

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3046

Appeal PA11-163

Ministry of the Attorney General

January 31, 2012

Summary: The appellant submitted a request to the Ministry of the Attorney General for all House and Issue Notes referencing Caledonia for a defined period of time. The Ministry denied access to the records on the basis of a number of exemptions including the solicitor-client privilege in section 19. This order upholds the Ministry's decision that the records, prepared by Crown counsel, qualify for exemption under the solicitor-client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 19.

Orders and Investigation Reports Considered: Order PO-1678.

Cases Considered: *Ontario (Ministry of Community and Social Services) v. Ontario (Information and Privacy Commissioner)* [2004] O.J. No. 1854; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] S.C.R. 32; *Ministry of the Attorney General v. Tom Mitchinson, Assistant Information and Privacy Commissioner and Jane Doe, Requester*, Toronto Doc. 190/02 (Div. Ct.) .

OVERVIEW:

[1] The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

... [a]ll House and Issue notes referencing Caledonia from the period Feb 1, 2006 to October 31, 2010.

[2] After issuing a fee estimate and receiving a deposit from the appellant, the ministry issued a decision denying access to all of the responsive records on the basis of the exemptions in sections 13 (advice or recommendations), 17(1) (third party information), section 19(a) (solicitor-client privilege) and section 21(1) (personal privacy) of the *Act*. The ministry also returned the appellant's deposit to him.

[3] The appellant appealed this decision.

[4] During mediation, the ministry prepared an index of records, and sent a further letter to the appellant, attaching the index and also referring to the presumptions in sections 21(3)(a) and (h) in support of its decision to deny access to some of the records on the basis of section 21(1). In addition, the index identified that access to portions of certain records was denied as these portions are not responsive to the request. The appellant advised that he was not pursuing access to the non-responsive severances in the records, and those portions of the records are no longer at issue in this appeal.

[5] Also during mediation, the appellant took the position that there is a public interest in the disclosure of the records at issue and, as a result, the public interest override in section 23 was also identified as an issue in this appeal.

[6] Mediation did not resolve the remaining issues, and this file was transferred to the inquiry stage of the process. I sought and received representations from both parties. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

RECORDS:

[7] The records at issue in this appeal consist of 45 "House Book Notes" (some with attachments), comprising a total of 373 pages.

DISCUSSION:

Does the solicitor-client privilege exemption at section 19(1) apply to the information at issue?

[8] The Ministry states that its primary position is that the records qualify for exemption under section 19(a) and (b), namely that "the records sought are communications directly from counsel to staff within the Ministry and therefore are protected by solicitor-client privilege, and are further protected as documents created

by Crown counsel for use in giving legal advice, or in contemplation of litigation or for use in litigation.” Section 19 reads 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.

[9] Subsection (c) has no application in the circumstances of this appeal.

[10] Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[11] Branch 1 of the section 19 exemption appears in section 19(a) and encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

[12] 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.)].

[13] 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].

[14] 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.)].

[15] 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].

[16] Confidentiality is an essential component of the privilege. Therefore, the ministry 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.)].

Litigation privilege

[17] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above)].

Branch 2: statutory privileges

[18] Branch 2 of section 19 arises from sections 19(b) and (c). Section 19(b) 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.

The ministry’s representations

[19] The ministry submits that all of the records at issue are exempt from disclosure based on section 19 of the *Act*. The ministry begins by reviewing the nature of the records and the manner in which they were created. It states:

The House Book Notes at issue here are documents prepared by Crown counsel, with the assistance of administrative staff, for use by communications staff within the Ministry as well as the Minister. The House Book Notes all discuss the litigation occurring in Caledonia and associated with the events and protests in and around [an identified property]. The House Book Notes at issue address in detail the litigation matters relating to injunctions, a notice of constitutional question,

contempt proceedings in court, civil actions, a class action and the background from Crown counsel's perspective of the Six Nations assertions in the area. None of the House Book Notes at issue in this appeal deal with operational matters within the Ministry. The documents themselves are not shared outside the Government of Ontario. The following discussion refers to the House Book Notes at issue. There are some House Book Notes prepared within the Ministry of the Attorney General that are not prepared by counsel, and in those circumstances there would likely be no issue as to solicitor and client privilege.

Further, there may be unusual situations in which a House Book Note prepared by counsel may not be for the purpose of giving legal advice, or otherwise reflecting legal advice, and in that unusual circumstance the Ministry would not claim solicitor and client privilege.

For the purposes of this Inquiry, the key features of the records sought are that they are prepared by counsel, contain information and legal analyses provided by counsel, and are approved by counsel. In addition, when providing the information and advice in the House Book Note, counsel must consider that any information that the Minister or staff choose to provide to third parties does not offend the *sub judice* rule, would be considered contempt of the legislature, or be considered defamatory. The final House Book Notes will be prepared by staff within the Ministry, and perhaps edited for "legalese," but the content of the House Book Notes come directly from counsel.

[20] The ministry then identifies the purpose of the House Book Notes. It states:

There are circumstances in which the Province of Ontario is involved in significant litigation, whether as a consequence of the legal issues that it may raise, the amount of money that it may involve, or the amount of public interest that it may attract. In these circumstances staff within the Ministry of the Attorney General as well as the Minister himself/herself must have sufficient information in order to determine: 1. what the litigation is about; 2. whether to respond to questions about the circumstances giving rise to the litigation; 3. whether to respond to questions about the litigation itself; 4. if deciding to respond about the circumstances giving rise to the litigation, how to formulate a response, and 5. if deciding to respond to questions about the litigation itself, how to formulate a response.

It is important to recognize that the events in Caledonia related to the protests at [the identified property] gave rise to a number of court actions against the Province.

The House Book Notes at issue are documents prepared and approved by Crown counsel to communicate information deemed important by counsel in order to assist the Minister and the Minister's staff in understanding the issues in the litigation and addressing questions and concerns directed to the Minister by the public. Counsel synthesize information about the files, identify information that is relevant, analyze and summarize the nature of the litigation, and provide legal explanations of the issues raised to give the Minister and the Minister's staff the background that is required in managing issues related to high profile litigation. Counsel will often, after analyzing the issues, suggest to the Minister possible questions that may arise from high profile files, suggest possible responses, and provide background information about the files and the legal issues that arise within it. At times, and in this case in particular, counsel will analyse several cases, identify common themes and group them together. This exercise, whether selecting relevant facts or identifying common themes, involves the application of counsel's skill and knowledge and goes well beyond providing factual information otherwise available to the public.

...

The House Book Notes which are the subject of this appeal are different from House Book Notes prepared by non-legal staff and that have been considered by the Information and Privacy Commissioner in other cases. In the case of these House Book Notes, and others prepared by counsel involved in significant litigation, their content provides a continuum of communication between solicitor and client, updating the client on developments in the litigation. In this case, the Crown counsel is acting as lawyer, and not in an operational capacity. [Orders PO-1994 and PO-1850]

House Book Notes which reflect legal advice are not shared with the public. The contents of such House Book Note are not read to the public verbatim. The House Book Note is intended by counsel to be kept confidential, although the Minister, like any client, may choose to accept, reject or modify counsels suggestions regarding messaging. The fact that the House Book Notes prepared by counsel that update the Minister and the Minister's staff on the developments in significant litigation are prepared by counsel and intended to be confidential, distinguish such notes from house book notes prepared by non-lawyers, or which involve purely operational matters. In [Order PO-1678, former Assistant Commissioner] Mitchinson specifically references the fact that the note in question in that decision was prepared by "MBS staff."

None of the House Book Notes regarding Caledonia have been shared with the public or third parties and therefore no waiver of privilege has occurred.

The Contact person identified at the bottom of a House Book Note is counsel. A non-lawyer or administrative assistant may format the document or organize the document a certain way, or edit for "legalese," but the content of the document comes directly from counsel.

As will be indicated below, communications by counsel employed by government share the same protections as communications by counsel employed by corporations or retained by private citizens....

[21] The ministry proceeds to describe how the principle of solicitor-client privilege has evolved from a rule of evidence into a constitutional right over the past few years, and refers to various court decisions. The ministry also refers to the following quotation from the Supreme Court of Canada decision in *Descôteaux*:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection can be waived.

[22] In addition, the ministry refers to decisions which view the solicitor-client privilege as a constitutional right, and also cites cases where the courts have confirmed that the solicitor-client privilege can only yield in cases where it is "absolutely necessary."¹

[23] With respect to the House Book Notes at issue in this appeal, the ministry states:

As noted above the House Book Notes at issue here are communications from Crown counsel for the intended use of the Minister and the Minister's staff.

[24] The ministry goes on to identify that, with respect to the application of the solicitor-client privilege, the courts have confirmed that there should be no difference in its application of the privilege, whether it arises in the context of private practice or within the context of government lawyers giving legal advice to a "client department."

[25] In addition, the ministry refers to previous orders of this office which have applied the privilege in various contexts. It also refers to the decision in *Ontario*

¹ *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] S.C.R. 32 at para 20.

(Ministry of Community and Social Services) v. Ontario (Information and Privacy Commissioner),² and states:

In [that case], in-house counsel at the Family Responsibility Office created documents dealing with how and when default proceedings should be commenced and how to proceed with the default proceedings. The Ontario Superior Court established that the legal advice covered by solicitor-client privilege is not confined to a lawyer merely telling his client the law. Rather, the type of communication must be construed as broadly as possible, including advice on what should be done, legally and practically. In coming to this decision, Justice Linhares de Sousa relied on the following statement from the English Court of Appeal case of *Balabel and another v. Air India*:

... In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a *continuum of communication* and meetings between the 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.* A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, *legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.* [emphasis added]

[26] The ministry then provides confidential representations in which it refers to the specific nature of the information in the House Book Notes at issue, and identifies how this specific information qualifies for exemption under the exemption in section 19. It also refers to specific examples of information contained in the records in support of its position.

[27] The ministry also takes the position that it is not possible to sever the information contained in the records. It states:

² [2004] O.J. No. 18

It is impossible to sever the purely factual information contained in the House Book Notes from other information or explanation contained in them. Firstly, the fact that counsel has identified a particular fact as worthy of mention in the House Book Note betrays counsel's thinking. Secondly, providing a document with a simple factual statement, such as an upcoming court date, without the context explained in the House Book Note by counsel, would not be responsive or useful in any event.

The appellant's representations

[28] With respect to the issue of whether or not the solicitor-client communication privilege applies to the records, the appellant states:

It is truly impossible to believe [the ministry] can legitimately claim [solicitor-client privilege] on every single document when the primary purpose of these notes is to provide talking points for senior bureaucrats and politicians and not directly related to seeking, formulating or giving legal advice. Further it is difficult to believe they were all prepared by Crown Counsel.

[29] The appellant also refers to the possibility of severing portions of the records and states:

The purpose of severances is to allow the release of information to the public without legal or privacy violations.

[30] The appellant also provides representations in support of his position that the "public interest override" in section 23 ought to apply in the circumstances. However, section 23 does not apply to the section 19 exemption.³

Analysis and Findings

[31] The House Notes at issue generally consist of multi-page documents which include a heading, an identified issue (or issues), a proposed response to these issues, and then detailed information relating to the circumstances or background upon which the proposed response is based. In some instances, this background information includes attached documents.

[32] On my review of the House Notes at issue in this appeal, I am satisfied that all of the records at issue were prepared by Crown counsel as submitted by the ministry and confirmed by the contents of the records.

³ See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, reversing 2007 ONCA 32, which reversed (2004) 70 O.R. (3d) 332 (Div. Ct.).

[33] In addition, I am satisfied that all of the records relate directly to specifically identified litigation or legal matters. These matters include litigation relating to injunctions, a notice of constitutional question, contempt proceedings in court, civil actions and a class action, as well as Crown counsel's perspective on certain assertions made by identified parties. Although some of the information in these records also consists of background information regarding the litigation or the legal matters, on my review of the records, I accept the ministry's submissions that, in providing the background information about the files and the legal issues that arise within it, the authors applied their skill and knowledge as counsel to select relevant facts or identify common themes.

[34] In making this finding, I follow the approach taken by the Divisional Court in its review of Order PO-1994.⁴ In PO-1994, former Assistant Commissioner Tom Mitchinson found that a memorandum dealing with delays in the court system, prepared by a lawyer who was also the Director of Crown Operations to the Attorney General, did not qualify for exemption under section 19 of the *Act* because it was operational and not legal in nature. The Assistant Commissioner found that the subject matter of the memorandum was trial delays, and the summary, analysis, advice and recommendations provided by the Director dealt directly with these operational issues.

[35] The Divisional Court overturned the Assistant Commissioner's decision and found that, even though on its face the memorandum appeared to be operational in nature, it nonetheless qualified for exemption under section 19. The court found that the memorandum incorporated legal advice and opinion, and stated:

... This memorandum could not have been authored by anyone except an experienced prosecutor who is alive to the state of the law and what has transpired "in the field" in recent years. The memorandum synthesizes cause, effect and the strategy required to solve the legal problem that arises with criminal trial delays.

[36] On my review of the information in the House Notes at issue in this appeal, including the extensive background information contained in them which deal specifically with identified litigation or legal matters, I am satisfied that this information could only have been authored by legal counsel directly involved in the litigation and other legal matters discussed in the records.

[37] I have also carefully considered the appellant's concern that the primary purpose of these notes is not directly related to seeking, formulating or giving legal advice, but is to provide talking points for senior bureaucrats and politicians. Previous orders have found that, in general, the purpose of House Notes is to assist politicians and others in responding if asked particular questions in the Legislature (see Order PO-1678).

⁴ See *Ministry of the Attorney General v. Tom Mitchinson, Assistant Information and Privacy Commissioner and Jane Doe, Requester*, Toronto Doc. 190/02 (Div. Ct.)

However, I accept the ministry's position that the records at issue in this appeal were confidential communications from counsel to a client, and that they deal with legal matters. I accept the ministry's position that the decision on whether or not to waive the privilege is the client's, and that the fact that the records in this appeal are House Notes does not affect the application of the section 19 exemption.

[38] Lastly, I have carefully considered the appellant's position that portions of the records could be severed and released. In that regard, I have reviewed previous orders of this office which have found that House Notes could be severed where section 13(1) was claimed because the "response" portion of that record was intended to be made public, and did not qualify for exemption under section 13(1) of the *Act*. I considered whether I ought to adopt a similar approach to the application of the section 19 exemption to the "response" portions of the records in this appeal. However, I find that, because of the different purposes behind the section 13 and section 19 exemptions, I will not apply this approach to records for which the section 19 claim is made.

[39] The section 13 exemption relates to "advice or recommendations" of a public servant or other individuals employed or retained by the ministry. A primary purpose of the section 13 exemption is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. In that respect, the purpose of the section 13 exemption is ensure that the person providing the advice or recommendations is not inhibited from providing his or her advice freely and frankly because of concerns that the advice may be made public. For this reason, previous orders have established that if information is provided to a Minister for the specific purpose of making it available to the public, the purpose of section 13 is not met, and proposed "responses" do not qualify for exemption under that section. (See, for example, orders PO-1678 and PO-2725). However, the section 19 exemption is established for different purposes, and is a privilege that only the client (not the person providing the advice) can waive. As a result, I find that the approach taken in previous orders to House Notes when section 13 is at issue does not apply to the circumstances of this appeal, where section 19 is at issue.

[40] As a result of the above, I am satisfied that the House Notes at issue in this appeal qualify for exemption under the solicitor-client communication privilege in section 19 of the *Act*. I find that these records are direct communications of a confidential nature between a solicitor and client, or their agents or employees. I also confirm that the records were made for the purpose of obtaining or giving professional legal advice, or consist of information passed by the solicitor to the client as part of the continuum of communications aimed at keeping the client informed so that advice may be sought and given as required.

[41] Accordingly, subject to my review of the exercise of discretion below, I find that the records at issue qualify for exemption under section 19 of the *Act*.

Exercise of Discretion

[42] As noted, section 19 is a discretionary exemption. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

[43] 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

[44] In such a 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 43(2)].

[45] The ministry states:

The Head appropriately considered and balanced the consequences of disclosure of the records, and the interests of the public in access to government records.

In the event that the House Book Notes that are the subject of this appeal are disclosed, the requester would be privy to the thoughts and analysis of Crown counsel. The requester, and ultimately others, would learn what facts Crown counsel thinks are most relevant, counsel's understanding of the issues in the litigation, counsel's understanding of the law in certain circumstances ... Crown counsel's understanding of the context in which the litigation is proceeding ... and finally which cases raise similar issues as other cases. This is not information to which the general public has, or should have, access to, and is information which an ordinary person seeking legal advice would not have to disclose. If one were to ask a person who sought legal advice what that person's lawyer told them was important in the case, or what the lawyer's understanding was of the law concerning that issue, that person could properly claim solicitor-client privilege and refuse to disclose such information.

[46] The ministry goes on to identify that if the information in these records is ordered disclosed, it would have to change the manner in which certain House Book Notes are prepared. It states:

Counsel would have to have a very limited role in providing input to the client Minister with respect to on-going high profile litigation files, at least with respect to the preparation of House Book Notes. The Ministry should not have to be concerned about the particular document used to obtain information, advice, guidance and understanding from the counsel employed therein, out of fear that the document would be ordered disclosed. This is particularly so when the same information, provided through a different vehicle, would not be subject to disclosure.

[47] The ministry also acknowledges that the Minister (who is, in this instance, the client in the solicitor-client relationship) could disclose the information in these records. However, it then states:

Although a client has the right to waive solicitor/client privilege, that waiver is the absolute right of the client. In the event a third party or tribunal could order a waiver, the protection afforded solicitor/client privilege would be undermined. Section 19 of [the *Act*] recognizes that a client can waive the right to claiming privilege, but it does not provide jurisdiction to the Information and Privacy Commissioner to order the client to waive privilege, once the Commissioner has accepted that the documents are in fact subject to solicitor-client privilege.

[48] The appellant's representations focus primarily on his position that the records ought to be disclosed because of the subject matter of the records. He reviews the general background to the incidents and activities that have occurred in the Caledonia, and the public concerns that have been raised about a number of issues. He also identifies the perceived injustices that have resulted from the situation, and the perceived political and systemic issues that have been raised, as well as the costs that have resulted from the situation (including monetary and other costs). He states that these factors ought to result in all information being disclosed.

[49] I have carefully considered whether or not the ministry properly exercised its discretion in the circumstances of this appeal, and find that it has.

[50] I note that the appellant's primary concern is the great public interest in the circumstances concerning the situation in Caledonia. However, as identified above, the "public interest override" in section 23 does not apply to the section 19 exemption.

[51] On my review of all of the circumstances surrounding this appeal, I am satisfied that the ministry has not erred in the exercise of its discretion to apply section 19 to the withheld records at issue, and find that the ministry properly exercised its discretion to apply section 19. As a result, I uphold its exercise of discretion.

ORDER:

I uphold the ministry's decision, and dismiss this appeal.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ January 31, 2012