



Information and Privacy
Commissioner/Ontario

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

ORDER P-1417

Appeal P_9600372

Ontario Human Rights Commission



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ontario Human Rights Commission (the OHRC) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to records containing “a listing of all financial expenses incurred by the Commission” with respect to its investigation of a complaint of discrimination, as well as the subsequent Board of Inquiry hearing and the Ontario Court (Divisional Court) proceeding. The OHRC located records responsive to that portion of the request relating to the Board of Inquiry proceeding and denied access to them, in their entirety, claiming the application of the following exemption contained in the Act:

- solicitor-client privilege - section 19

The OHRC further advised the requester that it had no records relating to the expenses which it incurred in investigating the complaint. The requester, now the appellant, appealed this decision on the basis that further records should exist and that the records identified as responsive to the request are not subject to the exemption in section 19.

During the mediation of the appeal, the appellant further clarified and narrowed the scope of his request. The OHRC disclosed to him additional information regarding:

1. The salary ranges of human rights officers at the time the complaint was being investigated.
2. A list of the fees and disbursements which it incurred at the Board of Inquiry and Divisional Court proceeding.
3. A computer printout describing in greater detail some of the disbursements paid in the these proceedings.
4. A further explanation of one of the items listed in the printout.

The OHRC also advised the appellant that records relating to other disbursement items incurred in November 1992 are in the custody and control of the Ministry of Citizenship (the Ministry) and that a request for this information should be directed to the Ministry. The appellant maintains that records relating to the November 1992 disbursement should exist and that section 19 does not apply to the legal accounts which have been identified by the OHRC as the records which are responsive to his request.

As further mediation was not possible, a Notice of Inquiry was provided to the appellant and the OHRC. Representations were received from both parties.

PRELIMINARY ISSUE:

TRANSFER OF THE REQUEST

In its letter to the appellant dated February 24, 1997, the OHRC advised him that records relating to a travel claim made in November 1992 by counsel, which forms part of the requested information, are in the custody or control of the Ministry. As noted above, it further advised the appellant to make a separate request for this information to the Ministry. The OHRC indicates that, following consultation with the Ministry's Freedom of Information and Protection of Privacy Co-ordinator, it decided not to transfer that part of the request to the Ministry. Rather, it chose to advise the requester to make a further request to the Ministry for this information.

Section 25 of the Act describes the obligations of an institution when it identifies records which are in the custody or control of another institution. Section 25(1) states:

Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

- (a) forward the request to the other institutions; and
- (b) give written notice to the person who made the request that it has been forwarded to the other institution.

In my view, after making the determination that records responsive to part of the request were in the custody or in the control of the Ministry, section 25(1) requires that the OHRC forward that portion of the request to the Ministry and advise the appellant that it has done so. In this case, however, the OHRC simply asked the appellant to make a separate request of the Ministry.

In Order P-1400, Inquiry Officer John Higgins determined that the Commissioner and his delegates have an implied power under section 54(3) of the Act to order an institution to forward a request to another institution. I agree, and find that I have a similar authority to order the OHRC to transfer a portion of a request to another institution.

Therefore, in accordance with the requirements of section 25(1), I order the OHRC to transfer that part of the request involving records relating to the November 1992 travel expense claim to the Ministry and to give written notice to the appellant that it has done so. The transfer to the Ministry and notification to the appellant is to be made within 15 days of the date of this order and without recourse to a time extension.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking and the OHRC indicates that further records do not exist, it is my responsibility to ensure that the OHRC has made a reasonable search to identify any records which are responsive to the request. The Act does not require the OHRC to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the OHRC must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

The appellant submitted extensive representations. However, for the most part, they detail a series of alleged discrepancies between the expense information submitted by counsel and the progress of the human rights complaint which was the subject of the OHRC's investigation and the subsequent Board of Inquiry and the Divisional Court proceedings. Little of this information is of assistance to me in determining whether the OHRC's search for responsive records was reasonable.

The OHRC's representations include affidavits sworn by its former Freedom of Information and Protection of Privacy Co-ordinator (the Co-ordinator) and a Legal Assistant with its Legal Services Branch. Each of these affidavits describe in detail the nature and extent of the searches which were undertaken for records responsive to the appellant's request. In addition, the Co-ordinator has explained the efforts which he made to clarify the scope of the appeal and to locate a paper copy of the November 1992 travel claim.

I have reviewed the submissions of the parties with respect to this issue and find that the OHRC's efforts to identify and locate records responsive to the appellant's request were reasonable in the circumstances. Accordingly, I dismiss this portion of the appeal.

SOLICITOR-CLIENT PRIVILEGE

The OHRC identified ten pages of records, comprising legal accounts rendered to it by outside counsel, as responsive to the appellant's request. During the mediation phase of the appeal, the appellant agreed to narrow and limit the scope of his request in several ways. However, by letter dated January 9, 1997, (which was likely sent in March 1997) responding to an OHRC letter dated February 24, 1997, the appellant advised the OHRC because he felt there still existed some confusion on the part of the OHRC as to the information which he had requested, he wished to proceed to the inquiry stage of the appeal based on his request as originally framed. As such, I find that the ten pages of records which were identified by the OHRC as responsive to the request remain at issue. I will, accordingly, address the application of section 19 to them.

Section 19 of the Act consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege;
(Branch 1) and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the OHRC must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**
- (b) the communication must be of a confidential nature, **and**
- (c) the communication must be between a client (or his agent) and a legal advisor, **and**
- (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

The OHRC submits that the legal accounts which form the records at issue fall within the ambit of the first part of Branch 1 of the section 19 exemption as they are confidential communications between the OHRC and its counsel. In addition, it argues that since the records were generated as a result of the seeking, formulating or giving of legal advice, they are related to the provision of this legal service. The OHRC submits that a "class-based" approach to the third part of the section 19 test is more in keeping with recent jurisprudence with respect to the solicitor-client privilege. It relies on the decision of Mr. Justice Lowry of the British Columbia Supreme Court in Legal Services Society and Blaine Gaffney et al (unreported) and Descoteaux et al v. Mierzwinski [1982] 1 S.C. R. 860 for the proposition that such a "class based" basis, rather than a document by document basis, is the correct approach for determining whether documents fall within the ambit of the privilege.

In addition, the OHRC submits that the Divisional Court in The Attorney General of Ontario and Donald Hale, Ernst & Young and John Doe, April 1995, Court File No. 462/94 and again in Ontario Ministry of Finance v. The Information and Privacy Commissioner (1997) OJ 1465 took the view that the interpretation placed by the Commissioner's office with respect to Branch 1 of the section 19 exemption is too restrictive. The OHRC suggests that a return to a broader interpretation of the exemption, such as that taken by former Commissioner Sidney Linden in Order 126 is more appropriate.

A number of previous orders of the Commissioner's office have addressed the application of Branch 1 of the section 19 exemption to legal accounts.

In Order P-676, former Inquiry Officer Anita Fineberg discussed in detail the application of section 19 to legal accounts, reviewing past orders of the Commissioner's office. She held that:

In Order P-624, Assistant Commissioner Irwin Glasberg undertook a detailed analysis of the application of the common law solicitor-client privilege to various

legal accounts. He discussed the nature of legal accounts and concluded that a legal account is essentially an invoice which itemizes the services rendered by a law firm and the amounts charged for these services. From this perspective, a legal account is no different than an invoice for services remitted to an institution by a consultant or other category of professional. The distinguishing feature of a legal account is that it is issued by a law firm to its client and relates to the provision of legal services.

Although a legal account arises out of a solicitor-client relationship, this type of record differs qualitatively from legal opinions or other communications which purport to provide legal advice from a lawyer to his or her client (and which have traditionally attracted the solicitor-client privilege at common law). To put the matter somewhat differently, the essence of a legal opinion is that it provides legal advice to a client with respect to discrete legal issues. The essence of a legal account is that it requests payment for legal services previously rendered.

Legal accounts do not always assume the same form. In some cases, the breakdown of services provided is extremely detailed such that a review of the account would reveal the substance of the legal advice requested or provided, or the legal strategies pursued. On the other hand, some legal accounts contain nothing more than a general statement that legal work was undertaken and that a specific global amount is payable. In these latter situations, the fact that the invoice is a legal account can sometimes only be gleaned by referring to the letterhead on the statement.

...

In my view, section 19 of the Act (like every other discretionary exemption contained in the legislation) must be interpreted according to the stated purposes of the legislation. These underlying principles, which are set out succinctly in section 1(a) of the Act, state that information should be available to the public and that the necessary exemptions from the right of access should be limited and specific. This provision reveals a legislative intent that discretionary exemptions should be interpreted narrowly and that it is the obligation of institutions to err on the side of releasing information.

In Order P-624, Assistant Commissioner Glasberg adopted the approach he had articulated in Order M-213 for the analysis of such records under the Act. That is, for a legal account to qualify for exemption under section 19 of the Act, its contents must relate in a direct and tangible way to the seeking, formulating or provision of legal advice.

From a practical perspective, the test will be satisfied where the disclosure of the information contained in the account would reveal the subject(s) for which legal advice was sought, the strategy used to address the issues raised, the particulars of any legal advice provided or the outcome of these investigations. This approach reflects the fact that some information contained in a legal account may relate to

the seeking, formulation or provision of legal advice, but also allows the principle of severance to be applied to the record in a predictable fashion.

I adopt the principles enunciated in these decisions by both former Inquiry Officer Fineberg and former Assistant Commissioner Glasberg and specifically decline to follow the “class-based” approach suggested by the OHRC in interpreting Branch 1 of section 19. In my view, such an approach is contrary to the principle expressed in section 1(a)(ii) of the Act that the exemptions contained in the Act are intended to be applied in a limited and specific fashion. In addition, I find that the approach suggested by the OHRC would not allow for the severing of documents under section 10(2) in circumstances where it may be appropriate to do so.

Following my examination of the legal accounts which were submitted to the OHRC by its counsel, I find that they do not contain information which relates directly and tangibly to the seeking, formulating or giving of legal advice. In addition, the accounts do not reveal the subject(s) for which legal advice was sought, the strategies used to address the issues raised, the particulars of any legal advice provided or the outcome of any investigations undertaken by counsel on behalf of the OHRC. Accordingly, I find that they do not qualify for exemption under section 19. As no other exemptions have been claimed for these records, and no mandatory exemptions apply to them, they should be disclosed to the appellant.

ORDER:

1. I find that the search conducted by the OHRC was reasonable in the circumstances and dismiss this portion of the appeal.
2. I order the OHRC to transfer to the Ministry of Citizenship that part of the request involving records relating to the November 1992 travel expense claim pursuant to section 25(2) and to give written notice to the appellant that it has done so. The transfer to the Ministry and notification to the appellant is to be made within fifteen (15) days of the date of this order and without recourse to a time extension.
3. I order the OHRC to disclose the records to the appellant by forwarding him a copy by **July 16, 1997**.
4. In order to verify compliance with the terms of this order, I reserve the right to require the OHRC to provide me with a copy of the letters advising the Ministry and the appellant of the transfer of a portion of the request pursuant to Provision 2, as well as the records which are to be disclosed pursuant to Provision 3.

Original signed by: _____ June 25, 1997
Donald Hale
Inquiry Officer