



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

ORDER P-676

Appeal P-9300343

Ministry of the Attorney General



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ORDER

BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of all documents, internal memoranda, notes, cheques and correspondence relating to the payment of fees to a law firm by the Ministry on behalf of a named individual (the lawyer) during the period of December 1992 to May 1993.

The Ministry identified four records comprising 11 pages as responsive to the request and provided partial access to three pages. The Ministry denied access to the remainder of the pages in their entirety pursuant to sections 14(1)(a), (b) and (f), 19 and 21 of the Act. The requester appealed the Ministry's decision.

During mediation, the appellant indicated that he was not interested in receiving access to that part of Record 4 (Page 11), which had not been previously disclosed to him.

Further mediation of this appeal was not successful and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry and the appellant. Representations were received from the Ministry only.

THE RECORDS:

The three records remaining at issue in this appeal and the exemptions claimed by the Ministry to deny access are:

1. Memorandum to Deputy Attorney General (pages 1 and 2) (access denied in full under sections 14(1)(a), (b) and (f), 19 and 21);
2. Legal account (pages 3 and 4) (access denied in part under sections 19 and 21); and
3. Schedule to legal account (pages 5-10) (access denied in full under sections 19 and 21).

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the discretionary exemptions provided by sections 14(1)(a), (b) and/or (f) of the Act apply to Record 1.
- B. Whether the discretionary exemption provided by section 19 of the Act applies to Records 1, 2 and/or 3.
- C. Whether any of the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act and, if the answer is yes, whether the

mandatory exemption provided by section 21 of the Act applies to this personal information.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemptions provided by sections 14(1)(a), (b) and/or (f) of the Act apply to Record 1.

The Ministry submits that sections 14(1)(a), (b) and (f) of the Act apply to Record 1. These provisions read as follows:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (f) deprive a person of the right to a fair trial or impartial adjudication;

In its representations, the Ministry asserts in general terms that it may refuse to release a record if the disclosure could reasonably be expected to interfere with a law enforcement matter.

In order for the Ministry to rely on sections 14(1)(a) and/or (b) of the Act to exempt Record 1 from disclosure, it must first establish that this memorandum falls within the definition of "law enforcement" as set out in section 2(1) of the Act. The words "law enforcement" are defined as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b).

The Ministry submits that the definition of law enforcement has been satisfied because the libel proceedings launched by the lawyer were a response to comments made against him while prosecuting a criminal case. The libel action was successful (although a decision on the appeal is pending) and damages were recovered. The Ministry therefore claims that this proceeding was a "proceeding where a penalty or sanction could be imposed".

Having carefully reviewed Record 1, and the circumstances of its creation, I cannot accept the Ministry's submissions on this point. The proceeding described by the Ministry did not result from any inspections or investigations of the nature referred to in section 2(1)(b) of the law enforcement definition. All three records at issue in this appeal clearly relate to a civil cause of action for libel.

Furthermore, in order to successfully argue the application of sections 14(1)(a), (b) or (f), the Ministry must provide sufficient evidence to establish that the disclosure of the records could reasonably be expected to result in the harms described. The mere possibility of harm is not sufficient. At a minimum, the Ministry must establish a "clear and direct linkage between disclosure of the information and the harm alleged" (Order P-557).

In its representations, the Ministry has referred to certain other proceedings. It maintains that the disclosure of Record 1 "may impact" on these proceedings. It also submits, with respect to the application of section 14(1)(f), that:

Release of the information ... could reasonably be expected to interfere with the progress of the appeal in relation to this libel action; the funding issue is a major issue on that appeal. Any information with respect to the funding therefore could interfere with the orderly progress of the appeal and the right of the litigant to a fair and impartial hearing should a re-trial be ordered.

In my view, this evidence falls short of establishing a clear and direct linkage between the disclosure of the information in Record 1 and the harms described in sections 14(1)(a), (b) and/or (f).

Accordingly, I find that Record 1 does not qualify for exemption under sections 14(1)(a), (b), and/or (f) of the Act.

ISSUE B: Whether the discretionary exemption provided by section 19 of the Act applies to Records 1, 2 and/or 3.

Section 19 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 its representations, the Ministry submits that section 19 of the Act applies to all of the records at issue. However, the Ministry does not indicate which Branch might apply. In my view, the records at issue were not prepared for use in giving legal advice or in contemplation of or for use in litigation. Therefore, Branch 2 of the section 19 exemption does not apply to Records 1, 2 or 3.

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]

Record 1

This record is a memorandum addressed to the Deputy Attorney General by the Director, Divisional Planning and Administration.

In its representations, the Ministry explains that this record is "documentation relating to the client's [the lawyer's] review and authorization of payment of the solicitor's bill and as such should fall within the exemption of solicitor/client."

I have carefully reviewed this record and find that it cannot be categorized as a communication between a legal advisor and a client (or the agent of a client). Nor is it directly related to seeking, formulating or giving legal advice. In addition, this record was neither created nor obtained for a lawyer's brief for existing or contemplated litigation. On this basis, I find that Record 1 does not meet the tests established for Branch 1 (common law solicitor-client privilege) of the section 19 exemption.

Records 2 and 3

The information at issue in Record 2 is the disbursement section of a legal account issued by a law firm and directed to the Ministry for payment. Record 3 is the "Schedule A" attached to this legal account describing the services rendered by the law firm in greater detail.

In its representations, the Ministry submits that these records are exempt from disclosure in their entirety pursuant to the solicitor-client privilege set out in section 19 of the Act. The Ministry relies upon the cases reviewed in Order M-213 and, in particular, Mutual Life Assurance Company of Canada v. The Deputy Attorney General of Canada, [1984] C.T.C.155 (S.C.O. Motions Court) and Re Ontario Securities Commission and Greymac Credit Corporation, [1983] 41 O.R. (2d) 328 (Ont. Div. Ct.) to support its position that a bill between a client and his solicitor is protected by solicitor-client privilege.

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 Order P-624, Assistant Commissioner Glasberg also reviewed the manner in which legal accounts had been treated at common law. He discussed both the Mutual Life and Greymac decisions referred to by the Ministry in this appeal.

In the course of his decision in the Mutual Life case, 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 will apply.

Assistant Commissioner Glasberg noted that this decision appears to be at odds with the position taken by Southey, J., on behalf of the Divisional Court, in the Greymac case. 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 expunged) are not privileged**, and the solicitor may be compelled to answer the questions and produce the material. [emphasis added]

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

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.

Keeping in mind the approach to apply in cases such as these, I have reviewed the disbursement section of the legal account (Record 2), "Schedule A" to the account (Record 3) and the representations of the Ministry.

In my view, disclosure of only two of the disbursements listed on page 3 of Record 2 would reveal the strategy used to address the issues raised by the law suit. Therefore, I find that this information is properly exempt under section 19. I have highlighted this information in blue on the copy of the record sent to the Freedom of Information and Protection of Privacy Co_ordinator of the Ministry with its copy of this order.

Record 3 consists of a narrative description of services rendered (pages 5-9) and a list of nine individuals (page 10) at the law firm who were involved with the law suit as well as the hourly rate charged and the total charge for these individuals' work. I find that portions of the narrative

set out on pages 5-9 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 also highlighted in blue on the copy of the records to be sent to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator) are subject to exemption under part 1 of Branch 1 of the section 19 exemption.

Section 19 is a discretionary exemption. I have reviewed the Ministry's representations on its exercise of discretion. I have found nothing improper in the manner in which it was exercised and would not alter this determination on appeal.

I have also considered whether the information I have found not to qualify for exemption under part 1 of Branch 1 would qualify for exemption under the second part of the Branch 1 exemption. I find that this legal account was not created "especially for the lawyer's brief" for litigation and, accordingly, is not exempt under the second part of the Branch 1 exemption.

Those portions of Records 2 and 3 which do not qualify for exemption under section 19 should be disclosed to the appellant subject to my findings under Issue C.

ISSUE C: Whether any of the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act and, if the answer is yes, whether the mandatory exemption provided by section 21 of the Act applies to this personal information.

The Ministry submits that the records at issue contain the personal information of individuals other than the appellant. Specifically, it claims that the records contain the personal information of the lawyer who launched the libel action which is being funded by the Ministry.

"Personal information" is defined in section 2(1) of the Act, in part as "... recorded information about an individual including the individual's name where it appears with other personal information relating to the individual ...". Information that relates to individuals in their professional capacity or in the execution of their employment responsibilities does not qualify as "personal information" for the purposes of the Act (Orders P-369, P-377, P-427 and P-624).

None of the records at issue contain the personal information of the appellant.

The Ministry states that Record 1 reflects the degree of support given to the lawyer with his respect to his ability to pay his legal bills and continue the litigation and his review of the legal account. The Ministry submits that Records 2 and 3 indicate how this individual instructed counsel and the dealings he had with counsel. It is on this basis that the Ministry maintains that all three records contain the personal information of the lawyer.

The facts of this case are unique. The Ministry itself states in its representations that:

This libel and slander cause of action arose in the context of an attack on [the lawyer] when he was acting in the scope of his authority as the prosecutor in a criminal case. He was targeted because he was the prosecutor. In an effort to

protect the integrity of the legal system and Crown prosecutors against such attacks, the government funded this action.

In these circumstances, I find that the information contained in Records 1, 2 and 3 relating to the prosecutor does not qualify as his "personal information". Rather, it relates to a situation, the alleged libel, which arose during and because the lawyer was engaged in carrying out his employment responsibilities. The records concerning the funding of this action were created when the government made the decision to pay for the legal fees incurred by one of its employees, qua employee in launching the libel action.

There is also information contained in Records 1, 2 and 3 that refers to other individuals in either their professional capacities or in the execution of their employment responsibilities and which, therefore, does not constitute the personal information of these individuals.

Page 10 of Record 3, "Schedule A" to the legal account, consists of a list of individuals employed by the law firm who worked on a law suit. For the same reasons as I have expressed above, I find that this information is not the personal information of these individuals.

Pages 5-9 of "Schedule A" also contain references to several individuals. Further representations were sought from the Ministry as to the identity of ten of these individuals. The Ministry confirmed the identity of six of the individuals but did not provide any information about the remaining four. Of the six individuals that the Ministry identified, I find that each person is either referred to in his or her professional capacity or in the execution of an employment responsibility. Therefore, this information does not qualify as personal information.

In reviewing the remaining names, it is not apparent to me if they relate to individuals acting in a professional capacity or pursuant to employment responsibilities or in their personal capacity. I have highlighted these names in yellow on the copy of the record sent to the Ministry with its copy of this order. Should the Ministry have knowledge that one or more of the names I have highlighted is that of an individual acting in a professional or employment capacity, that individual's name also does not qualify as personal information.

I will assume for the purposes of this analysis, that the names of the four individuals who have not been identified were involved in a personal capacity. I shall now consider whether the mandatory exemption provided by section 21 of the Act applies to the names of these persons.

Section 21(1) of the Act prohibits the disclosure of personal information to any person other than the individual to whom the information relates, except in certain circumstances listed under the section. In my view, the only exception to the section 21(1) mandatory exemption which has potential application in the circumstances of this appeal is section 21(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The appellant has not submitted any representations. The Ministry's representations raise factors which weigh in favour of not disclosing the names. On this basis, I find that the release of these names would constitute an unjustified invasion of personal privacy and should not be disclosed to the appellant.

ORDER:

1. I uphold the Ministry's decision not to disclose those portions of Records 2 and 3 which have been highlighted in blue on the copy of the records provided to the Freedom of Information and Protection of Privacy Co-ordinator of the Ministry with a copy of this order.
2. I order the Ministry to disclose Record 1, and those portions of Record 2 which have not been highlighted in blue on the copy of the records provided to the Ministry with this order to the appellant within twenty (20) days of the date of this order.
3. I order the Ministry to disclose those portions of Record 3 which have not been highlighted in blue on the copy of the records provided to the Ministry with this order and the names contained in Record 3 which do not qualify as personal information to the appellant within twenty (20) days of the date of this order.
4. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provisions 2 and 3, **only** upon request.

Original signed by: _____

Anita Fineberg
Inquiry Officer

_____ May 11, 1994