

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3546

Appeal PA14-39

Ministry of Community and Social Services

November 20, 2015

Summary: The appellant made a request to the Ministry of Community and Social Services for access to the Family Responsibility Office (FRO) Policy and Procedures Manual under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant's request was subsequently narrowed and the remaining record at issue was the bankruptcy checklist, which the ministry withheld in part on the basis of the discretionary exemptions in section 14(1) (law enforcement) and 19 (solicitor-client privilege) of the *Act*. In this order, the adjudicator upholds the ministry's decision to withhold the record under section 19 and dismisses the appeal.

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: PO-2034

Cases Considered: *Ministry of Community and Social Services v. Copley et al.* (2004), 70 O.R. (3d) 680.

OVERVIEW:

[1] The appellant made a request to the Ministry of Community and Social Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the Family Responsibility Office (FRO) Policy and Procedures Manual.

[2] After locating the responsive record, the ministry issued a decision to the

appellant advising that it denied her access in full under section 19 (solicitor-client privilege) of the *Act*. The ministry also advised that portions of the records were exempt from disclosure under the law enforcement exemptions in sections 14(1)(a) (interfere with law enforcement matter), (c) (reveal investigative techniques or procedures) and (l) (facilitate the commission of an unlawful act or hamper the control of crime).

[3] In the appellant's appeal letter she advised that she was prepared to narrow the scope of her request to the policy and procedures that were referenced and followed in the administration of her FRO case as well as the policy and procedures that should have been referenced and followed, but were not. The appellant advised that these policy and procedures would include, but are not limited to, instructions regarding disabilities, bankruptcy, complaint review process and communications standards with clients.

[4] In response, the ministry issued a decision granting the appellant access, in part, to the records responsive to the appellant's narrowed request. The ministry advised the appellant that access was denied to certain portions of the records under sections 14, 19 and 20 (danger to safety or health) of the *Act*.

[5] The appellant subsequently amended the scope of her request further to include the Bankruptcy and Enforcement Checklist referenced in the FRO policy and procedures.

[6] After locating additional records, the ministry issued a decision to the appellant, granting partial access to the "Bankruptcy Checklist (Enforcement)". The ministry advised the appellant that four pages of the record were withheld under sections 14(1)(a), (c)¹, (l) and 19 of the *Act*.

[7] The appellant confirmed that she seeks access to the four pages of the "Bankruptcy Checklist (Enforcement)" that were withheld from disclosure. The appellant advised that she does not seek access to any other records at issue. Accordingly, all other records located by the ministry in response to the appellant's original and amended requests and the exclusions and exemptions claimed for these records are no longer at issue in this appeal.

[8] During the inquiry into this appeal, the adjudicator sought and received representations from the ministry and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. This file was assigned to me to dispose of the issues on appeal.

[9] In this order, I uphold the ministry's decision.

¹ In its representations, the ministry indicated that it was no longer claiming the application of the exemption in section 14(1)(c).

RECORDS:

[10] The only record at issue is "The Bankruptcy Checklist (Enforcement)".

ISSUES:

- A. Does the discretionary exemption at section 19 apply to the record at issue?
- B. Was the ministry's exercise of discretion proper in the circumstances?

DISCUSSION:

Issue A: Does the discretionary exemption at section 19 apply to the record at issue?

[11] The ministry submits that sections 14 and 19 apply to exempt the record from disclosure. However, due to my finding on section 19, I do not need to consider the application of section 14.

[12] 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 or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[13] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[14] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[15] 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 freely confide in his or her lawyer on a legal matter.³ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.⁴

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

[17] 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 The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁷

Branch 2: statutory privileges

[18] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

Representations

[19] The ministry submits that the Family Responsibility Office (FRO) is a program within the ministry with many facets including the collection and payment of child and spousal support payments pursuant to a positive duty under subsection 5(1) of the *Family Responsibility and Support Arrears Enforcement Act, 1996* (the *FRSAEA*). Subsection 5(1) states:

It is the duty of the Director to enforce support orders where the support order and the related support deduction order, if any, are filed in the Director's office and to pay the amounts collected to the person to whom they are owed.

[20] The ministry submits that FRO also has responsibility for the following:

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

³ Orders PO-2441, MO-2166 and MO-1925.

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.); Order MO-2936.

⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

- A law enforcement program that enforces support provisions contained in court orders as well as private written agreements that are filed with the court.
- A social justice program that addresses the challenges and failures of the private enforcement of child and spousal support while at the same time acting as a buffer between support payors and support recipients.
- A revenue-generating program that collects and pays the province and municipalities the support payments assigned to the province by parents and spouses who were, in essence, forced to collect social assistance because defaulting support payors failed to pay their court-ordered support obligation.

[21] In the present appeal, the ministry submits that both Branch 1 and 2 of section 19 apply to the record at issue. It explains that the Director requested that FRO in-house counsel prepare the record at issue (the checklist) to be included in the FRO Policy and Procedures Manual for the purpose of giving legal advice to the Director and her enforcement officers regarding the enforcement of cases where a support payor has filed bankruptcy. The ministry submits:

The Director requested this advice from counsel in confidence. The advice has always remained confidential and has never been disclosed outside of the solicitor-client relationship.

Without getting into any specific discussion that would divulge the contents of the Checklist, the advice includes discussions about, and direction on, the statutory requirements regarding the enforcement of cases involving bankruptcy proceedings, the options to be considered when enforcing such cases as well as the criteria to be considered in such cases...The advice also includes the circumstances wherein it may be necessary for the Director or her enforcement staff to contact FRO in-house counsel for additional legal advice.

[22] The ministry submits that the record at issue in the present appeal is akin to the records at issue in Order PO-2034 which was overturned by the Divisional Court in *Ministry of Community and Social Services v. Cropley et al.*⁸ The ministry submits that in *Cropley*, the Court found that even though the Director instructed FRO in-house counsel to share the documents with enforcement officers and panel lawyers across the province for the purpose of providing instruction, it did not change the source of the documents as arising from confidential communications between legal counsel and their client, and did not terminate the solicitor-client privilege. Furthermore, the Court found that solicitor-client privilege attached to the documents even though the documents

⁸ *Ministry of Community and Social Services v. Cropley et al.* (2004), 70 O.R. (3d) 680.

were of general application.⁹

[23] The ministry also submits that there has not been a loss of privilege as the information contained in the record has never been disclosed outside of the solicitor-client relationship.

[24] The appellant's submissions do not directly address whether the checklist is exempt under the solicitor-client privilege, but she appears to argue that any information in it would not be confidential. She states that:

The public is fully aware of any and all enforcement actions FRO can take to collect support. Those actions are listed in the Family Orders and Agreements Enforcement Assistance Act and the Family Responsibility and Support Arrears Enforcement Act. FRO mails letters upon registration that outline the enforcement actions it can take. Additionally, FRO's methods are openly discussed on websites, online forums and other social media platforms by both payors and recipients, who frankly share their personal experiences of enforcement procedures.

Finding

[25] In Order PO-2034, Adjudicator Laurel Cropley considered the application of section 19 to records relating to section 41 default hearings including some documents that came from the FRO Policy and Procedures manual like the record at issue in the present appeal. Furthermore, Adjudicator Cropley went on to find that the records at issue were prepared by legal counsel for the Director and that any communications between the Director and her staff or agents with legal counsel during the preparation of the records would have attracted the solicitor-client privilege. In finding that section 19 applied to these records, the Divisional Court in *Cropley* found the following:

An examination of the records in dispute reveals that the documents were created by legal counsel at the instruction of the Director. Without getting into any specific discussion that would necessarily divulge the contents of the documents, all of the documents include instructions and advice as to how and when s. 41 default proceedings should be commenced and how they are to proceed. Among other things, they include discussions of the statutory requirements of these proceedings and the evidentiary requirements of such cases; they include a discussion of criteria to be considered when deciding to proceed with these types of cases; they include an examination of options to be considered, depending on how the default hearings unfold before the court; and, they include a

⁹ The Court found that the adjudicator in Order PO-2034 erred in finding that the documents, in order to be exempt under the common law solicitor-client privilege, must relate to particular proceedings, or a "particular legal context".

discussion of how the enforcement officers should interact with panel lawyers on these matters.

The Commissioner appears to recognize that the communications between the Director and her legal counsel and/or her staff (all being agents of the Director) may be privileged in the preparation of the documents. We fail to see how that privilege can be lost once the documents are completed. Based on the Court's examination of the records, the documents are clearly the product of those confidential communications. In the unique circumstances of this case, the fact that the Director then instructs the in-house counsel to share the documents for the purpose of instructing its enforcement officers and the panel lawyers, all of whom are clearly agents of the Director, in our view does not change the source of those documents as arising from confidential communications from legal counsel. In essence, through the medium of those documents, the agents of the Director are receiving the instructions of the Director with respect to how s. 41 default proceedings are to be conducted in the name of the Director, as the Director has been so instructed by its legal counsel.

[26] I find that the Bankruptcy Checklist contains instructions to FRO's enforcement officers about what to do when a support payor has filed for bankruptcy, including the actions to be taken after a bankruptcy filing and what enforcement staff should do with enforcement that is already in place at the time of the bankruptcy filing. The checklist lists various scenarios and then provides instructions about what to do in each case. As such, I find the checklist to be similar to those records at issue in Order PO-2034.

[27] I further accept the ministry's submission that the Director requested FRO in-house counsel to prepare the checklist to be included in the FRO Policy and Procedure Manual for the purpose of giving legal advice to the Director and her enforcement officers regarding the enforcement of cases where the support payor has filed for bankruptcy. The circumstances of this appeal are, in my view, similar to the unique circumstances set out in the court's decision above.

[28] I find that the communications between the Director and legal counsel were confidential and the legal advice sought and received has never been disclosed outside of the solicitor-client relationship. While the appellant disputes whether FRO's policies regarding support payors that have filed for bankruptcy are actually confidential, I find that the appellant has not established that the information in the record has been disclosed or that FRO has waived its privilege in the checklist.

[29] Therefore, I find that the checklist is exempt under the solicitor-client communication privilege in Branch 1 of section 19 and I will now review the ministry's exercise of discretion with respect to the application of this exemption.

Issue B: Was the ministry's exercise of discretion proper in the circumstances?

[30] 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.

[31] 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.

[32] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[33] In support of its exercise of discretion, the ministry submits that it considered the following factors in deciding to withhold the checklist from disclosure under section 19:

- The purposes of [the *Act*], namely the principle that information should be available to the public. As such, the ministry disclosed information to the appellant that would not interfere with the program's ability to meet its statutory obligation to enforce support orders;
- The exemptions from the right of access should be limited and specific to those records which would interfere with the program's ability to meet its statutory obligation to enforce support orders;
- The wording of the exemption and the interests it seeks to protect, namely solicitor-client privileged information.
- The nature of the information and the extent to which it is significant and sensitive to the program;
- The historic practice of the program with respect to similar information; and
- The implications of disclosure of enforcement-related records on the programs ability to enforce support orders.

¹⁰ Order MO-1573.

[34] The appellant's submissions focus on the need for FRO to change its policy regarding the enforcement of support orders against support payors that have filed for bankruptcy. The appellant provided compelling submissions about her attempt through FRO to collect support from her ex-spouse and states:

And despite their mandate to collect support, FRO refuses to use all enforcement methods available to them to collect any post-bankruptcy support because of their misunderstanding of bankruptcy law.

FRO is a publicly funded agency charged with collecting support for vulnerable women and children. It is unconscionable that they refuse to properly collect that support and willfully ignore information that would improve their support collection practices.

The public must be able to access government policy and procedures so that they can assess if they are accurate and being properly administered. It is therefore my hope you will order the checklist released.

[35] Based on my review of the ministry's representations, I find that the ministry properly considered the purposes of the *Act*, the information at issue and the interests sought to be protected by the solicitor-client privilege. The appellant raises public interest considerations in her representations and argues that the ministry should have also considered the need for transparency in FRO's policy and procedures. The appellant's request for the record at issue is based on her negative experience with the way in which FRO's Director and enforcement officers have applied the bankruptcy policy to her case.

[36] I have reviewed the circumstances in this appeal and the parties' representations. In deciding to apply section 19 to the record at issue, I find that the ministry did not act in bad faith nor did it take into consideration improper factors. I find that the ministry sought to balance the appellant's right to information against its interests in protecting the confidential legal advice given by counsel to the Director. Accordingly, I find the ministry's exercise of discretion was proper.

ORDER:

I uphold the ministry's decision to withhold the record at issue under section 19 and dismiss the appeal.

Original Signed by: _____
Stephanie Haly
Adjudicator

November 20, 2015