



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2719**

## **Appeal PA06-382**

### **Ministry of the Attorney General**



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## **BACKGROUND**

The Office of the Children's Lawyer (the OCL) is charged with the responsibility of rendering services on behalf of children in both custody/access and child protection matters. Section 89(3.1) of the *Courts of Justice Act (CJA)* and section 38 of the *Child and Family Services Act (CFSA)* combine to give the court the authority to order that a child be given legal representation by the OCL where the court determines that legal representation is desirable to protect a child's interests. Section 112 of the *CJA* gives the OCL the authority to conduct an investigation and to report and make recommendations to the court on all matters concerning custody of or access to a child and his or her support and education.

Turning to this access to information appeal, the Ministry states that the OCL has been providing legal representation, with clinical assistance, to six children involved in a custody/access dispute. The case had been assigned to an in-house lawyer, who was being assisted by an in-house clinical investigator. The requester in this case is one of the parties to the dispute. At the time the Ministry provided its representations to me in this appeal the litigation involving this dispute was ongoing. The Ministry recently advised our office that the litigation had been concluded on September 8, 2008 by a final court order.

### **NATURE OF THE APPEAL:**

A request was submitted to the Ministry of the Attorney General (the Ministry) under the *Freedom of Information and Protection of Privacy Act (the Act)* for access to the following information held by the OCL:

...A) Training Manual or similar publication under different name (e.g. Guidelines, Field Handbook, Investigation Plan etc) and B) Sample Report.

The Ministry granted partial access to the responsive records, denying access to the withheld portions pursuant to section 19 (solicitor-client privilege) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

During the course of the mediation stage of the appeal process, the Ministry provided the appellant with an index of records containing a list of the responsive records along with an indication as to the pages that were disclosed and those that were withheld. The Ministry advised that it was continuing to rely on section 19 to deny access to the withheld information and that it would not disclose additional information.

The appellant indicated that he wished to pursue access to the withheld portions of the records. The appellant also questioned the existence of a sample report as outlined in the request. The Ministry clarified that there is no sample report as requested but that the information sought is contained within the record entitled "Policy and Procedural Manual for Clinical Investigators Office of the Children's Lawyer" at pages 824 to 835.

Further mediation was not possible and the file was referred to the adjudication stage of the appeal process for an inquiry.

I commenced my inquiry by issuing a Notice of Inquiry, in which I sought representations from the Ministry regarding the application of the section 19 exemption to the circumstances of this case. The Ministry responded with representations and agreed to share the non-confidential portions with the appellant.

I then sought representations from the appellant and included with my Notice of Inquiry a severed copy of the Ministry's representations. Portions of the Ministry's representations were severed due to confidentiality concerns. The appellant wrote to our office, providing information pertaining to issues he has had with the OCL. However, the appellant chose not to submit representations regarding the application of the section 19 exemption in the circumstances of this case.

## **RECORDS:**

There are two records at issue in this appeal, consisting of the withheld portions of the following two documents:

1. Office of the Children's Lawyer Personal Rights Nuts and Bolts, April 2006 (Record 1), and
2. Policy and Procedural Manual for Clinical Investigators Office of the Children's Lawyer (Record 2).

The Ministry states in its representations that it has reconsidered its position regarding the disclosure of the document entitled "Clinical Assists", since it is listed as a handout for parents in the Table of Contents of both Records 1 and 2. This document appears in Record 1 at page 215 and in Record 2 at page 862. I have received no indication that this document has been disclosed to the appellant. Accordingly, I will order its disclosure.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

The discretionary exemption in section 19 contains two branches. The Ministry is relying on both branches of the exemption to deny access to the withheld portions of the records. The Ministry must establish that one or the other (or both) branches apply.

The relevant parts of section 19 state 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;

### **Branch 1: common law privilege**

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 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. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

#### ***Solicitor-client communication privilege***

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

#### ***Litigation privilege***

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

## **Branch 2: statutory privileges**

Branch 2 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.

### ***Statutory solicitor-client communication privilege***

Branch 2 applies to a record that was “prepared by or for Crown counsel for use in giving legal advice.”

### ***Statutory litigation privilege***

Branch 2 applies to a record that was prepared by or for Crown counsel “in contemplation of or for use in litigation.”

## **Representations**

The Ministry states that in order for the OCL to discharge its mandate under section 112 of the *CJA* to conduct an investigation and prepare a report, whether in this case or in other cases, the OCL must retain and instruct both in-house staff and agents.

The Ministry describes Record 1 as “the manual provided to in-house and panel lawyers who represent children on behalf of [the OCL] in child protection and custody/access cases.” The Ministry states that Record 1 “contains directions about how cases are to be handled” on behalf of the OCL and its clients.

The Ministry describes Record 2 as “the manual provided to in-house counsel and panel clinical investigators who prepare investigations and reports for the court, and assist lawyers who represent children on behalf of [the OCL].” Like Record 1, the Ministry states that Record 2 “contains directions on how cases are to be handled” by the OCL.

I will first explore the Ministry’s representations on the application of the common law solicitor-client privilege to the information at issue.

The Ministry states that the records contain “instructions to in-house counsel and panel lawyers and clinical investigators, on how to conduct cases on behalf of [the OCL].” The Ministry indicates that distribution of these records is strictly limited to the OCL’s staff and agents and that it was always the intent of the OCL that these materials would be privileged and held in confidence. The Ministry asserts that opposing parties should “not be privy to the strategies used in providing legal representation to the child, or to the advice given to clinical investigators in preparing investigations and reports to the court in fulfillment of [the OCL’s] mandate.”

In support of its position, the Ministry relies on the Divisional Court’s decision in *Ontario (Ministry of Community and Social Service) v. Ontario (Information and Privacy Commissioner)*

(2004), 70 O.R. (3d) 680 and submits that the circumstances in this case are analogous to those in the Divisional Court case.

In that case, the Divisional Court found that documents created by in-house counsel at the Family Responsibility Office (FRO) at the request of its Director, for use by its Director, enforcement officers, in-house counsel and its agents on how and when default proceedings should be commenced and how they are to proceed under the *Family Responsibility and Support Arrears Enforcement Act (FRSAEA)*, were exempt from disclosure pursuant to the common law solicitor-client communication privilege exemption in section 19. The Ministry argues that the records in this case were similarly prepared by in-house staff at the request of the OCL to provide lawyers with instructions on how to deliver legal representation to children in both custody/access and child protection cases and to give clinical investigators prescribed steps to follow when conducting investigations, preparing reports for the court and providing assistance to lawyers. The Ministry states that the records were prepared to ensure that cases are conducted in a consistent manner. The Ministry submits that the records contain legal advice and direction on how to conduct cases on behalf of the children who are clients of the OCL.

### **Analysis and findings**

Having carefully examined the records at issue in conjunction with the Ministry's representations, I am satisfied that the withheld information qualifies for exemption under the solicitor-client communication head of privilege in branch 1. In reaching my conclusion I have applied the interpretation of the Divisional Court in *Ontario (Ministry of Community and Social Service)*. I concur with the Ministry that the circumstances in that case are analogous to those in this case.

In that case, the Divisional Court found that the legal advice covered by solicitor-client communication privilege is not confined to a solicitor telling his or her client the law. The type of communication that is protected "must be construed as broad in nature, including what should be done, legally and practically." In addition, the privilege is not lost once the documents in question are created to the extent that the ultimate receivers of the communication are applying the instructions provided in the records. Finally, the records need not relate to particular proceedings or to a particular legal context in order to be exempt under section 19.

In discussing the scope of the common law communication privilege in the circumstances of that case, the Divisional Court states:

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

In finding that the communication privilege continues after the creation of the documents in question and the provision of instructions by the Director to FRO's in-house counsel, the Divisional Court states:

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. There is no basis in law for terminating the solicitor-client privilege on these facts.

In concluding that the phrase "particular legal context" need not be confined to a particular matter, the Divisional Court states:

We are also of the view that the Commissioner's interpretation and application of the term "particular legal context" cited in the cases on which the Commissioner relied was too narrow. It need not be limited to a single discrete transaction or particular litigation. In this, the Commissioner appears to have been confusing litigation privilege with solicitor-client communication privilege...While the advice and instructions found in the documents in question can apply to many individual cases brought before the courts by the many agents of the Director throughout the province, all of the cases will be s. 41 default proceedings under the *FRSAEA* on which the Director had sought legal advice from her in-house counsel. The s. 41 default proceedings are one of the litigation tools accorded the Director under the *FRSAEA* in order to fulfill its legislative mandates on which it has sought legal advice. It can, therefore, be considered a "particular legal context" as described in the case of *Balabel and Another v. Air India*, [[1988] 2 W.L.R 1036].

In reaching its conclusion, the Divisional Court also distinguished the circumstances of that case from those in Order PO-1928. In Order PO-1928, Adjudicator Dora Nipp found that training

materials prepared by the staff of the OCL, to be given to both lawyers and social workers with the help of clinicians, such as psychologists or psychiatrists, provided generic information for trainees to follow when interviewing children. In addressing the different circumstances in Order PO-1928, the Divisional Court states:

[The records in PO-1928] were indeed generic training materials on a non-legal subject. [...] [T]he documents in this case are very different. Contrary to the Commissioner's findings, the conclusions reached in PO-1928 are not similarly applicable in this case.

Applying the Divisional Court's reasoning in *Ontario (Ministry of Community and Social Services)* to the circumstances in this case, I make the following findings:

- the records contain instructions and advice as to how and when to conduct custody/access and child protection cases on behalf of the OCL including
  - discussions of the statutory requirements of these proceedings and the evidentiary requirements of such cases
  - legal advice and directions regarding recommended processes to follow when conducting an investigation or preparing a report
  - communication protocols
  - precedent materials
- the records are the product of confidential communications between counsel and management at the OCL
- the information contained in the records is legal in nature and has been provided in confidence to the OCL investigators, its in-house lawyers and agents to apply the advice and instructions provided in the records
- the advice and instructions found in the records can apply to many individual cases; accordingly, it is irrelevant that the litigation in which the appellant in this case has been involved has concluded, since all cases - past, present or future - fall into the "particular legal context" of access/custody and children protection matters

In conclusion, I am satisfied that the withheld information in the records is exempt pursuant to the application of the common law solicitor-client communication privilege in section 19.



## **EXERCISE OF DISCRETION**

### **General principles**

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.

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

In either 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 54(2)].

### **Relevant considerations**

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information

- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

In addressing this issue, the Ministry states:

In exercising its discretion under s. 19, the [OCL] has considered the fact that the [OCL] represents the interests of children involved in extremely acrimonious, difficult access/custody litigation, and in very sensitive child protection proceedings. The child and legal representative have a solicitor-client relationship. In cases in which a clinical investigation and report is prepared, the [OCL] is not acting as counsel to the child but is responsible to the court for reporting on custody, access, support and education issues, and is independent of the parties to the litigation. It is essential that the [OCL] be able to provide direction and advice to her staff and agents about the conduct of cases on behalf of children, without being concerned that a parent will be able to view the training documents. For example, if the parent knew that the lawyer or clinical investigator would be using a particular strategy, influence could be put on the child to convey certain information or take certain steps when dealing with the [OCL], which would not provide the [OCL] with an accurate depiction of the context of the case.

On my review of the Ministry's representations, I am satisfied that the Ministry has properly exercised its discretion, taking into account relevant considerations and not taking into account irrelevant considerations. I am satisfied that in the circumstances, involving a sensitive and highly contentious area of litigation and the best interests of children, the Ministry properly exercised its discretion by denying access to information that I have found exempt under section 19. Accordingly, I uphold the Ministry's exercise of discretion.

**ORDER:**

1. I order the Ministry to immediately disclose a copy of the Clinical Assists document, which appears in Record 1 at page 215 and in Record 2 at page 862.

2. I uphold the application of the section 19 exemption to the remaining information at issue in Records 1 and 2.
3. In order to verify compliance with Provision 1 of this order, I order the Ministry to provide me with a copy of the Clinical Assists document together with any cover letter sent to the appellant.
4. I remain seized of this appeal in order to deal with any outstanding issues arising from this order.

Original Signed by: \_\_\_\_\_  
Bernard Morrow  
Adjudicator

\_\_\_\_\_ September 26, 2008