Information and Privacy
Commissioner/Ontario

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

ORDER P-1559

Appeal P-9700362

Ministry of Natural Resources

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NATURE OF THE APPEAL:

In 1997, the Ministry of Natural Resources (the Ministry) began to charge fees to boats that anchor in bays within the Massasauga Provincial Park. The Ministry received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of a legal opinion provided by the Ministry of the Attorney General to the Ministry prepared in the context of the Ministry's decision to begin charging fees. The requester is an umbrella organization representing a number of boating interests who dispute the Ministry's right to levy these fees.

The Ministry denied access to the record based on the following exemptions:

- section 13(1) - advice or recommendations
- section 19 - solicitor-client privilege

The requester (now the appellant) appealed the Ministry's decision. It states that because the Ministry has cited the record as the basis for making a decision, the exception provided by section 13(3) of the Act applies, and the Ministry is precluded from relying on its section 13(1) exemption claim. He also states that even if the record is subject to solicitor-client privilege under section 19, the actions of the Ministry in stating that it received the opinion, disclosing its contents and stating that it relied on the opinion in taking action, constitute waiver of this privilege.

This office sent a Notice of Inquiry to the Ministry and the appellant. Representations were received from both parties.

The record at issue is a five-page memorandum dated June 12, 1997, from General Counsel at the Ministry of the Attorney General to Counsel at the Ministry titled "Anchoring under the Provincial Parks Act: Massassauga Provincial Park".

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the Act 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.

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 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 two 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]

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.

[Order P-1342]

Turning to the first branch of the exemption, the Ministry states that the record is a written communication between the Ministry as client and its legal advisor (General Counsel for the Ministry of the Attorney General) and that the communication is confidential. The Ministry submits that the communication provides legal advice on the law as it relates to the common law right of anchorage.

The appellant disputes that the record is subject to solicitor-client privilege, but his representations focus primarily on the issue of waiver.

Having reviewed the record, I am satisfied that it is subject to the common law solicitor-client privilege (Branch 1). It is a written communication of a confidential nature prepared by the Ministry's legal advisor and submitted to the client Ministry, and the contents of the record directly relate to the giving of legal advice.

The appellant submits that the actions of the Ministry in stating that it had obtained a legal opinion, and then referring to the contents of that opinion in a number of letters, amounts to either an express or implied waiver of privilege.

In the appellant's view, the Ministry has done more than merely disclose the fact that it has obtained a legal opinion. He argues that in asserting a legal right to charge fees based on the opinion, the Ministry has put the actual contents of the opinion at issue. The appellant identifies two court decisions in support of his opinion that where a party relies on a legal opinion in support of its claim to have acted lawfully, privilege over the opinion is waived (Rogers v. Bank of Montreal (1985), 62 B.C.L.R. 387 (C.A.) and Lapointe v. Canada (Minister of Fisheries and Oceans), [1987] 1 F.C. 445 (T.D.)).

The Ministry states that the record is and has always been treated as a confidential communication between solicitor and client and that it has not waived privilege. It submits that the letters referred to by the appellant do not constitute waiver. The Ministry identifies three court decisions in support of its position that waiver by mention of a privileged document occurs only where the document is used as the basis for a claim or defence where an action is ongoing (Nowak v. Sanyshyn (1979), 23 O.R. (2d) 797 (H.C.), James v. Maloney, [1973] 1 O.R. 656 (H.C.) and Roberts v. Oppenheim (1884), 26 Ch. D. 724). The Ministry states that there is no ongoing litigation between the appellant, and that "if litigation should arise over the Ministry's ability to charge park fees to boaters moored in the water of [the] park, the opinion would not be the basis of any claim or defence put forth by the Ministry". The Ministry also points to the same three court decisions in support of its position that a mere reference to a privileged document, such as the casual reference in the letters referred to by the appellant, does not constitute an intention to waive privilege.

Waiver of common law solicitor-client 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)) (Order P-1342).

In Order M-260, former Inquiry Officer Anita Fineberg considered the issue of waiver of solicitor-client privilege (at pp. 4-5):

> Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied. As the appellant has not specifically stated whether she claims the waiver was express or implied, I shall examine both issues.
>
> In the recent text Solicitor-Client Privilege in Canadian Law, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:
>
> > Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
> >
> > Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

. . . . .

In [S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd. (1983), 35 C.P.C. 146 (B.C.S.C.)] McLachlin J. noted:

> However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require ...
>
> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp. 148-149)

The following passage from Wigmore on Evidence, vol. 8 (McNaughton rev. 1961), as set out in The Law of Evidence in Canada (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the recent case of [Piché v. Lecours Lumber Co. (1993), 13 O.R. (3d) 193 at 196]:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

I adopt this analysis for the purposes of this appeal.

Based on the evidence before me, I find that the Ministry has not expressly waived privilege over the record at issue in this appeal.

Turning to the issue of implied waiver, the appellant's claim is based on the actions taken by the Ministry in asserting a legal right to charge anchoring fees, and in referring to the legal opinion as the basis for this assertion in a number of letters issued by the Ministry. These letters are similar in nature, and state that the legal opinion from the Ministry of the Attorney General indicates (1) that the province does not have jurisdiction over navigation on navigable waterways, which includes the right to anchor; and (2) that the province has a right to collect user fees from visitors who come to provincial parks.

I have reviewed the record and the letters which mention the legal opinion. In my view, the Ministry's actions are not sufficient to constitute an implied waiver of privilege, in the circumstances of this appeal. The Rogers and Lapointe cases put forward by the appellant deal with very different circumstances. In both of these cases, the courts were dealing with civil actions in which a party put into issue a solicitor-client communication. In these circumstances, the courts found that it would be fundamentally unfair for the opposing party to advance its rights in the absence of knowledge of the contents of the communication [see also H.R. Doornekamp Construction Ltd. v. Belleville (City), [1997] O.J. No. 1008 (Div. Ct.)]. These

circumstances are not present here; there is no ongoing litigation between the appellant and the Ministry, and the same fairness concerns do not arise.

I accept the Ministry's submission that it has treated the record as confidential and, in my view, the Ministry's relatively minimal reference to the legal opinion for the purpose of responding to queries from the public is not inconsistent with this treatment. Moreover, I do not accept the appellant's submission that it would be unfair in the circumstances for the privilege to be upheld. Therefore, based on an objective consideration of the Ministry's conduct with respect to the record, I find that the Ministry has not demonstrated an intention to waive solicitor-client privilege.

To be clear, my finding above is applicable to this specific fact situation, and should not be taken to mean that a reference to a solicitor-client communication can never constitute waiver outside the litigation context.

Because I have found that there has not been waiver of solicitor-client privilege, I find that the record is exempt under the first part of Branch 1 of section 19 of the Act. As a result, it is not necessary for me to consider the application of section 13(1) of the Act to the record.

ORDER:

I uphold the Ministry's decision.

Original signed by: May 7, 1998
Tom Mitchinson
Assistant Commissioner