Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3078

Appeal PA11-238

Ministry of Infrastructure

May 10, 2012

Summary: The appellant submitted a request to the Ministry of Infrastructure for all documentation relating to the Government of Ontario's debate and decision on what to do with a specific property it had purchased in Caledonia. The ministry identified 47 responsive records, and denied access to them on the basis of a number of exemptions, including the solicitor-client privilege exemption in section 19. This order upholds the ministry's decision that the records qualify for exemption under section 19 of the *Act*.

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

Cases Considered: *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.).

OVERVIEW:

[1] The Ministry of Infrastructure [formerly the Ministry of Energy and Infrastructure (the ministry)] received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for briefing notes, emails or any documentation relating to the Government of Ontario's debate and decision on what to do with a home on a specific property it had purchased in Caledonia. The appellant noted that the government acquired ownership of the property at the end of 2009 and tore down the home located

there shortly afterwards. The appellant indicated that he was seeking access to any responsive records from 2009 to the date of the request.

[2] In response to the request, the ministry conducted a search for responsive records and initially located a large number of records. This number was reduced after duplicate records or duplicate email chains were removed, and 47 records (totaling 216 pages), consisting mainly of emails and some briefing notes, were identified as the responsive records. The appellant confirmed that he wanted access to these records.

[3] The ministry then issued its decision regarding access, and denied access to the responsive records on the basis of the mandatory exemptions in section 12 (Cabinet records) and section 21 (personal privacy) and the discretionary exemptions in section 13(1) (advice to government) and section 19 (solicitor client privilege).

[4] The appellant appealed the ministry's decision.

[5] During mediation, the ministry provided the appellant with an index of the responsive records. The ministry also sent the appellant a copy of a news release relating to the demolition of the property.

[6] Mediation did not resolve this appeal and it was transferred to the inquiry stage of the process where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry to the ministry. I received representations in response. I then sent the Notice of Inquiry to the appellant and shared the ministry's representations with him in accordance with IPC *Practice Direction 7*. The appellant provided brief representations in response.

[7] In this order I find that all of the records at issue qualify for exemption under section 19(a) of the *Act*.

RECORDS:

[8] There are 47[1] records remaining at issue, totaling 216 pages. The records consist of emails and email chains (including various attachments), handwritten notes, reports and a presentation.

[1] Note: Records 41 and 43 each have an additional record (41a and 43a) attached to them, bringing the actual total of records to 49.

DISCUSSION:

Do the records qualify for exemption under the solicitor-client privilege exemption at section 19(a) and/or (b)?

[9] The ministry takes the position that all of the records at issue qualify for exemption under sections 19(a) and (b). These sections read 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;

[10] Section 19 contains two branches; a common law privilege and a statutory privilege. The institution must establish that one or the other (or both) branches apply. I will begin with the common law privilege.

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.[2]

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.[3]

[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.[4]

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[2] 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).
[3] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[4] 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.[5]

[15] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[6]

[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.[7]

Litigation privilege

[17] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[8]

The ministry's representations

[18] The ministry begins by reviewing the records and the application of the section 19 exemption generally. It states:

> The Ministry is denying access to handwritten notes, emails and various attachments, including Briefing Notes, a presentation and a House Book Note, created by or for counsel within various ministries and staff. The emails and attachments contain discussions regarding the status of ongoing litigation against Ontario and recommendations and advice on the various settlement options provided to the Minister of Infrastructure (the "Minister") and/or Cabinet.
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> The email records described as "attached [identified property] Options" include attachments of the successive drafts of a Briefing Note to the Minister regarding the background, status and recommendations regarding the Ministry's role in the settlement of the litigation against Ontario. The Briefing Notes contain detailed legal analysis regarding the options for settling of litigation arising from the protests in Caledonia.

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

> The documents referenced as "handwritten notes" are Ministry counsels' personal notes taken during meetings regarding the settlement options to resolve the litigation.
>
> The House Book Note is a document prepared by Ministry staff, incorporating the legal advice, analysis and comments from counsel, for use by communications staff within the Ministry as well as the Minister. The House Book Note discusses the settlement of litigation. The document contains confidential recommendations and advice and has not been shared with the public.

[19] The ministry then summarizes its position as follows:

> The Ministry is denying access to documents that were created by and for counsel, the client Ministry, the relevant minister and/or Cabinet to advise of the settlement options to resolve the litigation and/or the process by which a settlement would be implemented. For the purposes of this Inquiry, the key features of the records sought are that they are prepared by counsel, contain confidential information and legal analyses and advice provided by counsel. …
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> The emails were exchanged amongst counsel of the relevant ministries and their instructing ministry clients and were focused on the settlement options to resolve the litigation and advice regarding implementation of the settlement. A number of the emails, to and from counsel, also attach successive drafts of a Briefing Note prepared to brief the Minister of the available settlement options and/or options available to implement the settlement. The final version of the Briefing Note was provided to the Minister as advice. A subsequent Briefing Note … was prepared to advise the Minister of the proposed processes to implement previously given recommendations.
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> The Briefing Notes provide a continuum of communication between solicitor and client, updating the client on developments in the litigation, and options for or the details of settlement. The Briefing Notes are not shared with the public, are confidential and are legal advice. The content of the Briefing Notes presented to the Minister was prepared as a record for Cabinet and/or was considered by Cabinet.

[20] The ministry also provides confidential representations regarding Record 43, and then continues with respect to Record 46:

> The House Book Note listed at [record 46] was created by Ministry staff and with counsel's input and advice to communicate information deemed

> important by Ministry staff and 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. The House Book Note synthesizes the information contained in the Briefing Notes, identifies information that is relevant, analyzes and summarizes the status of the litigation, and provides explanations of the issues raised to give the Minister and the Minister's staff the background that is required in managing issues related to the litigation, the settlement and the implementation of the settlement.
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> The primary exemptions claimed by the Ministry are sections 19(a) and (b), namely that every record, except one, includes communications for or by counsel or contains the advice of counsel within the Ministry in the context of a litigation settlement and therefore are protected by solicitor-client privilege. None of these records have been shared with the public or third parties and therefore no waiver of privilege has occurred.

[21] The ministry also provides more specific representations on the application of section 19(a) and (b) to each of the categories of records. It begins by describing 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 refers to court decisions where the courts have confirmed that the solicitor-client privilege can only yield in cases where it is "absolutely necessary."[9] The ministry also refers to court decisions which have confirmed that the solicitor-client privilege also applies in the context of government lawyers giving legal advice to a "client department."[10]

[22] The ministry then states:

> As noted above, the records at issue here are counsel's handwritten notes from meetings, communications between Ministry staff and counsel, or between counsel from the concerned ministries, for the purposes of giving advice and making recommendations to the Minister and the Minister's staff and/or Cabinet regarding the settlement of the litigation against Ontario.

[23] The ministry also states that the courts in Ontario have established that the legal advice covered by solicitor-client privilege is not confined to a lawyer merely telling his client the law, but may include advice on what should be done, legally and practically. It refers to the following quotation from *Balabel v. Air India* (referenced above):

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[9] *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] S.C.R. 32 at para 20.
[10] *R. v. Campbell* [1999] 1 SCR. 565 at para. 49. *Pritchard v. Ontario (Human Rights Commission,)* [2004] 1 S.C.R. 809 at para. 20.

> 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]

[24] The ministry also provides confidential representations in which it refers specifically to the information contained in the records. It then states:

> It is impossible to sever the purely factual information contained in the records from other information or explanation contained in them. First, the fact that counsel has identified a particular fact as worthy of mention in the records betrays counsel's thinking. As stated by Justice Sharpe,[11] "[o]nce it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege." The IPC has also held that when the content of the requested records are clearly communications between the solicitor and the client, whose purpose and entire focus is the provision of legal advice, the whole record is privileged and not subject to severance.[12] Second, providing a document with a simple factual statement, without the context explained in the remainder of the record, would not be responsive or useful in any event.

[25] The ministry also provides representations in support of its position that the records are exempt under Branch 2 of section 19(b), which is a statutory exemption from disclosure of any document "that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation." It states:

> The facts set out above in the discussion under branch 1, clearly establish that the records were prepared by or for Ministry counsel in the context of developing, explaining, providing advice regarding and implementing a settlement position for the litigation against Ontario.

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[11] *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner),* [1997] O.J. No. 1465, at para. 17.
[12] Order PO-2940, page 3.

> … The Briefing Notes contain legal analysis and recommendations regarding settlement options and the House Book Note contain a summary of the factual background and recommendations for messaging the terms of the settlement to the public and the Legislature. Both the Briefing Notes and the House Book Note are referred to when giving legal advice and answering questions from clients, but also in preparing documents to be used in related litigation.
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> Branch 2 of the exemption applies not only to documents created by Crown counsel, but also records "… related to the fact-finding or investigative process of counsel and resulting from selective copying, research, or the exercise of counsel's skill and knowledge…." The recommendations for messaging and legal analysis contained in the Briefing Notes and House Book Note include details regarding the confidential terms of the settlement proposed and/or agreed upon by the parties in the litigation. Releasing these records not only reveals details about the proposed and actual confidential terms of the settlement, but also counsel's recommendations and advice to the Ministry client regarding the appropriate messaging of the terms, which was subsequently conveyed to the Minister.

[26] The ministry also refers to the decision of *Ontario v. Magnotta Winery,*[13] and states that, in that decision:

> … the Court of Appeal confirmed the Divisional Courts conclusion that where records "are prepared by or for Crown counsel for use in any aspect of litigation, the public interest in transparency is trumped by a more compelling public interest in encouraging settlement of litigation." The Divisional Court added that "no one would willingly entertain settlement discussions with a government institution if it knew its confidential discussions would be made public. This is particularly so as during the settlement process the parties may make admissions and offer concessions that would otherwise be to their detriment."

[27] The appellant's representations are brief, and focus on his position that records relating to the subject matter of the request ought to be disclosed. He states:

> I believe information on what to do with the house when it became owned by the public - or talk about it coming into public hands – should be public documents. It is, after all, public money that was used to purchase the property ….

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[13] *Ontario v. Magnotta Winery Corp.* [2010] O.J. No. 4453 (Ont. C.A.)

[28] The appellant acknowledges that the property was purchased by the Ontario government following certain identified civil litigation actions being commenced against the province. The appellant is concerned about the lack of information relating to this matter that has been made public, and also questions whether the claim of solicitor-client privilege made for all of the documents is valid.

[29] Lastly, the appellant takes the position that there is a public interest in the subject matter of the records, and indirectly raises the possibility that the "public interest override" in section 23 ought to apply in the circumstances. I note, however, that section 23 does not operate to override the application of the section 19 exemption to records.[14]

Analysis and Findings

[30] Records 1-5 consist of a series of emails or email chains (some of which include duplicates of various emails). All of these emails were sent to or from counsel for the ministry, or were forwarded to counsel as part of an email chain. All of these communications relate to legal issues pertaining to the subject matter of the appellant's request. I am satisfied that these e-mails form part of the continuum of communications aimed at keeping both the solicitor and client informed so that advice may be sought and given as required. Accordingly, I find that section 19(a) applies to them.

[31] Records 6, 7, 8, 30 and 31 contain the handwritten notes made by counsel for the ministry. In addition, Record 7 contains a typewritten list. All of these records pertain to legal issues regarding the property in question. I find that these records comprise legal counsel's working papers directly related to seeking, formulating or giving legal advice and therefore, privilege attaches to them pursuant to section 19(a).

[32] Records 9-29 consist of a series of emails and email chains, all of which were sent to or from ministry legal counsel, relating to the matters on which legal counsel was providing advice. A number of these documents (Records 11, 12, 13, 16, 17, 19, 20, 21, 23, 24, 26, 27, 28 and 29) also include attachments which consist of drafts or revisions to a document prepared by the Legal Services Branch, or attachments providing documents or information relating to the matter being considered (ie: additional attachments to Records 23, 24, 27 and 28).

[33] I find that most of the content in these e-mail chains consist of communications of a confidential nature between solicitor and client relating directly to the legal issues addressed by counsel.

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[14] See section 23 of the *Act*, which lists the exemptions which can be overridden by section 23, but does not include section 19 in that list. See also *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.).

[34] A few of the emails in some of these email chains are informational, simply confirming that revisions are made to an attached document, or confirming the date or the attendees at meetings. I find that these portions of the e-mail chains form part of the continuum of communications aimed at keeping both the solicitor and client informed so that advice may be sought and given as required.

[35] One of the emails (the last one in a brief email string comprising record 28) does not include a lawyer as a sender or recipient; however, this email simply forwards the attached email and attachment, which is sent from counsel and attaches privileged materials. In my view, this email also forms part of a continuum of communications, which advises other members of the client group of the solicitor-client privileged material received.

[36] Accordingly, I find that Records 9-29 qualify for exemption under section 19(a).

[37] Records 32-44 (including 41a, but not 43a) also consist of a series of emails and email chains, all of which were sent to or from legal counsel, relating to the matters on which legal counsel was providing advice. A number of these emails (Records 36, 38, 41 and 45) also include attachments which consist of drafts or revisions to a document prepared by the Legal Services Branch, or attachments providing documents or information relating to the matter being considered.

[38] Similar to my findings above, I am satisfied that these records either contain legal advice or form part of the continuum of communications aimed at keeping both the solicitor and client informed so that advice may be sought and given as required.

[39] Record 43a, for which section 12 has been claimed, is identified as a presentation to Cabinet. There is some discrepancy in the material provided by the ministry regarding whether or not the section 19(a) claim is also made for this record. I note that on its face, Record 43a is a document that is clearly intended to be placed before Cabinet. I also note that the version of the Cabinet presentation attached to Record 43 is a draft version, which, in my view, falls within the exemption at section 19(a). It is clear from the e-mail to which it is attached (Record 43), that this document was reviewed and commented on by legal counsel. Accordingly, consistent with the other findings in this order, I find that the attachment contained in Record 43a also qualifies for exemption under section 19(a) as it contains legal advice from counsel and/or forms part of the continuum of communications between counsel and his or her client.

[40] Record 45 is a cover e-mail with an attachment containing background material. Record 46 is a cover e-mail with House Book notes attached. Record 47 is an e-mail chain including ministry legal counsel and ministry staff which identifies a potential legal issue relating to Records 45 and 46. It is clear from the discussions in the e-mail chain

that Records 45 and 46 formed part of the continuum of communications between legal counsel and their clients and were considered by counsel in order to prepare legal advice relating to the legal issue raised in this e-mail chain. On this basis, I find that Records 45, 46 and 47, taken together, fall within the solicitor-client communication privilege aspect of section 19(a).

[41] In conclusion, I find that all of the records at issue qualify for exemption under the solicitor-client communication privilege aspect of section 19(a). I will now consider whether the ministry has properly exercised its discretion in withholding the records from disclosure.

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.[15] This office may not, however, substitute its own discretion for that of the institution.[16]

[45] The ministry indicates that it "considered and balanced the consequences of disclosure of the records, and the interests of the public in access to government records." The ministry notes that:

> In the event that the records that are the subject of this appeal are disclosed, the requester would be privy to the thoughts and analysis of counsel in the context of developing a settlement position to resolve the litigation against Ontario. The requester, and ultimately others, would learn what facts counsel thinks are most relevant, counsel's understanding of the issues in the litigation, and advice and recommendations to settle the litigation. 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.

[15] Order MO-1573.
[16] Section 43(2).

[46] The ministry maintains that it "has exercised its discretion reasonably in refusing to release the records. All relevant factors have been taken into account."

[47] In conclusion, the ministry states:

> The purpose of all of these records was solely for the settlement of the litigation and provides valuable advice and recommendations to the Minister and the Minister's staff with respect to the litigation. The legal analysis, advice and recommendations provided by counsel and the client Ministry was intended to remain confidential and is not otherwise available to the public in any other forum.

[48] After considering the representations submitted by both parties, I am satisfied that the ministry has properly exercised its discretion to withhold the records at issue in this appeal. I note that the appellant's primary concern is that there exists a 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 information that is subject to the section 19 exemption. In my view, the ministry has taken into account only relevant considerations and has not made its decision in bad faith or for an improper purpose. Rather, the ministry has clearly based its decision on the importance of confidentiality in the litigation process and within the solicitor-client relationship.

[49] As a result, I uphold the ministry's exercise of discretion and find that the records at issue are properly exempt under section 19(a) of the *Act*.

[50] Because of this finding, it is not necessary for me to consider the possible application of the other exemptions raised by the ministry.

ORDER:

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

Original signed by: May 10, 2012

Frank DeVries
Adjudicator