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

ORDER PO-2830

Appeal PA08-153

Ministry of Community Safety and Correctional Services

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BACKGROUND OF THE APPEAL:

The Inquiry into Pediatric Forensic Pathology in Ontario (the Goudge Inquiry) was established by the Government of Ontario under the *Public Inquiries Act* on April 25, 2007. The Honourable Stephen T. Goudge was appointed Commissioner.

The transcripts from the Inquiry are posted on the Inquiry's public website. On November 30, 2007, the former Chief Coroner testified that the Ministry of Community Safety and Correctional Services (the Ministry) was prepared to fund a named doctor's lawsuit against the Fifth Estate news program televised on the Canadian Broadcasting Corporation (CBC). The former Chief Coroner testified that the doctor asked him whether the Ministry would assist with his legal fees. He also testified that he subsequently passed on a message from the Ministry's legal branch to the doctor. The message was that the Ministry was prepared to fund his law suit on a "very limited extent".

The request in this appeal seeks access to records relating to the Ministry's decision to fund the doctor's lawsuit.

NATURE OF THE APPEAL:

The Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "all records relating to the Ontario government's decision" to fund a named doctor's civil suit against the Fifth Estate, "including financial records indicating the extent, if any, of funding".

The Ministry located responsive records totalling 7 pages and notified the doctor (the affected party) to determine whether he objected to the release of a 2-page invoice setting out the total amount of legal fees the Ministry reimbursed him. The affected party consented to the release of this information.

The Ministry subsequently issued its decision letter granting the requester access to the responsive portions of the invoice (pages 1 and 2). The Ministry also granted the requester access to the responsive portions of a payment data printout (page 3).

The Ministry denied the requester access to the remaining portions of the records (pages 4 to 7) pursuant to section 19 (solicitor-client privilege) of the *Act*. In its decision letter, the Ministry states:

> Pages 4 to 7 are records that contain information reflecting confidential privileged communications. Access to these records is denied in accordance with the discretionary exemption from disclosure contained in section 19 of the [*Act*] for records that are subject to solicitor-client privilege or prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

The requester (now the appellant) appealed the Ministry's decision to this office. During mediation, the appellant confirmed that he is not seeking access to the non-responsive portions of records. He also confirmed that he continues to seek access to pages 4 to 7 of the records.

No further mediation was possible and the issues remaining in dispute were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I decided to commence my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry seeking its representations.

The Ministry provided representations in response. A Notice of Inquiry was then sent to the appellant along with a copy of the Ministry's representations. The appellant provided representations in response, which were then provided to the Ministry, who responded with reply representations.

RECORDS:

The remaining records at issue are:

Records	Description
Page 4	Fax Cover Sheet, dated January 31, 2000
Page 5	Email from Crown counsel, dated January 17, 2000 (first e-mail)
Page 6	Email from Crown counsel, dated January 21, 2000 (second e-mail)
Page 7	Handwritten notes, dated February 4, 2000

DISCUSSION:

I will first address the Ministry's claim that the records at issue qualify for exemption under section 19. If section 19 applies to any of the records, I will go on to consider whether the Ministry properly exercised its discretion to deny the appellant access and whether the public interest override at section 23, raised by the appellant, applies in the circumstances of this appeal.

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the *Act* states 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; 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 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). Section 19(c) has no application in this appeal.

For section 19 to apply in the circumstances of this appeal, the Ministry must establish that at least one branch applies. The Ministry submits that both branches apply.

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)].

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

In this case, the Ministry submits that the records contain solicitor-client communication privilege information under Branch 1 and 2.

The appellant's representations do not dispute that a solicitor-client relationship exists between Ministry and the Crown counsels in question. The appellant also does not appear to challenge the Ministry's position that the records contain solicitor-client privileged information. Rather, the appellant argues that any privilege attached to the records has been waived. Before I consider the appellant's evidence, I must first determine whether the records fall within the ambit of the solicitor-client communication privilege in Branch 1 or 2.

Solicitor-Client Communication Privilege

The Ministry's representations

The Ministry submits that the records consist of communications between Crown counsels or Crown counsel and Ministry employees. The Ministry made the following arguments:

- The first e-mail contains information exchanged between two Crown counsels.
- Information contained in the first e-mail was incorporated in the second e-mail.
- The second e-mail was sent by one Crown counsel to the former Chief Coroner and another Ministry employee. The Ministry describes the information

> contained in the second e-mail as "communications consisting of advice typical of what Crown counsel would provide a client. The communications were prepared for the purpose of keeping the clients of the Crown counsel informed concerning a legal course of action".

- The handwritten notes were prepared by Crown counsel and pertain to advice she provided the Ministry.

The Ministry also states:

> The records were created to provide legal advice to the Ministry client, and all of the records are part of the broad range of communications that is protected under this privilege once the solicitor-client relationship is created.
>
> …
>
> There is no evidence or actions on the part of Crown [c]ounsel or the Ministry client to suggest that the records were further disseminated or otherwise disclosed, and that the privilege that was established was ever waived by the Ministry client. The sensitive nature of the communications alone suggests that privilege was not waived.

The Ministry's representations did not address the issue as to whether the fax cover page contained solicitor-client privileged information.

Do the records fall within the ambit of solicitor-client communication privilege under Branch 1?

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.

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925]. Here, the Ministry argues that the records represent privileged communication it exchanged with its counsel.

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.)].

Fax cover page

As noted above, the Ministry did not provide representations specifically addressing whether the fax cover page falls within the ambit of solicitor-client communication privilege under Branch 1. I have carefully reviewed this record and find that Branch 1 does not apply.

The fax cover page appears to be a standard fax cover page used by Ministry staff. The cover page was sent by Crown counsel to the former Chief Coroner and indicates that a total of two pages, including the cover page were transmitted. However, the second page was not identified as responsive to the request and is not before me. Accordingly, all that remains is the fax cover page which identifies the sender and receiver along with information about their fax numbers and the time the fax was transmitted.

In my view, the existence of a solicitor-client relationship between the sender and receiver in itself, particularly in the absence of evidence from the Ministry, is not sufficient to demonstrate that this record falls within the ambit of solicitor-client communication privilege.

Accordingly, I find that the fax cover page is not subject to the solicitor-client communication privilege in Branch 1. I will go on to consider whether this information is subject to the solicitor-client communication privilege under Branch 2.

E-mails

The information contained in the first e-mail responds to a specific inquiry Crown counsel asked another to investigate relating to the subject-matter of the request. The Crown who requested this information then summarized it in her e-mail to the former Chief Coroner and a senior Ministry employee (the second e-mail) along with her advice about the affected party's reimbursement request.

The total amount of legal fees the Ministry reimbursed the affected party was disclosed to the appellant. This information was contained in the invoice and payment data printout released to the appellant.

In my view, the information contained in the e-mails differs from information the Ministry released to the appellant. The information at issue relates to the information Crown counsel gathered and considered in forming her legal opinion.

Having regard to the Ministry's representations and the records, I am satisfied that the information at issue constitutes Crown counsel's advice to the Ministry about the affected party's reimbursement request, along with the information she relied upon in making her recommendation. Accordingly, the e-mails represent a continuum of communications and fall within the ambit of privileged communications as contemplated in *Balabel v Air India*. In

addition, I find that the e-mails represent confidential communications between the Ministry and its lawyers and are subject to the solicitor-client communication privilege in Branch 1. As a result of my finding it is not necessary that I also determine whether the e-mails fall under the ambit of Branch 2. However, I must go on to consider the appellant's evidence that the Ministry waived its privilege attached to the e-mails.

Handwritten Note

The Ministry submits that the note comprises Crown counsel's working papers directly related to legal advice she provided the Ministry.

I carefully reviewed this record and note that it appears to be comprised of Crown counsel's telephone notes regarding two separate telephone discussions. Having regard to the nature of the information contained in Crown counsel's note, I am satisfied that this record comprises of her working papers directly related to seeking, formulating or giving legal advice. In particular, I note that the telephone notes refer to telephone discussions Crown counsel had with individuals before the Ministry reimbursed the affected party. I also note that it appears that Crown counsel obtained information in the first telephone call which she passed on to her client in the second telephone call.

Having regard to the above, I find that the handwritten note falls within the ambit of the solicitor-client communication privilege in Branch 1. As stated above, solicitor-client communication privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice. In addition, I am satisfied that the note represents confidential communications.

Again, since I found this record falls within the scope of Branch 1, it is not necessary to determine whether Branch 2 also applies. However, I will go on to consider the appellant's evidence that the Ministry waived its privilege attached to this record.

Do the records fall within the ambit of solicitor-client communication privilege under Branch 2?

As noted above, the Ministry claims that all of the records fall within the ambit of solicitor-client communication privilege under Branch 1 and 2. However, the fax cover page is the only record I found did not fall within the scope of Branch 1. Accordingly, it is the only record I need to consider in my determination as to whether Branch 2 applies.

The Ministry's representations did not specifically address whether the fax cover page falls within the ambit of solicitor-client communication privilege under Branch 2. Accordingly, I conducted a careful review of this record. Previously in this order, I noted that this record was a standard fax page containing information about the sender and receiver, such as their names and fax numbers and when the fax was transmitted.

In determining whether the fax cover page falls within the scope of Branch 2, I must determine whether the legal advice in question was sought from or given by Crown counsel. Though there is no dispute that Crown counsel sent the fax and her client, the Ministry received the fax, there

is no evidence that the fax contains information which can be described as comprising legal advice.

Again, in the absence of evidence from the Ministry, I am not satisfied that the existence of a solicitor-client relationship between Crown counsel and the Ministry in itself is sufficient to demonstrate that this record falls within the ambit of the solicitor-client communication privilege under Branch 2.

Accordingly, I find that the fax cover page is not subject to the solicitor-client communication privilege under Branch 2. As the Ministry has not claimed that any other exemption applies to this record, I will order the Ministry to disclose it to the appellant.

Did the Ministry waive any privilege to the records found to contain solicitor-client communication privileged information?

The only records I found contain solicitor-client privileged information are the e-mails and a handwritten note. I found that these records fall within the scope of the solicitor-client communication privilege under Branch 1. The appellant's position is that any privilege attached to these records has been waived by the Ministry. However, it does not appear that the appellant submits that the Ministry expressly waived privileged.

The appellant's position is that the former Chief Coroner was in a position to effectively waive privilege on behalf of the Ministry, and in fact did so, when he gave testimony regarding the legal advice the Ministry obtained from its legal branch.

The appellant submits that the former Chief Coroner testified that the Ministry's legal branch determined that the Ministry would, on a limited basis, be prepared to help with the affected party's legal fees. In support of his position, the appellant refers to the following portion of the former Chief Coroner's testimony:

> I -- I passed on a message from our legal branch, who had discussed it within the Ministry and said they would to a very limited extent, that they would pay a small amount towards the -- the case.

The appellant also refers to the following passage from Wigmore on Evidence, vol. 8 (McNaughton rev. 1961), as set out in The Law of Evidence in Canada (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in *Piche et al. v. Lecours Lumber Co. Ltd. et al.* (1993) 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the

> remainder. He may elect to withhold or disclose, but after a certain point his election must be final.

The appellant argues that the legal principles of implied waiver and/or waiver by implication apply in the circumstances of this appeal and as a result, fairness requires that the records at issue should be released so that the former Chief Coroner's testimony can be scrutinized.

The Ministry submits that there was no implied waiver of solicitor-client privilege and states that the former Chief Coroner:

> … may have disclosed orally in one or two sentences something that legal counsel told him [but that] does not mean that he disclosed the substance of what is in the records that are in dispute. There is a distinction between what [the former Chief Coroner] states and the underlying legal advice, which [the Ministry submits] remains privileged.
>
> There is precedent for the Information and Privacy Commissioner recognizing this distinction. In Order P-579, the Inquiry Officer upheld solicitor-client privilege in a legal opinion when a 2-page summary of the opinion was subsequently released in a letter. The Inquiry Officer found that there was a distinction between the summary of the opinion as set out in the letter, and the contents of the opinion, which the Officer found continued to be privileged. [The Ministry submits] that this same distinction applies here, that notwithstanding the statement that [the former Chief Coroner] made at the inquiry, there is no reason to suggest that he or the Ministry as a whole ever intended to waive solicitor-client privilege in the records that are the subject of this appeal.

The Ministry also submits that the legal principle of waiver by implication cannot apply in the circumstances of this appeal as it has not disclosed a substantial part of the records.

Decision and Analysis

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

The Ministry submits, and it appears that the appellant does not dispute, that it has not expressly waived privilege. Accordingly, the issue to be determined is whether the former Chief Coroner's testimony regarding the advice the Ministry obtained from its legal branch constitutes an implied waiver of solicitor-client privilege. As previously stated, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

In support of its position, the Ministry refers to Order P-579. In that order, Inquiry Officer Anita Fineberg considered whether implied waiver occurred as a result of the institution's partial disclosure of a legal opinion, and found that it did not. In that appeal, the document the requester claimed was partially disclosed was the two-page summary of the requested legal opinion. In making her decision, Inquiry Officer Fineberg accepted the institution's evidence that the legal opinion was clearly distinguishable from the contents of the summary and constituted a "separate subject matter". She also considered whether fairness required the disclosure of the legal opinion. In particular, she considered whether withholding access would mislead the appellant as to the institution's position and found that it did not.

Other orders from this office have considered the issue of whether disclosing the "bottom line" of a legal opinion constitutes waiver of solicitor-client privilege. In Order MO-2222, Adjudicator Colin Bhattacharjee stated:

> I have reviewed the legal opinion at issue in its entirety and compared it with the letter that the appellant received from the Township's Chief Administrative Officer. The sentence in the letter that the appellant has referred me to reads, "… the legal opinion we received indicates that your comments taken as a whole may indeed be defamatory." This represents just one portion of the conclusion reached in the legal opinion. I find that the letter does not disclose the bulk of the legal opinion, including the remaining elements that make up the conclusion, the legal analysis that led to this conclusion, or the recommendation.
>
> In Order MO-1172, Adjudicator Laurel Cropley found that disclosing the "bottom line" of a legal opinion did not constitute waiver of solicitor-client privilege in the particular circumstances of that appeal. In reaching this conclusion, she stated, in part:
>
> > In my view, it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case, this should not

> of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication.

Later in this order, she further states:

> … This is not to say that an institution can never be found to have waived solicitor-client privilege by partial disclosure of a privileged document. Rather, in determining this issue, a decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.
>
> In the circumstances of the current appeal, I am satisfied that in making the relatively minimal disclosure of a small portion of the "bottom line" of the advice, the City did not intend to waive privilege with respect to the record. Accordingly, I find that the City has not expressly waived privilege.
>
> There is no evidence that the City provided access to the legal opinion to anyone other than City officials. As well, the City took active steps to preserve the confidentiality of the opinion. I am satisfied that the City treated the record as confidential. In the circumstances, although the City did provide a small portion of the "bottom line" of the advice, I am not satisfied that fairness or consistency would require a finding that the privilege ceased. Therefore, I conclude that the City did not implicitly waive privilege.

I agree with this reasoning. In my view, although the Township did disclose one portion of the legal opinion's bottom line to the appellant, this does not constitute waiver, either express or implied, of the solicitor-client privilege that attaches to the legal opinion as a whole. There is no evidence before me to suggest that the Township has disclosed the legal opinion to anyone outside the municipality or engaged in other acts that would constitute waiver of solicitor-client privilege. I find, therefore, that the Township has not waived solicitor-client privilege with respect to this record.

I also agree with the reasoning in Orders P-579, MO-1172 and MO-2222 and adopt it for the purposes of this appeal. The information I found falls within the ambit of Branch 1 comprises of communications between Crown counsels or Crown counsel and Ministry staff related to the Ministry's decision to fund a portion of the affected party's civil suit. I have carefully reviewed this information along with the portion of the former Chief Coroner's testimony referred to me and am not satisfied that the Ministry waived its privilege to the information at issue.

The Ministry argues, and I agree, that there is a distinction between what the former Chief Coroner stated and the underlying legal advice obtained by the Ministry. In my view, the former Chief Coroner's statement merely summarizes advice the Ministry obtained from its legal branch. It does not specify the factual and legal reasoning that went into Crown counsel's advice and recommendations. In addition, I am not satisfied that fairness requires a finding that the privilege attached to the records ceased regardless of whether the Ministry intended that result or not. In my view, the facts of this appeal do not give rise to the circumstance contemplated in Wigmore on Evidence. In this regard, there is no evidence before me suggesting that the Ministry disclosed the advice and recommendations it received from Crown counsel to anyone outside the Ministry or engaged in other acts that would constitute express or implied waiver of solicitor-client privilege. Rather, the information the Ministry "elected to disclose" was its final decision to fund the affected party's civil suit on a limited basis. In my view, the privilege attaching to the e-mails and handwritten note does not cease as a result of this relatively minor public disclosure.

As I have found that the Ministry has not waived its privilege, expressly or impliedly, I find that the information contained in the e-mails and a handwritten note qualifies for exemption under section 19.

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)].

The Ministry's representations state:

> The Ministry has exercised its discretion to not disclose the records. The Ministry believes that solicitor-client privilege in the public sector results in Ministry officials consulting with Crown [c]ounsel freely, given that the content of their communications are protected from disclosure, and that this results in the Ministry making more informed decisions, which in turn has a positive impact on the public and society at large.

The appellant did not provide representations on this issue.

I have carefully reviewed the representations of the Ministry and am satisfied that the Ministry properly exercised its discretion and in doing so took into account relevant considerations. I also find that the Ministry did not exercise its discretion in bad faith, for an improper purpose or took into account irrelevant considerations. In particular, it appears that the Ministry considered the confidential nature of the information and the extent to which it is significant and sensitive to the Ministry. I found that this information is comprised of privileged communications between the Ministry and its solicitors. The purpose of the common law privilege under Branch 1 is to protect such communications.

Having regard to the above, I find that the Ministry properly exercised its discretion in the circumstances of this appeal.

PUBLIC INTEREST OVERRIDE

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 (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.

Representations of the parties

The appellant's representations state:

> I submit that there is a strong public interest in disclosure of the documents in question because of the fact that government funds were used to help fund a libel suit against the CBC (Canadian Broadcasting Corporation) and its constitutional implications.

The Ministry responded:

> [The appellant raises] that there is a strong public interest in the disclosure of the documents. However, the appellant has not explained why this outweighs the purpose of the solicitor-client privilege, what the highest court in the land has characterized as a "fundamental civil and legal right". It is the nature of government for it to be involved in high profile and at times contentious proceedings. If solicitor-client privilege is going to be overridden each time the government finds itself involved in these types of proceedings, then the privilege effectively would not apply to government an outcome that again is not support in law.
>
> Finally, the appellant states that there are constitutional implications involving this lawsuit, but he does not explain what these are. In my submission, there are no constitutional issues here that would support disclosing solicitor-client privileged records.

Decision and Analysis

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 [Orders P-984, PO-2607]. 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 or enlightening the citizenry about the activities of their government or its agencies, 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 [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

The information I found exempt under section 19 comprises of the two e-mails and a handwritten note prepared by Crown counsel. Having regard to these records and the representations of the parties, I find that the public interest override found at section 23 does not operate to override the solicitor-client privilege exemption.

I accept the appellant's argument that there is a "public interest" in the disclosure of information relating to the expenditure of public funds used to fund a portion of the affected party's civil suit.

Accordingly, I am satisfied that the appellant's interest in the records is not a private one. However, I am not satisfied that disclosure of the information I found exempt under section 19 would serve the purpose of informing the public about the Ministry's activities. The Ministry has already disclosed to the appellant the total amount of monies it reimbursed the affected party. In addition, the Ministry's decision to fund a portion of the affected party's civil suit is public information. Having regard to the information the Ministry already disclosed to the appellant and is in the public realm, I am not satisfied that disclosure of the information contained in the e-mails and the handwritten note would shed further light on the operations of the Ministry. In addition, I am not satisfied that there are any "constitutional implications" which would support a finding that there is a compelling public interest in the disclosure of the information at issue. Accordingly, I find that the circumstances of this appeal do not give rise to a "compelling" public interest.

In any event, even if a compelling public interest in the disclosure of the information at issue where to exist, for the section 23 override provision to apply, the compelling public interest must clearly outweigh the purpose of the solicitor-client privilege exemption. In this case, the purpose of section 19 is to protect confidential communications between solicitors and clients. In my view, the appellant has failed to adduce sufficient evidence to demonstrate that the public interest he identified clearly outweighs the purpose of the solicitor-client privilege exemption in the circumstances of this appeal.

Accordingly, I find that the public interest override at section 23 does not apply and I uphold the Ministry's decision to deny the appellant access to the e-mails and handwritten note.

ORDER:

1. I order the Ministry to disclose the fax cover page I found does not qualify for exemption under the *Act* by **November 6, 2009** but not before October 30, 2009.

2. I uphold the Ministry's decision to withhold the e-mails and handwritten note.

3. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the Ministry pursuant to order provision 1 to be provided to me.

Original signed by: September 30, 2009
Jennifer James
Adjudicator