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

FINAL ORDER P-1634

Appeal P_9800091

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

This order represents my final order in respect of the outstanding issues from Interim Order P-1621.

BACKGROUND:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request for access to specified records relating to the meetings of the Inter-ministerial Committee for Aboriginal Emergencies and meetings of the Core Working Group from September 3, 1995 to October 1, 1995 inclusive. The Ministry located several records and granted access in full to some and denied access in whole or in part to others. The requester appealed the denial of access. An inquiry was conducted, representations were received from the Ministry only, and I issued Interim Order P-1621. All issues with the exception of the litigation privilege portion of section 19 of the Act and the adequacy of search for responsive records were disposed of in Interim Order P-1621.

As far as the litigation privilege issue was concerned, in Interim Order P-1621 I stated:

> Having reviewed the records, in my view, the issue of whether litigation privilege which may have been enjoyed by the Crown has been lost through the absence of reasonably contemplated litigation or the termination of litigation is relevant with respect to pages 53 and 54. I have decided that the parties should be given the opportunity to provide representations on this issue before I make my determination on these records, and a Supplementary Notice of Inquiry will be sent to the parties coincidental with the issuance of this order.

Accordingly, a Supplementary Notice of Inquiry was issued, and representations on the issue of litigation privilege were received from the Ministry only.

Pages 53 and 54 consist of two draft statements to be read in court.

Turning to the adequacy of search issue, I made the following statement in Interim Order P-1621:

> In the course of adjudicating the appeal which led to Order P-1608, I was provided with representations which identified a number of records held by the Ministry concerning the Ipperwash incident. A number of these records were not responsive to the request in that appeal. However, the scope of the present appeal is different from that in Order P-1608. Based on the information provided to me by the Ministry in this appeal, I am unable to determine, one way or another, whether all records responsive to the appellant's request have been identified.

Therefore, I included provisions in Interim Order P-1621 requiring the Ministry to conduct a further search for additional records responsive to the appellant's request and to communicate

the results of this search to the appellant by sending him a letter summarizing the search results on or before October 28, 1998. If additional responsive records were located, I ordered the Ministry to issue an access decision concerning those records and to provide me with copies of all relevant correspondence.

I subsequently received a copy of a letter the Ministry sent to the appellant on October 28, 1998, which set out the additional searches that were undertaken, how they were conducted, and their results. The Ministry's letter indicated that some additional responsive records were located and that an access decision on these records would be provided to the appellant by November 7, 1998. A copy of the Ministry's November 6, 1998 access decision letter to the appellant was received by this office on November 9, 1998.

I am satisfied that the Ministry has complied with provisions 4-7 of Interim Order P-1621, which relate to the adequacy of search issue.

The only outstanding issue in this appeal is the application of section 19 of the Act to pages 53 and 54.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

This exemption is set out in section 19 of the Act, which 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]

LITIGATION PRIVILEGE

The scope of litigation privilege was described by Adjudicator Holly Big Canoe in Order P_1551 as follows:

> Litigation privilege, often referred to as the "work product" or "lawyer's brief" rule, protects documents which are not direct solicitor_client communications, but which are "derivative" of that relationship. This includes communications between the solicitor or the client and third parties, documents generated internally by the solicitor or the client, or documents compiled for a lawyer's brief, where the dominant purpose for which they were created or obtained is existing or reasonably contemplated litigation. Litigation privilege applies only if the document was made or obtained with an intention that it be confidential in the course of the litigation.
>
> The rationale for litigation privilege is to protect the adversary system of justice by ensuring a zone of privacy for counsel preparing a case for litigation [Hickman v. Taylor 329 U.S. 495 at 508_511 (1947); Strass v. Goldsack (1975), 58 D.L.R. (3d) 397 at 424_425 (Alta. C.A.); General Accident Assurance Co. v. Chrusz (1997), 34 O.R. (3d) 354 at 370 (Gen. Div.), leave to appeal granted (1997), 35 O.R. (3d) 727 (Gen. Div.)]. As the Ontario Court (General Division) Divisional Court explained in Ottawa_Carleton (Regional Municipality) v. Consumers' Gas Co. (1990), 74 D.L.R. (4th) 742 at 748:
>
> > The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his

> opinions, strategies and conclusions to opposing counsel. The invasion of privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter_productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research investigations and thought processes in the trial brief of opposing counsel.

Under the litigation privilege or work product rule, a distinction has been drawn between "ordinary" work product (documents gathered from third parties, the document itself or factual information) and "opinion" work product (counsel's mental impressions, conclusions, opinions or legal theories), with the latter enjoying a heightened protection [R.J. Sharpe, "Claiming Privilege in the Discovery Process", Law Society of Upper Canada Special Lectures, 1984 (Richard DeBoo Publishers, 1984), pp. 175_177; In re Sealed Case, 676 F.2d 793 at 809_810 (U.S.C.A., Dist. Col., 1982); C.A.); Mancao v. Casino (1977), 17 O.R. (2d) 458 (H.C.)].

Litigation privilege ends with termination of the litigation for which the documents were prepared or obtained [Boulianne v. Flynn, [1970] 3 O.R. 84 at 90 (Co. Ct.); Meaney v. Busby (1977), 15 O.R. (2d) 71 (H.C)]. The exception to this rule is where the policy reasons underlying the privilege remain, despite the end of the litigation. For example, privilege may be sustained in related litigation involving the same subject matter in which the party asserting the privilege has an interest [Carleton Condominium Corp. v. Shenkman Corp. (1977), 3 C.P.C. 211 (Ont. H.C.)]. In other words, the law will only give effect to the privilege while the purpose for its recognition continues to be served. Unlike solicitor_client communication privilege, the purpose of which is to protect against disclosures which could have a chilling effect on the solicitor_client relationship, the purpose of litigation privilege is to protect against disclosures which could have a chilling effect on the lawyer's preparation for the particular litigation, or any related litigation arising out of the same subject matter.

The parties were asked to submit representations on whether the relevant litigation has been terminated, or is no longer reasonably contemplated. Because the rationale for litigation privilege is, in essence, to protect the adversary system of justice, the parties were also asked to submit representations on whether the adversary system of justice would be harmed through disclosure of pages 53 and 54, notwithstanding the termination of litigation or the absence of reasonably contemplated litigation.

The Ministry submits that the pages dealt with "... an application for injunctive relief as a mechanism to remove the occupiers from Ipperwash Provincial Park. To this day, there are several outstanding litigation matters."

The Ministry goes on to identify ongoing criminal and civil actions, and states that:

> ... the litigation that is ongoing is directly related to the application for the injunction and therefore the reason for the privilege subsists. It is also extremely significant that the occupation of the park still continues today. There still remains the issue of how to remove the occupiers from the park. The possibility of injunctive relief may still be an option to be considered.

According to the Ministry, all ongoing matters arose out of the same subject matter in which the Crown has an interest and, therefore, litigation privilege continues even though the application for the injunction in 1995 was discontinued at that time. However, the Ministry does not submit nor does my examination of the pages indicate that the content of either of them comprise the opinion work product of Crown counsel.

There would appear to be no dispute that the specific litigation for which the pages were prepared was terminated in September 1995 when the injunction application was withdrawn by the government. The only remaining question is whether the policy reasons underlying the privilege remain, despite the end of that specific litigation. In other words, is it accurate to say that the current ongoing litigation arises from the same subject matter as the injunction. In my view, the answer is no.

The injunction application was brought for a specific purpose in September 1995. As court documents indicate, public access to Ipperwash Park was under blockade, and tensions among native people, police and neighbouring residents were intense. Public safety concerns had reached the point where the government concluded that legal action was required. Although Ipperwash Park may continue to be "occupied", as the Ministry maintains, more than three years have passed since the injunction application was withdrawn. The evidence before me does not support the conclusion that any ongoing or contemplated litigation is sufficiently linked to the September 1995 injunction application that records produced in that context would be relevant in other subsequent litigation. Although I have been provided with no evidence of any ongoing interest or intent on the part of the Ontario Provincial Police or the government to take action of any kind involving Ipperwash Park, should an injunction be brought in future, in my view, it would be sufficiently remote from the circumstances that existed in September 1995 that it would represent a new matter rather than one continuing from or related to the September 1995 injunction application.

As far as any ongoing criminal matters are concerned, they arise from actions which are quite separate and distinct from the injunction application and, for the most part, post-date the application itself. Although they relate to events surrounding the September 1995 occupation of Ipperwash Park, in my view, they involve different subject matters from the injunction application. Similarly, although the ongoing civil law suits also involve matters related to the occupation, they deal with broader issues of liability for actions which took place during this period of time, and I am not persuaded based on the evidence submitted by the Ministry that they

arise out of the same or sufficiently closely related subject matter as the injunction application itself that they should continue to be subject to litigation privilege. The Ministry has also not demonstrated how disclosure of these pages, created more than three years ago, could have a chilling effect on a lawyer's preparation for any ongoing litigation or otherwise adversely affect the adversary system of justice.

Accordingly, I find that the pages 53 and 54 are not subject to litigation privilege.

SOLICITOR-CLIENT COMMUNICATION PRIVILEGE

As I noted above, the Ministry now submits that the pages 53 and 54 are also subject to solicitor-client communication privilege.

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

Pages 53 and 54 are drafts of a statement that was ultimately read in court by counsel when the government decided not to proceed with the injunction. The Ministry submits that:

> ... the records themselves are clearly draft speaking notes or working notes. They do not represent, by contrast, the script of a formal statement or written submissions in the context of a court proceeding. Litigation counsel has advised that he believes that the statement as contained in the notes does not reflect the entire presentation to the court on that date.
> ...
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> ... the Ministry submits that the records represent the working notes of counsel, which record and reflect instructions from the client and counsel's own strategies. As such, the records qualify for exemption under "communication" solicitor-client privilege.

In my view, the Ministry's representations do not establish the requirements of solicitor-client communication privilege. The editorial changes made on page 54 are not significant, and appear to have been made by counsel himself. The Ministry's representations also appear to acknowledge that the content of the notes was in fact read in court, together with unspecified additional information subsequently prepared by legal counsel. In my view, the content of these pages is not accurately characterized as legal advice, and I find that pages 53 and 54 do not qualify for exemption under section 19 of the Act, and should be disclosed to the appellant.

ORDER:

l. I order the Ministry to disclose pages 53 and 54 to the appellant by **January 21, 1999** but not before **January 18, 1999**.

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

Original signed by: December 15, 1998
Tom Mitchinson
Assistant Commissioner