



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

ORDER MO-2622

Appeal MA10-306

Halton Regional Police Services Board



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NATURE OF THE APPEAL:

The Halton Regional Police Services Board (the Police) received a seven-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information related to the requester's involvement with the Police. The Police processed each part of the request separately and issued separate decision letters for each part. This appeal relates to the request for the following information:

[Item] D. A copy of all HRPS internal memos, communiques including but not limited to emails(s) or any form of written communication from the HRPS Freedom of Information Unit, HRPS Professional Standards Unit, The Chief of Police Office to other HRPS Units (including but not limited to the HRPS Reporting Centre Unit, District 3 Personal, [and two identified officers] a) directing/specifying the limitations of how they were to interact with and what to communicate to me.

The Police located 8 pages of responsive email records and denied access to them, in their entirety, claiming the application of the discretionary exemption in section 12 (solicitor client-privilege) of the *Act*. The requester, now the appellant, appealed that decision.

During the mediation stage of the appeals process, the appellant took the position that the records are administrative records and should not be subject to solicitor client-privilege.

As further mediation was not possible, the file was referred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending the Police a Notice of Inquiry seeking their representations. Because the responsive records appear to contain the personal information of the appellant, I asked the Police to consider the application of section 38(a), in conjunction with section 12, to the records.

The Police provided me with representations in response to the Notice and also indicated that they had located an additional 7 pages of responsive records consisting of email communications passing between various members of the police service. Access to these records was also denied under section 38(a), taken in conjunction with the solicitor-client privilege exemption in section 12. I note that some of the emails contained in the 7 pages located in the course of responding to the Notice are part of the email chains included in the original 8 pages of emails located at the request stage by the Police.

The Police asked that I not share their representations with the appellant because doing so would disclose the substance of the records themselves to the appellant. After reviewing the Police representations, I agreed that if I were to disclose them to the appellant, I would reveal the substance of the records which are claimed to be exempt. This is one of the criteria for withholding representations set out in section 5 of Practice Direction 7.

I subsequently sent a Notice of Inquiry to the appellant seeking his representations. Instead of providing the actual representations received from the Police, I summarized them as follows:

The representations of the Police indicate that they rely on the solicitor-client communication privilege aspect of the section 12 exemption. The records contain communications passing between a solicitor and client made for the purpose of obtaining or providing legal advice about a legal issue or as part of a 'continuum of communications' passing between solicitor and client.

The appellant also submitted representations in response to the Notice of Inquiry.

RECORDS:

The records at issue in the appeal consist of 15 pages of email communications passing between Police staff.

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. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

I have reviewed the contents of all of the records at issue and make the following findings:

- All of the records refer to the appellant by name and describe his contacts with various employees of the Police, as well as his activities in relation to various requests for information under the *Act* and more informally;
- The references to the appellant in the records do not appear in his professional or in an employment context; and
- Any references to employees of the Police that appear in the records were made in the context of their professional or employment responsibilities arising from their contacts with the appellant that occurred in the course of their employment.

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

The Police rely on section 38(a), taken in conjunction with the discretionary exemption in section 12, to deny access to all of the information contained in the records. Section 12 states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege.

Branch 1: common law privilege

Branch 1 of the section 12 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 12 to apply, the institution must establish that one or the other, or both, of

these heads of privilege apply to the records at issue. The Police rely exclusively on the solicitor-client communication aspect of Branch 1 in this case. [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 [Orders PO-2441, MO-2166 and MO-1925].

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.)].

In its representations, the Police submit that the records represent communications “up the chain of command” seeking “professional legal advice” and the actual advice provided by legal counsel to its staff. The Police argue that the communications, taken as a whole, are exempt from disclosure on the basis that they constitute part of the “continuum of communications” passing between legal counsel and his clients, various Police staff. The Police indicate that while not all of the emails were sent directly to or by legal counsel, they addressed the problem and defined the legal questions which ultimately were answered by him in several of the email responses which counsel gave to staff that contained his legal advice.

The appellant submits that not all communications originating with or directed to a lawyer qualify as privileged communications.

In addition, the appellant argues that a distinction can be made between records which contain what he describes as a “directive”, whether they were issued by a lawyer or not, and communications relating to legal advice passing between a solicitor and his client. In this case, he argues that the communications contained in the records between the lawyer and police staff

took the form of the issuance of a “directive” providing a course of action to be followed and does not constitute a privileged communication for the purposes of section 12.

Findings

The emails at issue may be characterized in one of two ways. The Police have described some of them as communications up and down the chain of command within the police service. I agree with this description of at least some of the records. The second category of records involves a series of direct communications passing between members of the police service and its legal counsel. In my view, an important distinction can be made between these two groups of email communications.

The Police appear to be taking the position that internal communications between individuals within the police service who are not lawyers still fits within the description in the cases referred to above as the “continuum of communications”. I cannot agree with this interpretation of that language. The communications referred to by the Police represent communications between various individuals at different levels of rank within the service but do not include communications involving legal counsel. The “continuum of communications” must, in my view, represent communications between a solicitor and his or her client which arise in the context of the solicitor-client relationship. I find that they do not extend to communications passing between different individuals employed by the client, despite the fact that the emails relate to the questions being posed to legal counsel for the Police. Accordingly, sections 12 and 38(a) do not apply to exempt these communications from disclosure.

I find that the direct communications passing between counsel and his clients clearly fall within the ambit of the solicitor-client communication privilege aspect of Branch 1 of section 19. These emails represent direct communications passing between a solicitor and his clients that are related to the giving and seeking of legal advice about a legal issue. As such, I find that they clearly qualify for exemption on that basis. I do not agree with the position taken by the appellant that certain advice given by a lawyer may not qualify as a privileged communication because it takes the form of a “directive”. Communications that provide legal advice from counsel to his or her client about a legal issue meet the test for exemption regardless of how you may wish to characterize them. I can find no reason to distinguish between legal advice that takes the form of a memorandum, oral advice or a “directive” if the circumstances surrounding its communication to the client meet the requirements of the test for communication privilege.

As a result, I find that certain portions of the records, which I have highlighted on a copy of the record provided to the Police Freedom of Information and Protection of Privacy Coordinator, qualify for exemption under section 19. Because these records contain the personal information of the appellant, I find that they qualify for exemption from disclosure under section 38(a).

I have examined carefully the representations of the Police with respect to the manner in which they exercised their discretion not to disclose the records to the appellant. I find that the Police only relied upon relevant considerations and did not consider irrelevant factors in deciding not to disclose the records. Accordingly, I find that the Police have properly exercised their discretion

in this case and the information I have highlighted on the copy of the records provided to the Police is exempt under section 38(a).

ORDER:

1. I uphold the Police decision to deny access to those portions of the records that I have highlighted on the copy of the records provided to the Police Freedom of Information and Protection of Privacy Co-ordinator with this order. The highlighted portions of the records are properly exempt from disclosure under section 38(a), taken in conjunction with section 12.
2. I order the Police to disclose those portions of the records which are **not** highlighted by providing the appellant with copies no later than **June 6, 2011**.
3. In order to verify compliance with the terms of order provision 2, I reserve the right to require the Police to provide me with a copy of the records that are disclosed to the appellant.

Original Signed By: _____ May 13, 2011
Donald Hale
Adjudicator