Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-624

Appeal P-9300242

Ministry of Agriculture and Food

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ORDER

BACKGROUND:

The Ministry of Agriculture and Food (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of all paperwork relating to a specific enrolment in the Ontario Farm Adjustment Assistance Program (OFAAP). The time period for the request was from August 1991 onwards.

The Ministry located a total of 61 records that were responsive to the request and granted access to 36 of these documents in their entirety. The Ministry, however, made the decision to withhold the remaining 25 records based on the exemptions contained in sections 19 and 49(a) of the Act. The requester appealed both the denial of access and also submitted that one additional record, not previously identified by the Ministry, should be included within the scope of the appeal.

Mediation efforts were not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry and to a Bank (the affected person) involved in the appellant's case. Representations were received from all parties.

While these representations were being evaluated, I issued Order M-213, where I was called upon to determine whether section 12 of the Municipal Freedom of Information and Protection of Privacy Act (which is similar to section 19 of the Act) applied to a legal account. Since I considered that this decision had a material impact on the issues raised in the present appeal, I determined that copies of Order M-213 should be provided to all the parties to this appeal. The parties were then afforded the opportunity to state whether the interpretation in Order M-213 would cause them to change or to supplement the representations which they had previously made. Additional representations were received from the Ministry and the appellant.

It would be helpful, at the outset, to provide some background information about the OFAAP program and the roles played by the Ministry and the Bank in their dealings with the appellant. The OFAAP was established in 1982 to provide financial assistance to Ontario farming enterprises by means of grants or guarantees on financing provided by a bank or other approved lender.

In the present case, the financing was provided through a loan from the Bank which was guaranteed by the Ministry. The same Bank had also negotiated separate loans with the appellant outside the OFAAP program. The appellant had difficulty in meeting the payment schedules and defaulted on several of the loans. The Bank subsequently initiated legal proceedings to recover on its security and, in so doing, engaged the services of three law firms. In the process, the Ministry also assigned to the Bank its rights as guarantor to recover monies which had already been paid over pursuant to the guarantee.

The legal action against the appellant was eventually settled. The Bank and the Ministry then proceeded to determine how the costs incurred in attempting to recover the amounts outstanding should be shared as between the two parties.

[IPC Order P-624/February 8, 1994]

The records at issue in this appeal relate to various costs incurred by the Bank (as agent for the Ministry and for its own account) with respect to the division of the costs incurred by the two creditors. For ease of reference, I have categorized the records into three groups. Group One consists of Records 1 through 6 which contain correspondence, memoranda and notes. Group Two involves Records 7 through 24 which are made up of a ledger page, various legal accounts, two invoices and one letter. The final document at issue is the Bank's opening statement at trial, which is labelled as Record 25.

ISSUES:

The issues to be addressed in this appeal are:

A. Whether any of the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

B. Whether the discretionary exemptions provided by sections 19 and 49(a) of the Act apply to the records.

C. Whether the Ministry conducted a search for the record identified by the appellant which was reasonable in the circumstances of the appeal.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether any of the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

Under section 2(1) of the Act, personal information is defined to mean recorded information about an individual including information relating to age, marital status, financial transactions and the individual's name where it appears with other personal information relating to the individual.

Based on my review of the records, I am satisfied that each document contains information which qualifies as the personal information of the appellant. Some of the records also contain information about other named individuals. I am satisfied, however, that with the exception of Record 23, the information found in these documents was provided by these other individuals in either their professional capacities or in the execution of their employment responsibilities. On this basis, such information (save that found in Record 23) does not qualify as "personal information" for the purposes of the Act (Orders P-369, P-377 and P-427).

ISSUE B: Whether the discretionary exemptions provided by sections 19 and 49(a) of the Act apply to the records.

Section 19 of the Act reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section 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 institution must provide evidence that the record satisfies either of the following 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]

A record can be exempt under Branch 2 of the section 19 exemption regardless of whether the common law criteria relating to Branch 1 are satisfied.

Two criteria must be met in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; **and**

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

In its representations, the Ministry submits that section 19 of the Act applies to all of the records at issue. More specifically, the Ministry claims that the Group Two records are exempt under Branch 1 of section 19 and that Record 25 is exempt under both branches. The Ministry is, however, not specific as to the branches which apply to the Group One records.

I will now deal with each of these record groupings in turn.

The Group One Records

This grouping encompasses Records 1 through 6. Records 1, 2 and 6 are correspondence between the Bank and the OFAAP program office of the Ministry. Record 3 is a memorandum of a telephone call from a Bank employee to the Ministry which includes calculations posted on the back of the page. Record 4 is a Notice of Payment sent to the Bank respecting reimbursement for the Ministry's share of legal costs. Record 5 is a page of handwritten notes and calculations prepared by an OFAAP employee to determine the Ministry's share of the legal costs.

In its representations, the Ministry explains that these records:

> qualify for an exemption under section 19 because they are written communications of a confidential nature that refer to the respective positions of the bank and Ministry regarding legal costs and also reveal details about legal advice given, or the instructions given to counsel, about the conduct of legal proceedings.

I have carefully reviewed these records and find that none of them can be categorized as a communication between a legal advisor and a client (or the agent of a client), nor are they directly related to seeking, formulating or giving legal advice. In addition, these records were neither created nor obtained for a lawyer's brief for existing or contemplated litigation. On this basis, I find that the Group One records do not meet the test established for Branch 1 of the section 19 exemption.

I also find that none of these records were prepared by or for Crown counsel for use in giving legal advice or in contemplation of litigation or for use in litigation. On this basis, the Ministry has failed to establish that the second branch of the section 19 exemption applies to these records. The result is that Records 1 through 6 should be released to the requester.

The Group Two Records

This record grouping consists of a ledger page, various legal accounts, two invoices and one letter. The Ministry has claimed that each of these records is exempt from disclosure under Branch 1 of the section 19 test. I will now describe the individual records more fully.

Record 7 is a ledger page compiled by the Bank which documents various legal costs which it paid out during the proceedings taken against the appellant. This record was created by the Bank for accounting purposes and is clearly not a communication between a client and its legal advisor. Nor was this document created or obtained especially for a lawyer's brief for litigation. For these reasons, I find that the ledger page does not qualify for exemption under Branch 1 of section 19.

Record 10 contains two invoices for services rendered by a locksmith and a bailiff. The invoices were created by these third parties and sent to the Bank for payment. Record 10 does not qualify as a communication with a legal advisor and, on this basis, is not subject to exemption under Branch 1 of section 19.

Record 23 consists of a letter sent by the Bank to an individual whom it intended to call as a witness in its legal action against the appellant. On its face, this record does not represent a communication between a client and its legal advisor, nor was it prepared for a lawyer's brief. Accordingly, the Ministry cannot rely on Branch 1 of section 19 to withhold this document from disclosure.

In find, however, that the name and address of the witness mentioned in this record constitutes that individual's personal information under section 2(1)(h) of the Act. I further find that the disclosure of this information would constitute an unjustified invasion of that individual's personal privacy under section 49(b) of the Act. Thus, when releasing Record 23, I order the Ministry not to disclose the name and address of the individual.

In summary, I find that Records 7, 10 and 23 (with the exception of the name and address of the witness) should be disclosed to the appellant.

Records 8, 9, 11 through 22 and 24 are legal accounts issued by one of three law firms which are directed to the Bank for payment. These accounts relate to proceedings which the Bank brought against the appellant. In its representations, the Ministry submits that these legal accounts are exempt from disclosure pursuant to the solicitor-client privilege set out in section 19 of the Act.

Before addressing the Ministry's submissions in detail, it would be useful to reflect on the character of a legal account as a discrete type of document. 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 one 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 record category 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.

It is also important to note that 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. In other cases, the 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.

To support the position that section 19 should apply to the legal accounts at issue, the Ministry has referred me to the decision of Southey J. in Mutual Life Assurance Company of Canada v. The Deputy [Attorney] General of Canada [1984] C.T.C. 155 (S.C.O. Motions Court). In that case, the Court was called upon to interpret section 232(1)(e) of The Income Tax Act. In the course of his decision, Southey J. stated in obiter that, were it not for the fact that The Income Tax Act explicitly excluded an "accounting record of a lawyer" from the ambit of solicitor-client privilege, he would have decided that ordinarily a statement of account is a document to which this privilege would apply.

The Ministry has also drawn my attention to a criminal law case, that of Regina v. Prousky and Biback(1986) 30 C.C.C. (2d) 353 (Ont. Prov. Ct.), as further authority to support its submission.

The Ministry's essential position is that, at common law, legal accounts are always subject to protection under the solicitor-client privilege. The Ministry has, however, only been able to identify one civil case, the Mutual Life decision, where a judicial statement is made that, ordinarily, a legal account would attract this privilege. I do not, however, consider this case to represent a binding authority on me for three reasons. First, Mr. Justice Southey's comments were provided in obiter. Second, the Mutual Life decision was made in the context of a different legislative scheme to that established under the Act. Third, the ruling in this case appears to be at odds with the position taken by Southey, J., on behalf of the Divisional Court, in the case of Re Ontario Securities Commission and Greymac Credit Corp.; Re Ontario Securities Commission and Prousky (1983) 41 0.R. (2d) 328 (Ont. Div. Ct.). At page 337 of that ruling, Mr. Justice Southey states that:

> ... Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. Oral evidence regarding such matters, **and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged**, and the solicitor may be compelled to answer the questions and produce the material. [emphasis added]

I consider these comments to be quite significant.

I have also reviewed the Regina v Prousky case and find that, because of the criminal law context in which it was decided, the decision has only limited relevance to the facts of this appeal. In addition, the document at issue in that case was a reporting letter rather than a legal account.

Based on my review of the case law, I conclude that the common law position on whether legal accounts, in whole or in part, are protected by the solicitor-client privilege is still unclear. That being the case, my determination of whether section 19 applies to the legal accounts at issue in this appeal must be based exclusively on the wording and the intent of the Act.

The Ministry's next argument on the application of section 19 is the following:

> [Section 19] does not contemplate the application of additional tests or requirements to establish the existence of privilege, nor does it contemplate the limitation of the scope of the privilege due to the consideration of factors that have not been deemed relevant at common law.
>
> The Ministry therefore submits that the tests that should be used to determine whether particular communications are privileged for the purposes of section 19 (and therefore subject to exemption), are those that exist at common law and these should be given a liberal interpretation. Once an institution establishes that a particular record meets the common law tests, section 19 does not allow the Commissioner to consider the application of other factors.

I will initially address the Ministry's submission that the section 19 test should be interpreted liberally with a view towards protecting the legal accounts from disclosure. 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 are set out succinctly in section 1(a) of the Act, as follows:

The purposes of this Act are:

> to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) 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. Based on an analysis of this section, I am unable to accept the fundamentally opposite

submission advanced by the Ministry that section 19 should receive a broad and liberal interpretation.

The Ministry's next point is that the Commissioner's office does not have the authority to consider factors, other than those established at common law, to determine whether the contents of a record fall within the section 19 exemption. This view, however, is inconsistent with the important principle of severance which is established in section 10(2) of the Act. This provision states that:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under section 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

In my view, it is entirely consistent with the wording of this section for the Commissioner's office to articulate tests to determine when the contents of legal accounts should be subject to the severance principle.

Since the promulgation of the Act in 1988, the Commissioner's office has issued dozens of orders which have interpreted the ambit of section 19 of the Act. This section codifies the solicitor-client privilege and brings this exception to disclosure within the broad operating principles of the legislation. On this basis, it would be useful to determine how previous orders have addressed the issue of whether, and to what extent, legal accounts should be subject to the application of this exemption.

A useful place to begin is with Order 49. There, former Commissioner Sidney B. Linden considered the tests that an institution would have to meet in order to satisfy the first branch of the section 19 exemption. Based on his review of the case law on solicitor-client privilege, he indicated that an institution must establish, among other things, that the communication is directly related to either seeking, formulating or giving legal advice.

In Order 210, Commissioner Tom Wright considered the meaning of the term "legal advice" for the purposes of the solicitor-client aspect (Branch 1) of the exemption. He there stated that:

> The term "legal advice" is not defined in the Act. In my view the term is not so broad as to encompass all information given by counsel to an institution to his or her client. Generally speaking, legal advice will include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. It does not include information given about a matter with legal implications, where there is no recommended course of action, based on legal considerations, and where no legal opinion is expressed.

This definition has been referred to with approval in many subsequent orders.

The question of whether Branch 1 of the section 19 exemption is available to protect legal accounts from disclosure has, in turn, been addressed in two decisions issued by the Commissioner's office - Order 126 and Order M-213. In Order M-213, I summarized the purport of Order 126 (which had been decided four years prior to Order M-213) as follows:

> In Order 126, Commissioner Linden found that, while the invoices and accounts, themselves, did not contain legal advice, they reflected communications of a confidential nature directly related to the seeking, formulating or giving of legal advice, and were, therefore, exempt from disclosure. In my view, the implication of this decision is not that the solicitor-client exemption will apply automatically to records of this nature, but rather that the decision maker must determine, based on the contents of each legal account, whether the information contained in the document relates in a tangible and direct way to the seeking, formulating or provision of legal advice.

I then went on to consider whether the legal account at issue in Order M-213 was a communication related to seeking, formulating or providing legal advice. I addressed this issue in the following fashion:

> I have carefully reviewed the legal account at issue in the present appeal. While this record sets out, in a summary fashion, the steps which the law firm took to complete its work assignment, the legal account neither contains legal advice, nor reveals any such advice indirectly. In addition, because of the non-specific fashion in which this account is drafted, the record discloses neither the subject(s) which the law firm was asked to investigate, the strategy used to address these issues nor the result of this exercise. In short, I find that this record has no direct connection with either "seeking, formulating or giving legal advice". This conclusion has been reached following a careful analysis of section 12 of the Act in relation to this specific legal account.

In its representations, the Ministry refers to the finding made in Order 126 that, in the circumstances of that appeal, the legal accounts at issue are directly related to the seeking, formulating or provision of legal advice, to support the proposition that a legal account is automatically "directly related" to the seeking or provision of legal advice.

I am unable to concur with this submission. As I indicated in Order M-213, for a legal account to qualify for exemption under the municipal equivalent of section 19, its contents must relate in a direct and tangible way to the seeking, formulating or provision of legal advice. On this basis, the application of section 19 to a legal account (or to a part of such an account) must be judged on a document by document basis. It necessarily follows that a record will not automatically attract the section 19 exemption simply because it is characterized as a legal account.

Having articulated the approach to apply in cases such as these, I must now determine whether any of the information contained in the 16 legal accounts relate in a direct and tangible way to the seeking, formulating or provision of legal advice. From a practical perspective, that 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 in a predictable fashion.

With these criteria in mind, I have reviewed each of the legal accounts at issue. The accounts described as Records 9, 12, 13, 16, 19, 21 and 24 individually provide a tally of the hours spent and disbursements made by the law firms, as well as brief narratives of the steps taken to complete the assignments. In my view, the disclosure of the information contained in these accounts would neither reveal the subjects for which legal advice was sought, the legal advice provided, the legal strategy pursued nor the results obtained. On this basis, these legal accounts do not contain information which relates in a direct and tangible way to the seeking, formulating or provision of legal advice. The result is that these records are not protected from disclosure under the first part of Branch 1 of the section 19 exemption.

I find, however, that portions of the narratives set out in Records 8, 11, 14, 15, 17, 18, 20 and 22 would reveal the type of legal advice sought, the legal advice provided, the legal strategy pursued or the results obtained. On this basis, I find that the disclosure of these excerpts (which I have highlighted on the copy of the records to be sent to the Ministry's Freedom of Information Co-ordinator) are subject to exemption under Branch 1 of the section 19 exemption.

I have also considered whether Records 9, 12, 13, 16, 19, 21 and 24, and the remaining portions of Records 8, 11, 14, 15, 17, 18, 20 and 22 would qualify for exemption under the second part of the Branch 1 exemption. I find that these legal accounts were not created "especially for the lawyer's brief" for litigation and, accordingly, are not exempt under the second part of the Branch 1 exemption.

The Treatment of Record 25

Record 25 consists of the Bank's opening statement in its legal action against the appellant which was scheduled to come to trial in January 1992. The record was created by a lawyer retained by the Bank to collect on the appellant's outstanding loans, both on the Bank's own account and as agent for the Ministry.

I am satisfied that Record 25 was prepared for use in litigation and that it was prepared by Crown counsel which, under section 19, includes any person acting in the capacity of legal advisor to an institution covered by the Act. In this case, the law firm was acting on behalf of the Ministry through its agent, the Bank.

The fact that the legal action was settled prior to the commencement of the trial (hence without the opening statement actually being **used** in litigation) does not change the fact that it was prepared by Crown counsel for use in litigation (Order P-538). Accordingly, I find that Record 25 is exempt from disclosure under the second branch of the section 19 exemption.

To summarize, I have found that parts of Records 8, 11, 14, 15, 17, 18, 20 and 22 and all of Record 25 are properly exempt from disclosure under section 19 of the Act.

Section 49(a) of the Act provides the Ministry with the discretion to refuse to disclose an appellant's personal information if section 19 otherwise applies to the information. I have reviewed the Ministry's exercise of discretion in favour of refusing to disclose the records which qualify for exemption under section 19 and find nothing improper in the manner in which this discretion was exercised in the circumstances of this appeal.

ISSUE C: Whether the Ministry conducted a search for the record identified by the appellant which was reasonable in the circumstances of the appeal.

In her representations, the appellant referred to a letter, dated April 3, 1991, which was previously disclosed to her. This correspondence referred to a "final reconciliation form" which was to be completed by the Bank and sent to the Ministry regarding the final accounting for the appellant's OFAAP enrolment. The form was to include any claim for the Bank's costs of collection.

The appellant submits that she has never received this form in response to her previous requests for information, nor was it disclosed in the course of the request which led to this appeal. The appellant also indicates that the document was not listed as being exempt from disclosure.

The Ministry submits that the "final reconciliation form" does not exist because of the manner in which the case proceeded to litigation and eventual settlement. In addition to its representations, the Ministry provided an affidavit sworn by its Manager of Freedom of Information, setting out the steps taken to locate the record identified by the appellant.

Where an appellant has provided sufficient details about the record(s) which he or she is seeking and a Ministry indicates that additional records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. While the Act does not require that the Ministry prove to the degree of absolute certainty that such records do not exist, the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

I have carefully reviewed the Ministry's representations and the additional affidavit that was provided. I am satisfied that the Ministry has taken all reasonable steps to locate the record and I find that the Ministry's search was reasonable in the circumstances of the appeal.

ORDER:

1. I uphold the Ministry's decision not to disclose Record 25 and those portions of Records 8, 11, 14, 15, 17, 18, 20, 22 and 23 as indicated on the highlighted copy of the records

which will accompany the copy of this order sent to the Freedom of Information Co-ordinator for the Ministry. The highlighted portions should **not** be disclosed.

2. I order the Ministry to disclose Records 1 through 7, 9, 10, 12, 13, 16, 19, 21, 24 and those portions of Records 8, 11, 14, 15, 17, 18, 20, 22 and 23 which are not highlighted, to the appellant within 35 days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.

3. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant in accordance with provision 2, **only** upon request.

Original signed by: February 8, 1994
Irwin Glasberg
Assistant Commissioner