stephanie Haly
Adjudicator