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

ORDER PO-2818

Appeal PA09-2

Ministry of Government Services

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BACKGROUND:

On April 13, 2007, the requester submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act)* to the Ministry of Government Services (the Ministry) for access to records relating to a particular claim made against the Ministry of Transportation. Specifically, the requester indicated as follows:

> I have been involved in an ongoing dispute with the Ministry of Transportation in regard to flooding damage to my property. In March, 2007, I received copies of the Profile and Quantity Sheets and photographs made during the design and construction stage of [named] Parkway in front of our home.
>
> In order to provide new information to enable the Ministry to reconsider their position, I need to find out what information they possess.
>
> [Named Risk Management Company] acted on behalf of the Ministry of Transportation and I require copies of the complete file used when my claim was denied. The first file is from the Belleville Office. [identified File number]. The second file is from the Toronto Office. [Identified Claim number].

In response, the Ministry identified 10 responsive records and granted access to records # 1, 2 and 5 to 10. The Ministry denied access to records # 3 and 4 pursuant to sections 13 (advice or recommendations), 18 (economic and other interests) and 19 (solicitor-client privilege) of the *Act*. The appellant did not appeal this decision.

NATURE OF THE APPEAL:

On November 4, 2008, the requester submitted another request to the Ministry advising as follows:

> I am still in an ongoing dispute with the Ministry of Transportation. I had received information from the Ministry of Government Services –letter dated July 06, 2007, which I had assumed would be sufficient to prove my case.
>
> Unfortunately the information from [named Risk Management Company] was denied. (index 3,4) I know I am well past the deadline for an appeal so I am reapplying for the information.

The Ministry responded to the request and again denied access to Records 3 and 4 (as identified on the Ministry's original index prepared in response to the requester's initial request) pursuant to sections 13, 18 and 19 of the *Act*.

The requester, now the appellant, appealed the decision of the Ministry to this office.

During mediation, the Ministry clarified the specific exemptions claimed to withhold the records at issue. The Ministry advised that sections 13(1), 18(1)(c), (d) and (e) and 19(a) and (b) are being relied on to deny access.

Further mediation was not possible and the file was forwarded to the adjudication stage of the appeal process. From my review of the nature of the request and the records at issue, I note that they pertain to matters arising from a claim made by the appellant against the Province for relief resulting from flooding damage to the appellant's property. This raises the question whether the records contain the appellant's personal information pursuant to the definition of that term in section 2(1) of the *Act*. Accordingly, in addition to the exemptions raised by the Ministry, I have added the possible application of the discretionary exemption in section 49(a) as an issue in this appeal.

I decided to seek representations from the Ministry, initially, and sent it a Notice of Inquiry setting out the facts and issues on appeal. The Ministry submitted representations in response. I subsequently sought representations from the appellant and sent him a copy of the Ministry's representations, in their entirety, along with a copy of the Notice of Inquiry. The appellant also submitted representations in response.

RECORDS:

The records at issue, as described in the Ministry's index of records, comprise:

Item # 3: Adjuster's formal reports to Risk Management Insurance Services

Item # 4: Adjusters' electronic file notes

DISCUSSION:

PERSONAL INFORMATION

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. Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable 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]. Nevertheless, 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

The Ministry submits that the records at issue "do not contain a substantial amount of the personal information of the [appellant]." The Ministry indicates that most of the records that do contain his personal information, such as his statement to the adjuster, have already been disclosed to him, and that the remaining records deal primarily with his property and the liability issues surrounding his claim for damages. Nevertheless, the Ministry appears to acknowledge that the analysis should be conducted under section 49(a) of the *Act*.

The appellant submits that the records contain his personal information.

Findings

The records at issue contain a report and the notes made by an adjuster retained to address the issues arising from the appellant's claim that the Ministry of Transportation is liable for the damages to his property. As such, much of the information contained in the records is about the property and the damages caused to it as a result of flooding. However, the records also refer to the appellant, provide some personal details about him and refer to communications with him relating to his claim. As well, the records contain comments about the appellant and his actions. References to the appellant are interspersed throughout the records. As a result, I find that the records contain the appellant's personal information. Moreover, although the claim is in relation to the appellant's property, I find that the records, in their entirety relate to his personal actions in making a claim against the government.

SOLICITOR-CLIENT PRIVILEGE/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 47(1) of the *Act* gives individuals a general right of access to their personal information held by a government body. Section 49 provides a number of exceptions to this general right of access, including section 49(a), which reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

In this appeal, the Ministry relies on section 49(a) in conjunction with sections 19(a) and (b). In the event that the records are found to contain the appellant's personal information, section 19 must be read in conjunction with section 49(a). As I indicated above, the records at issue contain the appellant's personal information. Accordingly, I will consider the application of section 49(a) in conjunction with section 19 for these records.

The Ministry claims the application of the solicitor-client exemption in sections 19(a) and (b) to all of the information in the records. These sections read:

> 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;

Section 19 contains two branches. The institution must establish that one or the other (or both) branches apply. The Ministry submits that the records at issue are exempt under both branches of section 19, and that they fall within both the solicitor-client communication privilege and litigation privilege. I will begin with the Ministry's claim that the records are exempt under common-law litigation privilege.

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)].

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)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] 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.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Representations

The Ministry sets out considerable background information about the Province's insurance program, the role of the Province's Risk Management and Insurance Services (RMIS) office and the role of adjusters in the insurance industry. This information was provided in a letter from the Manager, Claims Management at RMIS that the Ministry attached to its representations. In his letter, the Manager also indicated that he was involved in the appellant's claim for damages and provided some background regarding it. An understanding of the way this program and industry operate is useful in assessing the issues in this appeal. With respect to liability insurance, the Manager states:

> For many years the Province has purchased Commercial General Liability ("CGL") insurance. Speaking very generally, this form of third party liability insurance covers tort claims against the insured where the allegation is that the insured's actions or omissions have caused a third party bodily injury, or damaged the third party's tangible property. In exchange for the premium paid by the insured, the insurer agrees to defend the insured in the event of a civil action claiming the type of damages covered by the policy. In addition, the insurer agrees to fund the settlement of any such action, or to pay the damages in the event of a judgment. By its very nature third party liability insurance only responds when the insured has been sued, or there is a claim for damages and an implicit or explicit threat of a lawsuit if the matter is not settled and the insurer's response is based on legal liability.

The Manager also explains the role of RMIS and the manner in which claims against the government are dealt with:

> As noted above, the Province purchases CGL insurance. This insurance is subject to [a named amount] self insured retention (SIR), which is akin to a deductible. The Province is responsible for all claims that are within the SIR, and is responsible for the first [named amount] of any larger claim which exceeds the SIR. This SIR includes adjusting costs and the costs of defence counsel.

> Claims against the Province for bodily injury or property damage typically come into the government by service of a notice of claim served on the Crown Law Office - Civil [CLO-C] pursuant to sections 7 and 10 of the Proceedings Against the Crown Act. Section 7 of the Proceedings Against the Crown Act states that "**no action for a claim** shall be commenced against the Crown unless the claimant has, at least sixty days before the commencement of the **action** served on the Crown a notice of the claim.... [emphasis added]" A subset of these claims that deal with the Province's liability for claims that arise out of an alleged failure to properly maintain a Provincial highway may be served directly on the Ministry of Transportation. In some instances, such as this case, the notice of claim is served directly on RMIS and either CLO-C or the [Ministry of Transportation].
>
> RMIS is responsible for dealing with all claims that fall within the SIR. Therefore, where the notice of claim deals with claims that are within the SIR, [CLO-C], or the Ministry of Transportation forwards the notice of claim to RMIS for handling. RMIS treats this notice as an explicit notice that a statement of claim will be issued if the matter is not resolved, and all of RMIS's efforts are with a view to defending the Crown against the claim that it has acted negligently. Those efforts may include attempts to settle the claim at the earliest opportunity, but any such settlement attempts are undertaken on the basis of an assessment of the Crown's legal liability and in the context of defending the Crown.
>
> Once the claim is referred to RMIS, the file is assigned to a claims examiner, who is a government employee, who directs the province's defence of the claim. Typically the claims examiner will assign the file to a private sector adjusting firm, which will investigate the circumstances of the loss and report back to the claims examiner who will in turn provide the adjuster with instructions regarding potential settlement discussions, including where appropriate a denial of the claim. Where the claim cannot be settled at this juncture either internal defence counsel are assigned, or external counsel are retained.
>
> The investigation carried out by the adjuster is carried out independently of any internal investigation that the ministry involved in the matter may have carried out, and has one purpose and one purpose only, namely to assist RMIS in preparing for and defending the claim against the Crown.

The Manager also explains the insurance industry's use of adjusters:

> It is common for insurers to use the services of "adjusters" to investigate claims, and to enter into settlement discussions on the insurer's behalf. These adjusters can be employees of the insurer, but are commonly "outside" independent adjusters retained by the insurer. These adjusters typically report to, and take their instructions from "claims examiners" who are generally employees of the insurer, who are charged with directing the insurer's defence to the claim for damages.

> When a claim, or notice of claim is received by a third party liability insurer, the insurer, on behalf of the insured party engages in preparation for litigation. In this regard, the adjuster, the claims examiner and counsel for the insurer work as a team. The adjuster investigates the claim, and prepares an assessment of the insured's liability in order to assist the insurer prepare to defend the insured party in litigation. Typically many claims are resolved or settled by the insurer's claims examiner at this juncture, however, it is common for the insurer to retain counsel to prepare for and defend the claim. The adjuster's reports and notes are provided to defence counsel to assist counsel to provide legal advice about the claim, and to aid counsel's preparation for litigation.
>
> In my experience, third party liability insurers always treat adjuster's reports and files as privileged and confidential. Third party liability insurers use adjusters to assist them [to] determine how to respond to existing or contemplated litigation, and the insurers are dependent on the ability of their adjusters to candidly and openly convey that information and advice to them in confidence. In the absence of this confidence insurers would be not be able to properly prepare for litigation, including being unable to properly assess their insured's liability. In addition, in the absence of confidentiality the insurer would be unable to discuss or develop a strategy for defending the claim, including the potential for settlement, nor give the adjusters instructions in this regard.

As further explanation, the Ministry outlines the requirements of section 7(1) of the *Proceedings Against the Crown Act* (*PACA*), which requires that notice be given to the Crown prior to commencing to file a statement of claim. The Ministry notes that receipt of this "notice" places the Crown "in a position where it can reasonably contemplate being made a party to a litigation proceedings." The Ministry states further:

> In *Mattick Estate* v. *Ontario (Minister of Health)* [(2001), 52 O.R. (3d) 221] the Court of Appeal clarified that the policy reason for the sixty-day notice period under subsection 7(1) of *PAPA* is to allow the Crown to assess the claim with a view to properly defend itself in litigation where there is no resolution to the dispute.

The Ministry notes further that it is not necessary for a claimant to specifically indicate that the claim is launched under *PACA*. Rather, it is sufficient that the notice contain sufficient particulars to allow the Crown to identify the source of the potential problem, and that it entail an element of complaint (*Mattick*, conf'd in *Latta* v. *Ontario* (2002), 62 O.R. (3d) 7.).

The Manager outlines the sequence of events beginning in March 2005 that led to the appellant's involvement with RMIS. With respect to the date that RMIS determined that notice was given, the Manager states:

> In an effort to convince the [Ministry of Transportation] to affect these repairs to his private property [the appellant] met at his property with [Ministry of Transportation] officials on at least two occasions. On the latter occasion his MPP was in attendance. The [Ministry of Transportation] officials ultimately took the

> position that the [Ministry of Transportation] infrastructure in the area operated as designed, and was not the cause of [the appellant's] damage and that accordingly the [Ministry of Transportation] would not affect the repairs [the appellant] was requesting. [The appellant] was advised of this decision by an [Ministry of Transportation] official.

I note that among the documents provided by the appellant along with his representations, there is a letter written to the appellant by the Maintenance Superintendent in April 2005 in which the Superintendent states, "We therefore regret that the ministry is unable to assist you with the restoration of your property."

The Manager continues:

> In the midst of these discussions [the appellant] wrote to [the then senior manager] responsible for RMIS. [The appellant's] letter set out the history of the matter from his perspective, and ended with a request for "some mediation in this dispute." I reviewed [the appellant's] letter and concluded that it did not articulate a claim for damages and as such was not a matter to which RMIS could respond…
>
> On September 27, 2005, [the appellant] wrote to me…[and] set out the history of the matter from his perspective, including his realization that contrary to his earlier belief, the [Ministry of Transportation] would not affect the repairs to his property and that he would have no alternative but to affect the repairs himself and then seek compensation. He advised that the repairs were already underway.
>
> I replied to [the appellant's] letter on October 6, 2005. In that correspondence I referred to [the appellant's] earlier letter. I also noted that RMIS "deals with claims formally brought against Crown entities seeking damages for harm allegedly caused by their negligence..." and that the initial correspondence did not appear to assert such a claim. Finally, I indicated that I interpreted his September 27th letter as a formal demand for damages and that RMIS would institute its normal process for responding to such claims, including the appointment of an adjuster and a determination of whether the Crown was liable for the damages claimed. These steps were undertaken in the context of defending the Crown against the claim being asserted by [the appellant].

The Manager then outlines the steps that were subsequently taken in processing the appellant's claim, which resulted in the records at issue being created.

With respect to litigation privilege, the Ministry, referring to the Supreme Court of Canada's decision in *Blank* v. *Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 280, states that the "purpose of litigation privilege is to create a 'zone of privacy' in relation to pending or apprehended litigation to facilitate investigation and preparation of a case for trial by the adversarial parties to litigation."

The Ministry states further that "the dominant purpose for the retention of the adjuster, and the subsequent creation of the adjuster's reports, and related 'notes-to-file', was to assist the Crown in preparing for reasonably contemplated litigation in the sense contemplated in Order PO-2364. The Ministry also refers to a number of previous orders of this office, which have considered the

application of litigation privilege to adjuster's reports, and which have consistently held that such reports qualify for litigation privilege (see: Orders M-285, M-502, MO-1571 and MO-2124-I).

The appellant states that in order to reopen his claim against the Ministry of Transportation, he requires the results of the site visit in the fall of 2005. Moreover, he states:

> Upon reading the submissions of the [Ministry] I was completely surprised that we were in such an adversarial position. I had assumed we were working towards a solution that was legally, morally and ethically correct not just a legal position.

The appellant discusses his view of the matter and comments on the Ministry's submissions regarding the sequence of events. He notes that he did not receive the Manager's letter of October 6, 2005 and expresses surprise that his September 27, 2005 letter to the Manager would be taken as a formal demand. He states that he thinks this response was excessive as "[i]t appears to be quite a leap from getting property repaired to getting financial compensation through legal action. The appellant also expresses some confusion about the role of the adjuster, and claims that he believed the adjusters were involved regarding a potential settlement.

Findings

In Order MO-1571, the requester sought access to records relating to flooding that had occurred as a result of a storm. One of the records at issue was a consultant's report, entitled "Flooding Investigations…" The Municipality in that case took the position that the record was subject to litigation privilege because "[t]he 'dominant purpose' for the creation of this record was a contemplated or real apprehension of litigation." In upholding the Municipality's decision to withhold this record, Adjudicator Bernard Morrow stated:

> Previous orders of this office have addressed the application of litigation privilege to reports prepared in similar circumstances. In Order M-285, Adjudicator Holly Big Canoe found that reports prepared by an insurance adjuster for the City of Kitchener in response to damage claims for flooded homes by homeowners met the dominant purpose test and fit within the scope of litigation privilege. Adjudicator Big Canoe found that the dominant purpose for the preparation of the reports in that case was to prepare for anticipated litigation between the City and the homeowners. In Order M-502, Adjudicator Donald Hale found that a report prepared by the City of Timmins' Public Works Department following two incidents in which the appellant's home was damaged by a sewer back-up, met the dominant purpose test. In that case, Adjudicator Hale found that the report was intended to inform the adjuster retained by the City's insurer of the occurrence and the possible cause of the problems with the sewer on the appellant's street. As the City had been put on notice by the appellant that a claim was being made, Adjudicator Hale found that there was a reasonable prospect of litigation at the time the report was prepared. Accordingly, Adjudicator Hale concluded that litigation privilege applied.

> Consistent with Orders M-285 and M-502, I am satisfied that the consultant's report was prepared on behalf of the Municipality for the dominant purpose of using it in reasonably contemplated litigation against the City. It is clear that the Municipality's insurer sought the report to assess the Municipality's liability, in possible future litigation, for damages caused by the storm. In fact, some of the contemplated litigation has already come to fruition, and the Municipality has established that there is a reasonable prospect of further claims.
>
> Accordingly, I find that the record falls within the litigation privilege aspect of section 12 of the [Municipal] *Act* [which is similar to section 19 of the *Act*].

Having reviewed the representations submitted by the parties and the records at issue, I am satisfied that common law litigation privilege in section 19(a) attaches to the Adjuster's report and notes. I find that the records at issue were prepared on behalf of RMIS for the dominant purpose of using the records in reasonably contemplated litigation against the Ministry of Transportation. It is clear that RMIS sought the report to assess the Ministry of Transportation's liability, in possible future litigation, for damages caused by the flooding on the appellant's property, which he claims was a result of prior road construction and the construction of a culvert. Moreover, I find that there was a reasonable prospect of litigation at the time the report was prepared and that litigation continues to be reasonably contemplated as the matter is not yet resolved.

Although the appellant appears to be somewhat confused about the claims process, it is clear from the evidence that he has been pressing a claim for reimbursement of the damages to his property. The wording of his access request reflects his understanding that he had made a claim. Although I accept that he may have wished to have it amicably resolved, the description of the Province's liability insurance program makes it clear that once certain actions are taken by an individual, in this case, a letter from the appellant stating that he was seeking compensation, RMIS "treats this notice as an explicit notice that a statement of claim will be issued if the matter is not resolved…"

As a result, I find that the records at issue fall within the common law litigation privilege aspect of section 19(a) of the *Act*. Because of this finding, it is not necessary to consider the other aspects of the solicitor-client privilege exemption to the records.

EXERCISE OF DISCRETION

General Principles

The section 19 and 49(a) exemptions are discretionary and permit 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 that it took into consideration the principles of the *Act*, including that information should be available to the public. As well, the Ministry took into account the interests that the exemptions seek to protect. In balancing these two interests, the Ministry submits that those favouring non-disclosure outweighed those favouring disclosure. In this regard, the Ministry states that it considered:

- the interest of the Crown in maintaining confidentiality in order to prepare for litigation and defend itself against a claim;
- the requester is seeking not only his own personal information, but information created for the dominant purpose of litigation;
- the public interest in maintaining a "zone of privacy" for litigation, particularly where the requester has made the claim for damages;
- adjuster's reports have historically been treated confidentially;
- RMIS uses adjusters in an attempt to investigate and settle claims as part of the litigation process and disclosure could compromise both the preparation of claims for litigation and their settlement, which could result in more prolonged and protracted litigation; and
- Disclosure creates an unfair advantage to the requester in litigation.

In response, the appellant expresses some dissatisfaction with the manner in which his claim was investigated and comments on the construction done by the Ministry of Transportation. He states further:

> It is also unfortunate that the average citizen who is unable to afford legal representation is put at such a disadvantage by an institution with such an unlimited budget.
>
> …It would have been in the public's best interest to resolve minor issues more expeditiously. I would expect that [the Ministry of Transportation] has to settle a very small number of claims, if as soon as they are made, plans for litigation are instituted.
>
> Since I am now aware of their method of operation I feel that my dealings with RMIS have been in bad faith…

Having considered the representations made by the parties and all of the circumstances in this appeal, I am satisfied that the Ministry has not erred in the exercise of its discretion to apply sections 19 and 49(a) to the records at issue. The Ministry has taken into account that the records contain the appellant's personal information, and has weighed the possible harm that could arise from disclosing information prepared for the dominant purpose of litigation against potential benefits to the public or the appellant from releasing the information and has decided against release.

Accordingly, I uphold the Ministry's exercise of discretion.

In light of this finding, I do not need to consider the section 13(1) and 18 exemption claims.

ORDER:

I uphold the Ministry's decision.

Original signed by: August 26, 2009
Laurel Cropley
Adjudicator