

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3856

Appeal PA17-392

Ministry of Natural Resources and Forestry

June 14, 2018

Summary: This order addresses the ministry's denial of access to records related to a municipal survey application under section 19 (solicitor-client communication privilege) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The adjudicator upholds the ministry's decision to deny access pursuant to the exemption at section 19(a) of the *Act*.

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

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

OVERVIEW:

[1] The Ministry of Natural Resources and Forestry (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

- All documents relating to the Municipal Survey application [the application] pursuant to Section 48 of the *Surveys Act*
- By-Law #2017-014 per the Corporation of the Township of Strong [the township]
- Lands affected being part of the Road Allowance in front of Lot 19 between concessions 2 & 3, and part of the Shore Road Allowance in front of Lot 19,

Concession 2, Geographic Township of Strong, Municipal Township of Strong, District of [Parry] Sound.

[2] The ministry notified five affected parties and sought their views on disclosure of records relating to them, pursuant to section 28 of the *Act*. Four of the five affected parties consented to disclosure. The remaining affected party did not respond.

[3] After considering the positions of the affected parties, the ministry issued a decision granting full access to some records and denying access in full to other records based on the solicitor-client privilege exemption at section 19 of the *Act*. The ministry provided the requester with an index of records and notified the affected parties of its decision.

[4] The requester appealed the ministry's decision to deny access to certain records in full, thereby becoming the appellant in this appeal.

[5] During mediation, the ministry issued a revised decision disclosing additional records to the appellant; however, the appellant advised the mediator that they wished to pursue access to all of the records that remain withheld. No further mediation was possible and the appeal was moved to the adjudication stage for an inquiry.

[6] I began my inquiry by sending a Notice of Inquiry outlining the facts and issues to the ministry and inviting written representations. Once I received the ministry's representations, I shared the non-confidential portions with the appellant¹ along with a Notice of Inquiry, and invited the appellant to provide representations in response. I received representations from the appellant.

[7] In this order, I find that the records at issue fall within the common-law solicitor-client communication privilege and that the privilege has not been waived. I find that the ministry properly exercised its discretion under section 19(a) of the *Act*, and I uphold the ministry's decision to deny access to the records.

RECORDS:

[8] There are 77 pages of records remaining at issue in this appeal. They consist of emails and correspondence that are identified in the ministry's index as pages 195-217, 244-257, and 260-299. Most of these records are email chains that contain considerable duplication of content.

¹ In accordance with section 7 and Practice Direction Number 7 of the IPC's Code of Procedure for appeals under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*.

ISSUES:

- A. Does the discretionary exemption for solicitor-client privileged information at section 19 of the *Act* apply to the withheld records?
- B. Did the ministry properly exercise its discretion under section 19?

DISCUSSION:

Issue A: Does the discretionary exemption for solicitor-client privileged information at section 19 of the *Act* apply to the withheld records?

[9] The ministry relies on the discretionary solicitor-client privilege exemption at section 19 of the *Act* to deny access to the records that remain in dispute. Section 19 of the *Act* states:

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.

[10] 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.

Solicitor-client communication privilege

[11] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation 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 advice². 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

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

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

keeping both informed so that advice can be sought and given.⁴

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

[14] 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

Loss of privilege

[15] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.⁸

[16] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.⁹

[17] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹⁰ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹¹

Representations

[18] The ministry's representations provide an overview of relevant jurisprudence on the interpretation of the solicitor-client privilege exemption at section 19, much of which is set out above. The ministry submits that section 19 applies to all of the records that remain at issue because they reflect confidential communications relating to the seeking and giving of legal advice. The records are ministry counsel's working papers/handwritten notes or emails and related attachments sent for the purpose of giving/receiving legal advice that fall within the "continuum of communications" between solicitor and client. The ministry submits that the emails are between:

- ministry staff and ministry counsel;

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.).

⁸ *S. & K. Processors Ltd.*, cited above.

⁹ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹⁰ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

¹¹ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

- ministry counsel;
- ministry counsel and other ministry legal staff;
- ministry counsel and Crown Law Office - Civil counsel; and
- ministry staff where the communication falls within the continuum of communications.

[19] The confidential portions of the ministry's representations provide further details in support of its position that each of the 77 pages are exempt under the section 19 exemption.

[20] The ministry's submissions offer clarification on the information provided in its index. Namely, the ministry advises that certain pages in the index for which the "To/A" and "From/De" entries appear to show information passing between ministry staff and the township's legal counsel do not, in fact, represent communications made between the two individuals listed, but rather consist of draft correspondence on which legal advice was sought.¹² The confidential portions of the ministry's representations further clarify the interpretation of its index with regard to these documents.

[21] Finally, the ministry submits that the privilege in section 19 has not been lost through waiver by client or counsel.

[22] The appellant submits that the documents at issue relate to an application made to the Minister of Natural Resources and Forestry pursuant to section 48(1) of the *Surveys Act* for the purposes of fixing the boundary of lands described within the application.

[23] The appellant advises that in the application, the ministry and the township are opposing parties; as such, the township's legal counsel cannot also be counsel to the ministry, as this would put him in a conflict of interest.

[24] The appellant submits that the ministry provided an index of pages, rather than records, in which each page is described based on the document appearing at the top. As a result, the appellant maintains that there are a number of emails that are not described in the index because they were not at the top of a page. The appellant submits that in failing to consider what information on each page is not covered by solicitor-client privilege, the ministry has failed to discharge its duty to disclose as much of a responsive record as can be reasonably severed.

[25] The appellant sets out reasons for believing that various pages (or portions of pages) are not subject to privilege pursuant to section 19 of the *Act*. These reasons include where no counsel is noted as part of the communication, especially where the ministry has not indicated that the communication reveals the legal advice provided by counsel, and where there is nothing in the description of the documents that

¹² Pages 196, 198, 203, 275, and 290.

demonstrates that they contain legal advice. The appellant maintains that a communication between two people, neither of whom is a lawyer, cannot be subject to solicitor-client privilege unless it reveals the legal advice provided by counsel.¹³

[26] Moreover, the appellant submits that documents (such as email attachments) that are not themselves privileged cannot become privileged simply because they are sent to or by counsel.¹⁴ Similarly, the appellant maintains that the fact that legal advice relates to a document does not make the document subject to privilege; it is only where a record contains or would reveal the contents of a communication between the solicitor and client that it would qualify for privilege.¹⁵ Finally, the appellant submits that some documents¹⁶ are dated prior to the application and therefore cannot have been created for the purpose of giving or receiving legal advice with respect to the application.

Analysis and findings

[27] I have reviewed the records at issue and considered the parties' submissions, including the confidential portions of the ministry's representations. Based on this review, I am satisfied that the records qualify for exemption under section 19(a) of the *Act*.

[28] Many of the records at issue form part of an email chain and therefore contain duplicate information. Some of the pages consist of emails and attachments exchanged directly between the counsel with the ministry's Legal Services Branch and ministry staff in non-legal departments. Based on my review of these records, I am satisfied that they either contain a request for, or the provision of, legal advice, or they were created to keep both the ministry staff and counsel informed so that legal advice may be sought and provided as required. I find that these records contain confidential communications between legal counsel and client regarding legal matters, and therefore fall within the ambit of the solicitor-client communication privilege in Branch 1 of section 19 of the *Act*.

[29] As noted by the appellant, many of the pages of records do not appear to have been prepared by or for the ministry's legal counsel. As I have mentioned, the majority of the records consist of email chains. While some of the emails were not directly sent to or from counsel within the ministry's Legal Services Department, my review confirms that they clearly address the subject matter for which the legal counsel had been consulted. For example, some of the pages are emails or attachments received from ministry counsel and subsequently forwarded between ministry staff; others consist of draft correspondence on which legal advice was sought; and others reveal discussions had with counsel.

¹³ Order MO-2789 at page 10; Order PO-2624 at page 13.

¹⁴ *Ontario (Provincial Police) v Assessment Direct Inc*, 2016 ONSC 8138 at para 23; *General Accident Assurance Co v Chrusz* (1999), 180 DLR (4th) 241 (ONCA), para 36 and 51.

¹⁵ Order MO-2231 at page 5.

¹⁶ Namely, pages 206, 210 and 268.

[30] Past orders of this office have recognized that email exchanges between non-legal staff can form a part of the "continuum of communication" covered by solicitor-client privilege.¹⁷ This includes where disclosure would "indirectly reveal information exchanged between the [counsel] and [client] for the purpose of keeping both [...] informed so that legal advice may be sought and given as required,"¹⁸ and where emails between non-legal staff refer to the need for the communications to be sent to legal counsel.¹⁹

[31] Based on my review of these emails, I am satisfied that they contain information that would reveal the content of discussions between the ministry's legal counsel and its staff. I am also satisfied that disclosure of these records would indirectly reveal information exchanged between the ministry's legal counsel and its staff for the purpose of keeping both informed so that legal advice may be sought and given as required. Having regard to the content of these pages in the context of the records as a whole, I find that they form part of the "continuum of communication" which falls within Branch 1 of the solicitor-client privilege exemption at section 19 of the *Act*.

[32] My review also confirms that some of the pages of records consist of the ministry's counsel's working notes related to formulating or giving legal advice. I find that these are notes that can be withheld pursuant to the solicitor-client privilege at section 19(a) of the *Act*, based on the "working papers" aspect of the privilege.²⁰

[33] The appellant maintains that some documents predate the application and therefore cannot have been created for the purpose of seeking or obtaining legal advice. I have reviewed those pages in particular and I am satisfied that they are documents attached to emails sent from ministry staff to legal counsel for the purpose of obtaining legal advice. The appellant argued that documents that are not themselves privileged cannot become privileged simply because they are sent to or by counsel. However, in *Descôteaux v. Mierzwinski* the Supreme Court of Canada stated:

[A]ll information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privilege attaching to the confidentiality.²¹

[34] Based on my review of these attachments, I am satisfied that they were required to be provided for the purpose of obtaining legal advice from the ministry's legal counsel. Accordingly, I am satisfied that these pages of records also fall within the scope of the exemption at section 19(a).

[35] With regard to the possibility of waiver, the ministry submits that it has not waived the privilege attaching to the records. However, the appellant suggests that

¹⁷ Orders P-1409, P-1663, and PO-2624.

¹⁸ Order MO-2789.

¹⁹ Order PO-2624.

²⁰ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

²¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618 (S.C.C.), cited in orders PO-1409 and PO-1850.

waiver may have occurred when certain pages of records were sent between ministry staff and the township's counsel.

[36] Upon review, I find that the pages noted by the appellant consist of email attachments containing draft correspondence from ministry staff to the township's counsel. The emails were sent between ministry staff and ministry counsel for the purpose of seeking and providing legal advice with regard to the attachment, and clearly qualify for exemption under section 19. The fact that a final copy of the correspondence was (presumably) sent to the township's counsel does not waive privilege over the draft and marked-up copies that were shared between ministry staff and ministry counsel in the formulation of the final copy. As there is no other evidence before me to suggest that waiver has occurred, I find that there has not been a waiver of solicitor-client privilege in relation to the records at issue.

[37] Finally, the appellant raises the issue of severability of the records by submitting that the ministry has decided to deny access based solely on the document appearing at the top of each page. Based on my review, I am satisfied that the pages cannot reasonably be severed without revealing information that is covered by solicitor-client privilege.

[38] I will now turn to the ministry's exercise of discretion in withholding the records that are covered by the section 19(a) exemption.

Issue B: Did the ministry properly exercise its discretion under section 19?

[39] The section 19 solicitor-client privilege 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, or 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.²² According to section 54(2), however, this office may not substitute its own discretion for that of the institution.

[40] As I have found that section 19(a) applies to the records, I will now review the ministry's exercise of discretion in choosing to withhold the information under section 19.

Representations

[41] The ministry maintains that it properly exercised its discretion to deny access to the information contained in the records at issue. The ministry submits that in doing so

²² Order MO-1573.

it considered the circumstances of the request, the purposes of the *Act*, the nature of the exemption, the importance of the solicitor-client relationship, and the importance of preserving the confidentiality of communications in the course of seeking and giving legal advice. The ministry submits that it did not base its decision on irrelevant considerations. The ministry submits that it has exercised its discretion in good faith and for purposes consistent with the intention of the exemption.

[42] The appellant submits that since 2012 it has been involved in litigation involving the township concerning, among other things, the boundary at issue in the application. The appellant advises that as part of that litigation, it obtained a survey indicating that the land at issue in the application is the appellant's land, but when this survey was presented to the township, it commenced the application. The appellant advises that the trial of the litigation between it and the township has been delayed pending the outcome of the application.

[43] The appellant maintains that the ministry and the township should not be or even seen to be working together with respect to the application. The appellant states that the ministry should complete the survey as required by the application in an impartial manner.

[44] The appellant is concerned that the ministry has withheld correspondence that relates to the boundary dispute between it and the township that would be relevant to the litigation. The appellant maintains that a failure to disclose the documents in question will undermine the legitimacy of the application and could influence the outcome of the litigation.

Analysis and findings

[45] Based on my review of the parties' submissions and the nature and content of the records that I have found exempt under section 19(a), I find that the ministry properly exercised its discretion to withhold the records. I am not persuaded by the appellant's submissions that the ministry has failed to properly exercise its discretion in deciding to withhold records pursuant to section 19. I find that the ministry took into account relevant considerations and did not act in bad faith or for an improper purpose.

[46] Accordingly, I find that the ministry properly exercised its discretion in applying section 19(a), and I uphold its decision to withhold the records at issue pursuant to this exemption.

ORDER:

I uphold the ministry's decision to deny access to the records remaining at issue under section 19(a), and I dismiss the appeal.

Original Signed By
Jaime Cardy

June 14, 2018

Adjudicator