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

ORDER P-1342

Appeal P_9600223

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of the Attorney General (the Ministry). The request was for access to copies of records sent by the Ministry to the Law Society of Upper Canada (the Law Society). The records relate to the prosecution of fraud charges against the appellant, for which he was acquitted in 1984. The appellant originally asked the Law Society for a copy of the records with respect to discipline proceedings which were not ultimately pursued. The Law Society disclosed the contents of the file it maintained pertaining to the appellant with the exception of documents received from the Ministry because the Ministry did not consent to the disclosure of the records it had provided.

The appellant indicates that he gave an undertaking not to practice law while the criminal proceedings were underway. After he was acquitted, the undertaking was no longer necessary and he continues to be a paid-up member of the Law Society although he is not currently practising. He assumes that had he been convicted on any of the counts, disciplinary proceedings would have commenced, but no disciplinary proceedings ever materialized because he was acquitted.

The Ministry denied access to the four records it identified as being responsive to the request under the following exemption:

- solicitor-client privilege - section 19

The appellant appealed the Ministry's decision. A Notice of Inquiry was sent to the Ministry and the appellant. As the Appeals Officer was of the view that section 49(a) (discretion to refuse requester's own information) was relevant to the determination of this appeal, the parties were also invited to submit representations regarding its application. Representations were received from the Ministry only.

After reviewing the Ministry's representations, I determined that it was appropriate to solicit further representations from the parties to the appeal, as well as from the Law Society. Supplementary representations were received from the Law Society and the appellant.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. The Ministry submits, and I agree, that the records contain the personal information of the appellant.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access. Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,

> where section 12, 13, 14, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information. [emphasis added]

The Ministry claims that section 19 of the Act applies to the records. This section states:

> 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 the Ministry 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 Ministry 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 section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied 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.

[See Order 210]

The Ministry submits that Records 3 and 4 fall under Branch 1 of the exemption, and that all of the records fall under Branch 2 of the exemption.

Branch 1

Record 3 is a chart prepared by the Crown Attorney which summarizes part of the evidence in the appellant's criminal trial. Record 4 is a draft of the Crown Attorney's closing arguments at the criminal trial. The Ministry submits that Records 3 and 4 were prepared by Crown counsel for use in litigation at the appellant's criminal trial. The Ministry does not submit that these records were prepared for use in giving legal advice, nor are there any facts before me which would suggest that the records were prepared for use in giving legal advice. The Ministry does not submit that it is claiming privilege on the Law Society's behalf, and the Law Society has not claimed privilege with respect to any of the records at issue in this appeal.

The second part of Branch 1 has been called the "third party communications", the "lawyer's brief" and the "litigation" privilege. Records which do not represent communications between solicitor and client may become privileged as a result of being copied for inclusion in the lawyer's brief for litigation, as long as there was an intention to keep them confidential. In one of the leading cases on this subject, Hodgkinson v. Simms, 55 D.L.R. (4th) 577 (1988), McEachern, C.J.B.C. states as follows at page 589:

> It is my conclusion that the law has always been, and in my view it should continue to be, that ... where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection ...

This aspect of privilege arises in the context of the procedural principles of discovery. It has its origin in the protection of the solicitor's brief, in order to ensure that a solicitor is free to prepare his client's case for trial without fear of forced revelation of his mental impressions, opinions or legal theories with respect to the action. Unlike traditional solicitor-client communications privilege, the litigation type of privilege, which encompasses the lawyer's work product for litigation, does not last indefinitely. It ends with the litigation for which it was prepared [J. Sopinka et. al., The Law of Evidence in Canada (Toronto: Butterworths, 1992), p. 663].

In Order P-667, Assistant Commissioner Irwin Glasberg found that Branch 1 of the section 19 exemption depends on the availability of the common law solicitor-client privilege, and confirmed that the litigation aspect of the common law privilege can be lost as a result of the termination of litigation:

> ... Branch 1 of the section 19 exemption depends on the availability of the common law solicitor-client privilege. That privilege can be lost as a result of the termination of litigation, as noted in the following extract from Solicitor-Client Privilege in Canadian Law by Ronald D. Manes and Michael P. Silver (Butterworths, 1993) at page 210:

(a) Direct communications between solicitor and client are forever privileged and, accordingly, the general rule that "once privileged, always privileged" applies;

(b) Derivative communications made in contemplation of litigation cease to be privileged upon completion of the original litigation;

(c) However, where the privileged communications were originally obtained for both the original litigation and any subsequent litigation involving the same subject matter, privilege is maintained in the subsequent litigation.

I am satisfied that Records 3 and 4 were created especially for the lawyer's brief for litigation (the criminal trial), but that this litigation terminated in 1984 with the appellant's acquittal, and their character as privileged documents at common law ended with the litigation. Neither the Ministry nor the Law Society has submitted that there is any ongoing or contemplated litigation involving the same subject matter.

Although the above finding is sufficient to resolve the issue of the application of Branch 1 of the exemption, I believe it is relevant to note that common law solicitor-client privilege can also be lost through a waiver of the privilege by the client. Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd., [1983] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) at 148-149 (C.P.C)]. Generally, disclosure to outsiders of privileged information would constitute waiver of privilege [J. Sopinka et al., The Law of Evidence in Canada at p. 669. See also Wellman v. General Crane Industries Ltd. (1986), 20 O.A.C. 384 (C.A.); R. V. Kotapski (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Strictly speaking, since the client is the "holder" of the privilege, only the client can waive it. However, the client's waiver of the privilege can be implied from the actions of the client's solicitor. Legal advisors have the ostensible authority to bind the client to any matter which arises in or is incidental to the litigation, and that ostensible authority extends to waiver of the client's privilege. [J. Sopinka et. Al., The Law of Evidence in Canada at p. 663. See also: Geffen v. Goodman Estate (1991), 81 D.L.R. (4th) 211 (S.C.C.); Derby & Co. Ltd. v. Weldon (No. 8) , [1991] 1 W.L.R. 73 at 87 (C.A.)]

The Attorney General of Ontario is the Chief Crown Prosecutor for offences in Ontario. The Attorney General is a representative of the Crown for the purposes of this litigation, because of his specific mandate in the subject area. Technically, I believe it is correct to conclude that the client of Crown counsel is "Her Majesty the Queen in right of Ontario", however, the Attorney General is clearly the "directing mind" for the purposes of the litigation. From a practical point of view, the client in the context of this case is the Attorney General.

The Ministry submits that it did not waive its privilege under section 19 of the Act with respect to the appellant by voluntarily releasing these materials to the Law Society. In this regard, the Ministry submits that section 42(g) of the Act permits disclosure "to an institution or law

enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result". The Ministry argues that the Law Society is a "law enforcement agency" as defined in section 2(1) of the Act and the disclosure of documents relating to a possible breach of the standard of conduct for lawyers to the Law Society is, therefore, a procedure that is contemplated by the Act. On this basis, the Ministry concludes that the disclosure cannot be considered a waiver of the Crown's section 19 privilege with respect to parties such as the appellant.

Section 42 prohibits the disclosure by an institution of an individual's personal information except in certain listed circumstances where disclosure is expressly permitted under the Act. Even assuming that a self_governing professional body such as the Law Society can be considered a law enforcement agency, section 42 cannot create solicitor_client privilege where none before existed, nor does it provide an exception to the common law concept of waiver of privilege exclusively for government lawyers. There is nothing in section 42 to suggest, for example, that disclosures made pursuant to any of the listed exceptions, including the law enforcement exception, preserves any rights or privileges with respect to the information which the disclosing institution might have enjoyed. To the contrary, section 42 is designed to protect individuals' privacy interests in their personal information and provide for its disclosure only in the circumstances specified. It is not designed to protect the interests of institutions in that same information. Section 42 does not, in my view, support the Ministry's arguments under section 19.

I note that in British Coal Corp. V. Dennis Rye (No. 2), [1988] 3 All E. R. 816 (C.A.), limited waiver was found to have occurred in respect of criminal proceedings, but not in respect of civil proceedings arising out of the same events. In that case, documents handed over to the police by the plaintiff in a civil suit, for the purpose of assisting the police in criminally prosecuting the defendant, remained privileged in the civil suit. The court found that the plaintiff had complied with a public duty to assist the police in the criminal proceedings, and it was considered contrary to public policy to construe express or implied waiver for the purposes of the civil proceedings. In the case before me, the accused had already been acquitted of the charges against him at trial. Moreover, while the Law Society may at one point have considered bringing disciplinary proceedings against the appellant, such proceedings were not ultimately pursued, even with the benefit of the information provided by the Ministry. In all of the circumstances, I unable to find that the Ministry had a public duty to voluntarily provide information to the Law Society with a view to instigating or assisting in disciplinary proceedings against the appellant in respect of alleged conduct for which the Ministry was unable to secure a conviction at trial.

It is possible for two or more parties to have a joint interest in a record which could have an impact on solicitor-client privilege. In Johal v. Billan [1995] B.C.J. No. 2488 (B.C.S.C.) the court found that a husband and wife who had consulted the same solicitor for the purpose of drafting wills had waived the privilege between themselves, but maintained this privilege against third parties who did not share a joint interest with one or both of them. This judgement makes reference to this interest being supported by Mr. Justice Sopinka in the text Law of Evidence in Canada, at page 638:

> Joint consultation with one solicitor by two or more parties for their mutual benefit poses a problem of relative confidentiality. As against others, the communication to the solicitor was intended to be confidential and thus is

> privileged. However, as between themselves, each party is expected to share in and be privy to all communications passing between either of them and their solicitor, and accordingly, should any controversy or dispute subsequently arise between the parties, then, the essence of confidentiality being absent, either party may demand disclosure of the communication. ... Moreover, a client cannot claim privilege as against third persons having a joint interest with him in the subject-matter of the communication passing between the client and the solicitor.

Applying this reasoning to the circumstances of the present appeal, in my view, I have not been provided with evidence sufficient to establish a "joint interest" between the Ministry and the Law Society for the purposes of solicitor-client privilege. The Crown Prosecutor clearly was not retained by the Law Society, and his professional responsibilities relate exclusively to the prosecution of criminal offences. Based on the representations submitted by the Ministry, I am not convinced that the interests of the Ministry and the Law Society in regards to the conduct of lawyers in Ontario are sufficiently connected to be accurately characterized as a "joint interest".

The Ministry does not submit, nor is there any evidence that the Crown Prosecutor who voluntarily disclosed these records to the Law Society was acting without the authority of his client, the Attorney General. I am satisfied that the Attorney General and his Crown Prosecutor know of the existence of the privilege. In this case, I find that by disclosing Records 3 and 4 to the Law Society, the Ministry has demonstrated a clear intention to forego the privilege. Accordingly, I find that any privilege which may have attached to these records at common law has been waived.

Accordingly, Records 3 and 4 do not qualify for exemption under the second part of Branch 1.

Branch 2

The second branch of section 19 is parallel to the two branches of the common law solicitor-client privilege. The circumstances of this appeal raise the issue of whether the limitations on the common law privilege should also generally apply to Branch 2 of section 19. The wording of the exemption itself does not clarify this issue and, on this basis, the legislative history of the exemption is relevant to the proper interpretation of the exemption.

The 1980 Williams Commission Report addressed the underlying rationale for the solicitor-client privilege exemption and made recommendations as to the form the exemption should take. In its recommendation, the Commission set out the following draft version of the exemption:

> 52. We recommend the adoption of an exemption based on the doctrine of solicitor-client privilege in the following terms:
>
> a. A document is an exempt document if it is of such a nature that it would be privileged from production in pending or likely legal proceedings to which a provincial government institution is or may be a party, on the ground of legal professional privilege.

Branch 2 was added to the exemption by the Standing Committee of the Legislative Assembly. In summarizing the intent of the amendment, the Honourable Ian Scott, then Attorney General of Ontario, made the following statement:

> **Hon. Mr. Scott**: As I said the other day, this is just to expand the coverage designed to ensure protection for solicitor-client material to crown counsel, who according to how you view the law, may or may not have a client and therefore may or may not have, technically, the benefit of solicitor-client privilege. I would have not thought the issue was contentious.
> ...
>
> To be fair, Mr. Chairman, I do not think it really extends section 19; it clarifies it. The use of the words, "for use in giving legal advice or in contemplation of or for use in litigation" really adds nothing because they would be within our understanding of what a solicitor-client privilege is anyway.
>
> The key words, and the words that clarify, are "crown counsel" because the case is made that crown counsel may not, in a highly theoretical sense, have a client. Because crown counsel has a kind of independent role that a normal lawyer does not have, a crown counsel may be thought, in a technical sense, not to have a client. The policeman is not the crown counsel's client, but as a matter of clarification it was recognized that opinions given by crown counsel should be producible or not in the same way as opinions given by any other crown lawyer [sic].
>
> (Monday, March 30, 1987, Morning Sitting, pages M-1, M-3)

In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.

Again, the Ministry does not submit, nor are there any facts before me which would suggest that the records were prepared for use in giving legal advice.

With respect to Records 1 and 2, which were prepared after the appellant was acquitted of the criminal charges, the "litigation" referred to by the Ministry in its representations is the disciplinary proceedings which the Ministry claims the Law Society was contemplating at the time. In the common law context, the Law Society might be entitled to claim that these records were privileged communications obtained for use by the Law Society in preparation for litigation, specifically its disciplinary proceedings. Any privilege arising in this context, however, would belong to the Law Society, not the Ministry. As the records are the Ministry's, not the Law Society's, I must consider the exemption with respect to the Ministry's own circumstances, not the Law Society's. In any event, any privilege which might be claimed by the

Law Society has not been claimed and is not before me. Additionally, as described above, the common law dictates that communications like these cease to be privileged upon completion of litigation.

Further, it is my view that section 19 is not available to the Ministry to exempt documents which were prepared by Crown counsel to assist the Law Society in conducting **its** "litigation". In my view, Branch 2 of the exemption is designed to protect information prepared by or for Crown counsel in connection with proceedings being conducted by Crown counsel **on behalf of the government**.

It is clear that, at the time Records 3 and 4 were prepared, litigation regarding the criminal charges was underway, and I am satisfied that the dominant purpose of the preparation of these two records was for use in litigation. However, the litigation has terminated, and the records have been voluntarily disclosed to another party.

The Ministry's arguments in favour of the application of Branch 2 of section 19 are based on the principles of the common law. During my inquiry, the Ministry was asked to comment on the issue of whether privilege had been waived through disclosure of the records to the Law Society. The Ministry provided representations regarding the issue of waiver, which is a common law concept, without differentiating between Branch 1 and Branch 2 of the exemption. The Ministry has not suggested that section 19 should apply despite the fact that privilege would have been lost at common law. In the supplemental Notice of Inquiry, I asked the Ministry to identify the basis on which the Ministry would continue to enjoy privilege under the second branch of the exemption if common law solicitor-client privilege was lost through termination of litigation or would be considered waived. The Ministry did not respond.

Because the rationale behind the two branches of the exemption is essentially the same, the fact that the litigation in question no longer exists and that the information has been disclosed to another party should, as with the common law privilege, lead to the conclusion that the privilege no longer applies. There is no suggestion in the Williams Commission Report or in the Proceedings of the Standing Committee of the Legislative Assembly that the second branch of the exemption was added to ensure that litigation privilege, which would be lost through waiver or the termination of litigation at the common law, would endure simply because the now terminated litigation had been conducted by Crown counsel. Nor is there any suggestion that privilege attaching to the government's solicitor-client relationships could survive waiver. In fact, the above-noted passage from the Standing Committee debates suggests exactly the opposite. Moreover, in my view, an interpretation which renders Branch 2 of the exemptions more durable than the common law privilege would be inconsistent with the statutory principle that exemptions from the right of access should be "limited and specific" (section 1(a)(ii)), and contrary to one of the fundamental purposes of the Act, which is the promotion of open government (Order 187).

Accordingly, because both the criminal trial and the disciplinary proceedings before the Law Society have ended, and all of the records were voluntarily disclosed to the Law Society, I find that the Ministry is not entitled to rely on either branch of the section 19 exemption.

ORDER:

1. I order the Ministry to disclose Records 1-4 to the appellant by sending him a copy by **February 24, 1997**.

2. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: February 7, 1997
Holly Big Canoe
Inquiry Officer