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

ORDER PO-2978

Appeal PA10-213

Financial Services Commission of Ontario

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NATURE OF THE APPEAL:

The Ministry of Finance (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to all documents concerning the merger of two identified pension plans, including all documentation concerning the disposition of the surplus of one of them. The requester subsequently indicated that he is also seeking access to a specific trust agreement. The appellant's request arises from a transfer of assets from an Ontario registered pension plan to a Quebec registered pension plan. The Quebec pension plan regulator, the Régie des Rentes du Québec (the Régie), consented to the asset transfer in 1998.

After receiving the request, the ministry determined that certain responsive records were in the custody or control of the Archives of Ontario (archives). Accordingly, it also forwarded the request to that institution, in accordance with section 25(1) of the *Act*.

The ministry then issued an interim decision letter containing a fee estimate for processing the request for access to those records within its custody and control. The letter provided that upon payment of a deposit of one-half of the fee estimate, the ministry would process the request. The ministry further advised that on a preliminary review it appeared that the discretionary exemption at section 19 (solicitor-client privilege) of the *Act* might apply to some of the responsive records. After the requester paid the deposit the ministry processed the request and issued an access decision. In the decision letter the ministry provided a revised fee estimate. It also advised that upon payment of the balance of the fee it would provide the appellant with partial access to the responsive records. The ministry relied on section 19 of the *Act* to deny access to the portion it withheld.

The requester paid the balance of the fee and the ministry provided copies of the responsive records that it had decided to disclose.

The requester (now the appellant) appealed the ministry's decision to deny access to the records it withheld.

At mediation, the ministry reconsidered its position and provided a supplementary decision letter releasing all of Record 45 and portions of Record 46 to the appellant. As a result of mediation, only the last three emails severed from Record 46 remain at issue in this appeal.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

I commenced the inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the ministry. The Financial Services Commission of Ontario (FSCO) provided representations in response. It explained that FSCO is the proper responding institution with the ministry being designated as its head. In its representations, FSCO clarified that it is only relying on section 19(a) of the *Act* in support of its exemption claim. I then sent a Notice of Inquiry to the appellant, along with FSCO's representations, inviting his representations in response. The appellant decided not to provide responding representations.

RECORDS:

The undisclosed portions of Record 46, being the last three emails, are at issue in this appeal.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the *Act* provides that:

> 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. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises in the case of Crown counsel or counsel employed or retained by an educational institution, from sections 19(b) and (c). The institution must establish that at least one branch applies.

In this instance the ministry only relies on the exemption at section 19(a) of the *Act*.

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.[1]

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.[2] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[3]

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[1] 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).
[2] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[3] Orders MO-1925, MO-2166 and PO-2441.

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.[4]

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[5]

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.[6]

Litigation privilege

Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[7]

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver,[8] 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.

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[4] *Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).*
[5] *Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27.*
[6] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[7] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (cited earlier); see also *Blank v. Canada (Minister of Justice)* (cited earlier).
[8] *Butterworth's: Toronto, 1993*.

FSCO's representations

FSCO submits that the last three emails severed from Record 46 are three internal emails that passed between the Deputy Superintendent, Pensions (Deputy Superintendent) and a FSCO lawyer. FSCO submits that they contain legal advice and instructions and were sent to clarify the rationale for FSCO's interpretation of the law concerning asset transfers from one pension plan to another. As a result, FSCO argues that the emails "are directly related to formulating and giving legal advice."

It asserts that the communications are of a confidential nature and that:

- the only individuals who were copied on the first email are the FSCO pension officer who had the former Ontario registered pension plan in her allocation and two additional FSCO lawyers who had previously provided advice on the specific issue

- the only individual copied on the second email was the Deputy Superintendent's administrative assistant

- no individuals were copied on the third email

FSCO submits that there has been no waiver of solicitor-client privilege, stating:

> While the FSCO lawyer verbally communicated FSCO's position to the Régie's lawyer, the rationale and history behind that position was not communicated to any third parties.

Analysis and finding

I have reviewed the contents of the withheld emails and in my view they fall within the scope of section 19(a). I find that disclosing the withheld emails would reveal the substance of confidential communications between a solicitor and client directly relating to the provision or seeking of legal advice. I am also satisfied that there has been no waiver of privilege with respect to these records through any communication with the Régie.

Accordingly, I find that the last three emails contained in Record 46 are exempt under section 19(a) of the *Act*.

EXERCISE OF DISCRETION

I must now determine whether discretion was exercised in a proper manner in applying section 19(a) of the *Act* to the last three emails contained in Record 46.

The exemption at section 19(a) 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 any of these cases, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[9] However, pursuant to section 54(2) of the *Act*, this office may not substitute its own discretion for that of the institution.

In its representations on the exercise of discretion, FSCO sets out the factors and circumstances that were considered in the exercise of discretion.

Given the circumstances and nature of the information at issue, I find that only relevant and proper considerations were relied upon in making the decision to not disclose the last three emails in Record 46 that are subject to the section 19(a) exemption. Accordingly, I uphold the exercise of discretion and will not disturb it on appeal.

ORDER:

I uphold the decision of the ministry and dismiss the appeal.

Original Signed by: June 21, 2011
Steven Faughnan
Adjudicator

[9] Order MO-1573