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

ORDER PO-1855

Appeal PA-000039-1

Ministry of the Attorney General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

The Ministry of the Attorney General (the Ministry) provided background information, which is useful in understanding the context of this appeal:

> The information requested relates to consents executed by the Attorney General pursuant to s. 140 of the *Courts of Justice Act*. Subsection 140(1) provides that, where a judge of the Superior Court is satisfied, upon application, that a person has persistently and without reasonable grounds instituted vexatious proceedings or conducted a proceeding in a vexatious manner, the judge may order that no proceedings may be instituted or continued by the person in any court.
>
> Subsection 140(2) provided that the written consent of the Attorney General was required prior to the commencement of any such application. Subsection (2) was repealed in December 1998, as part of a "red tape bill".
> ...
>
> The requesters were the subject of an application under s. 140 of the *Courts of Justice Act*. The application was instituted before s. 140(2) was repealed, and so, prior to the commencement of the application, the written consent of the Attorney General had to be obtained. In this case, two consents were provided. The first consent consented to the commencement of an application against the two individual requesters. The second consent consented to the commencement of an application against the requesters, their son, several corporations controlled by the requesters and/or their son, and another named individual.
> ...
>
> Prior to the initial hearing of the application, the requesters indicated that they intended to challenge the consent given by the Attorney General, and in February 1998 the requesters delivered a notice of constitutional question challenging the constitutionality of s. 140(2) of the *Courts of Justice Act* on the basis that it failed to set out minimal (or any) procedural requirements. The requesters and the other named individual purported to serve the Attorney General with a notice of examination, in an effort to cross-examine him on the consent given.
> ...
>
> The records responsive to this request are contained in the files of legal counsel in the Crown Law Office -- Civil and in the Constitutional Law Branch. Those files were maintained for the several purposes of (1) advising the Attorney General on the request for his consent under s. 140(2) of the *Courts of Justice Act*, and (2) advising the Attorney General with respect to a notice of examination served on him, (3) advising the Attorney General of the need to appear, through counsel, at the hearing of the application, and (4) preparing a response to the litigation challenging the constitutionality of s. 140(2) of the *Courts of Justice Act*.

NATURE OF THE APPEAL:

The Ministry received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records for the period December 18, 1996 to March 13, 1998 including records relating to "the personal and corporations of [the requesters] in actions 96-CV-114359 and 98-CV-141167" in respect of a consent dated December 19, 1997. The request included access to factual information about the requesters and relating to "S140 of the CJA, brought by all applicants, including [another named individual]."

The Ministry located 3367 responsive records, and made the following decisions:

- full access was granted to 19 records;
- access to 1512 records was denied under section 22(a) of the *Act*, on the basis that they consisted of court records and were currently available to the public (an index of these records was provided to the requesters);
- access to approximately 1692 records (drafts of the court documents), and 163 records (briefing materials, correspondence, Crown Counsels' notes, administrative forms and internal correspondence) under sections 49(a) and (b) of the *Act*, as they relate to sections 13(1), 19 and 21(1);
- Record 30 was denied on the basis that it contained information that was not responsive to the request.

The requesters (now the appellants) appealed the Ministry's decision.

As a result of mediation, the scope of the appeal was modified as follows:

- the appellants confirmed that they were not seeking access to the court documents withheld by the Ministry under section 22(a), thereby removing Records 1873-3384 from the scope of the appeal;
- the appellants confirmed that they were not seeking access to the drafts of court records, thereby removing Records 181-1872 from the scope of the appeal.

Further mediation was not successful, so the appeal proceeded to the inquiry stage. I sent a Notice of Inquiry initially to the Ministry and two individuals whose interests may be affected by the outcome of this appeal - the appellants' son, and the other individual who had been a subject of the section 140 application

(the affected person). I received representations from the Ministry and the affected person. The affected person did not consent to the disclosure of any records containing his personal information. The address provided to me for the appellants' son was the same as the appellant's address. Upon receipt of the Notice of Inquiry for their son, the appellants advised this Office that he had moved to the United States, however they were not prepared to provide me with his current address. As a result, I was unable to locate the appellants' son for the purpose of allowing him the opportunity to participate in this inquiry.

I then sent the Notice of Inquiry to the appellants, together with the Ministry's representations. The appellants provided representations in response.

In its representations, the Ministry withdrew their reliance on sections 49(a)/13(1) exemption claims. Because these are discretionary exemptions, I will not consider them further in this order. The Ministry also withdrew all exemption claims related to Records 93, 104, 105, 124, 125, 126, 154, 155 and 156. I will include a provision in this order requiring the Ministry to disclose these records to the appellants.

RECORDS:

A total of 163 records remain at issue in this appeal, as described in the body of this order. Included among these records is the portion of Record 30 which the Ministry claims is not responsive to the appellants' request.

PRELIMINARY ISSUE:

RESPONSIVENESS OF RECORD

The Ministry claims that part of Record 30 is not responsive to the appellant's request. The Ministry submits:

> Page 30 is a memo from Crown Law Office -- Civil to the Constitutional Law Branch, forwarding two documents which are unrelated to each other. The *second* matter referred to in that memo was the Notice of Constitutional Question delivered by the requesters in February 1998. The first matter referred to in the memo was a separate legal proceeding, that had nothing to do with the requesters or the application under s. 140, and is, therefore, not responsive to the request.

I accept the Ministry's position on this issue. The matter referred to in the first paragraph of Record 30 is not "reasonably related" to the appellants' request, and therefore not responsive (Orders P-880 and P-1051).

DISCUSSION:
PERSONAL INFORMATION

"Personal information" is defined in section 2(1) of the *Act*, in part, as recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)] and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

Having reviewed the records which remain at issue in this appeal, most of them relate to the section 140 application involving the appellants. I find that the appellants' names and address appear on many of the records, as do the views and opinions expressed by other individuals about the appellants in the context of the section 140 application process. I also find that some records contain similar personal information of the affected person and/or other identifiable individuals, either in combination with that of the appellants or on their own. Finally, I find that some records contain no personal information.

Specifically, I make the following findings:

- Records 7, 8, 15, 16, 25, 29, 35, 48, 56, 71, 74, 75, 87, 106, 108, 109, 113, 119, 120, 121, 139, 140, 153, 158, 159, 160, 161, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 177, 178, 179, 180, 3385, 3386 and 3387 contain the personal information of the appellants only.

- Records 17, 21, 37, 46, 55, 76, 77, 78, 79 and 80 contain the personal information of the affected person only.

- Records 45, 175 and 176 contain the personal information of identifiable individuals other than the appellants or the affected person only.

- Records 1, 2, 3, 4, 5, 6, 9, 10, 14, 18, 20, 22, 23, 26, 27, 28, 33, 34, 38, 39, 40, 43, 44, 49, 50, 53, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 72, 73, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 95, 96, 97, 98, 99, 100, 102, 103, 110, 111, 112, 116, 117, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 141, 142, 143, 151, 152, 164, 3388, 3389, 3390, 3391, 3392 and 3393 contain the personal information of both the appellants and the affected person.

- Records 19, 24, the responsive portions of Record 30, Records 36, 41, 42, 47, 51, 52, 54, 70, 107, 122, 123, 150, 162 and 163 do not contain any personal information.

SOLICITOR-CLIENT PRIVILEGE/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a) of the *Act*, the Ministry has the discretion to deny an individual access to their own personal information in instances where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that information.

For those records which do not contain any personal information of the appellants, I will determine whether or not the Ministry has established the requirements of section 19 of the *Act*. For those records which contain the personal information of the appellants, I will consider the requirements of section 19 as a preliminary step in determining whether these records qualify for exemption under section 49(a).

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).

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> 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.
>
> (Order P-1342; upheld on judicial review in *Ontario (Attorney General)* v. *Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.))

Solicitor-client communication privilege

At common law, 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).

In order for a record to be subject to the common law solicitor-client communications privilege, 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;

(Order 49)

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
>
> (*Descôteaux* v. *Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409)

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> (*Balabel* v. *Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409)

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice (*Susan Hosiery Ltd.* v. *Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729).

Briefing Notes

The Ministry makes the following submissions regarding the briefing notes which form part of the records:

> Pages 1-6, 74, 75, 88, 89, 90, 91, 92, 95, 96, 97, 98, 99, 100, 129-138, 158, 159, 165, 166, 167, 169, 170, 171 of the record consist of briefing materials prepared for the Attorney General by legal counsel. The briefing notes identify the existence of a request for the Attorney General's consent, set out background information, and detail the advice from legal counsel to the Minister with respect to the request. All of the briefing notes were prepared by a lawyer.
>
> The briefing notes meet the test for common law solicitor-client privilege (Branch 1) in that they are confidential, written communications prepared by Crown counsel for the purpose of giving legal advice to the Minister. ...
>
> In addition, notes of discussions relating to the delivery and receipt of legal advice (records 87, 107, 108, 109-112, 113, 121, 123, 139, 160, 161, 162, 163, 176) are included as part of the continuum of communications surrounding legal advice, and therefore those records are also subject to solicitor-client privilege. Where copies of documents that have been released or are already in the possession of the requesters are attached to a privileged document, it is submitted that the attached copy of the document is privileged as well.
>
> Five of the records (25, 119, 120, 175, 3385) are internal tracking forms which are part of the system by which requests for legal advice and recommendations are identified and monitored. These documents are also part of the continuum of communications and should be exempted.

I accept the Ministry's position with respect to Records 1-6, 74, 75, 88, 89, 90, 91, 92, 95, 96, 97, 98, 99, 100, 129-138, 158, 159, 165, 166, 167, 169, 170 and 171. These records consist of briefing notes and draft consents which clearly set out the legal issue involved, a background of the situation and a recommendation by counsel. I find that these records are all written communications between legal counsel and their client, the Attorney General, created for the purpose of giving legal advice. Given the nature of these records and the circumstances under which they were created, it is reasonable to conclude that these communications were confidential. Therefore, I find that all of these records satisfy the requirements of the solicitor-client communications privilege component of section 19.

I also accept that Records 108, 109-112, 113, 119, 120, 121, 139, 160, 161, 162 and 163 consist of memoranda, e-mails and handwritten notes made by Crown counsel. Although these records do not themselves contain legal advice, they do contain information relating to the ongoing relations between solicitor and client in the context of providing legal advice and, in my view, they are part of the continuum of communications described in *Balabel*, and satisfy the requirements of solicitor-client communications privilege.

However, I do not accept the Ministry's position with respect to Records 25, 87, 107, 123, 175, 176 and 3385. These records consist of phone message slips, a facsimile cover sheet, a file tracking sheet, and a handwritten note identifying an individual who appears not to be involved in the section 140 application. In my view, these records are simply administrative documents which do not include any information concerning the receipt or provision of legal advice and cannot accurately be characterized as part of the continuum of communications surrounding legal advice. Therefore, I find that Records 25, 87, 107, 123, 175, 176 and 3385 do not satisfy the requirements of the solicitor-client communications privilege component of section 19.

Counsel's notes and drafts

The Ministry made the following submissions on notes made by counsel and draft documents:

> The records also contain counsel's notes with respect to conversations between Crown counsel, draft letters and comments thereon, which were prepared for the purpose of formulating advice to the Minister with respect to the request for his consent under s. 140(2) of the *Courts of Justice Act* (81, 82, 84, 176), and on the issue of whether the Minister should appear, by counsel, at the hearing of the application (records 7, 15, 16, 24, 26, 27, 28, 29, 30, 53, 3386, 3387.)
>
> It is submitted that these notes are directly related to the seeking, formulating and giving of legal advice, and that the notes constitute working papers. As a result, these records are exempt under the second branch of s. 19, in that they were prepared by Crown counsel for use in giving legal advice.
>
> Counsel also made notes of telephone conversations with third parties. Records 122, 150, 151, 152, 153, 168, 174 were prepared in the course of advising the Minister on the request for his consent under s. 140(2) of the *Courts of Justice Act*. Records 9, 10, 14, 45, 47, 48, 79, 80, 83, 106 were prepared in the course of advising the Minister on whether to appear at the hearing of the application.
>
> These records are subject to solicitor-client privilege under Branch 2 in that they were prepared by Crown counsel for use in giving legal advice. They are also subject to litigation privilege in that they were prepared in contemplation of litigation.

Records 81, 82 and 84 appear to be draft letters prepared by Crown counsel which contain handwritten notes commenting on the content of these letters. I find that these draft documents and notes were prepared by counsel, and I accept the Ministry's position that they were prepared for use in giving confidential legal advice and, therefore, satisfy the requirements of solicitor-client communications privilege.

Record 176 is a cover sheet of a court application which also contains handwritten notes. There is nothing to indicate that this document was prepared by Crown counsel, and the notations on Record 176 are

administrative in nature and do not contain legal advice. Therefore, I find that Record 176 does not qualify for exemption under the solicitor-client privilege component of section 19.

The Ministry submits that Records 7, 15, 16, 24, 26, 27, 28, 29, 30, 53, 3386 and 3387 were prepared for the purpose of formulating advice to the Minister with respect to the consent request, and whether the Minister should appear by counsel at the application hearing. Records 7, 15, 16, 26, 27, 28, 30, 53 and 3387 consist of draft letters, records of verbal transactions and handwritten notes on various documents. I find that these records make up Crown counsel's working papers directly related to formulating legal advice and satisfy the requirements of solicitor-client communications privilege component of section 19 (see *Susan Hosiery Ltd., supra*). Records 46 and 164, although not specifically addressed in the Ministry's representations, are similar in nature to Records 7, 15, 16, 26, 27, 28, 30, 53 and 3387, and I find that they also satisfy the requirements of solicitor-client communications privilege for the same reasons. Records 24, 29 and 3386, on the other hand, are administrative documents that do not relate to the formulating or giving of legal advice and as such do not satisfy the requirements of the solicitor-client communications privilege component of section 19.

Records 9, 10, 14, 45, 47, 48, 79, 80, 83, 106, 150, 151, 152, 153, 168 and 174 consist of records of telephone messages and handwritten notes of telephone conversations prepared in the context of the section 140 application. I accept the Ministry's position on these records, and find that they are also accurately characterized as Crown counsel's working papers directly related to the formulating of legal advice (see *Susan Hosiery Ltd., supra*), and therefore meet the requirements of solicitor-client communications privilege. Record 122 is also a handwritten note, but I am unable to determine from its content or the Ministry's representations that it refers to the formulating or giving of legal advice, and therefore find it does not satisfy the requirements of solicitor-client communications privilege

Background materials prepared by or for legal counsel

The Ministry submits the following representations regarding the various background materials:

> Part of the record consists of information prepared for Crown counsel (8, 70, 71, 141, 142, 143, 172, 173) to assist Crown counsel in giving legal advice to the Minister on the issues of (1) whether to provide consent as requested pursuant to s. 140(2) of the *Courts of Justice Act*, and (2) what response was required to the legal challenge to s. 140(2) raised by the requesters.
>
> There is nothing about these records which suggests that the writer or the Crown counsel who received them intended the records to be anything but confidential. It is submitted that these records are exempt within the second branch of s. 19 in that they constitute documents prepared for Crown counsel for use in giving legal advice to the Minister.
>
> Other documents (18, 19, 20, 54, 55, 56, 57, 58, 72, 73, 116, 117, 176-180, 3388-3393), while not prepared specifically for Crown counsel, were provided to Crown counsel for the purposes of assisting him or her to formulate legal advice. Records 18, 20,

> 56, 57, 58, 72, 73, 116 and 117 were partially disclosed, in that information about the source of the document was severed. The severed portions of 18, 20, 56, 57, 58, 72, 73, 116 and 117, and records 19, 54, 55, 176-180, 3388-3393 are exempt from disclosure due to litigation privilege.

Records 8, 70, 71, 141, 142, 143, 172 and 173 are letters exchanged among various Crown counsel in the context of preparing for the section 140 application. Although Records 8, 141, 142, 143, 172 and 173 are not a direct written communication between a solicitor and client, in my view, they contain information related to the ongoing relations between solicitor and client in the context of providing legal advice. Therefore, I find that they are part of the continuum of communications described in *Balabel*, *supra*, and satisfy the requirements of the solicitor-client communications privilege component of section 19. Record 140 is not specifically identified in the Ministry's representations; however, it is similar in nature to Records 141, 142 and 143, and I find that Record 140 also qualifies for exemption under section 19 for the same reasons. Records 70 and 71, on the other hand, are a fax cover sheet and transmittal memo which do not contain any information concerning the receipt or provision of legal advice and cannot accurately be characterized as part of the continuum of communications surrounding legal advice. Records 35, 36, 41, 42, 51 and 52, which, again, are not specifically addressed in the Ministry's representations, are similar in nature to Records 70 and 71, and I find that these records also fail to satisfy the requirements of solicitor-client communications privilege for the same reasons.

Records 19 and 54 are fax cover sheets containing no legal advice. For the same reasons outlined for other similar records, I find they do not meet the requirements of solicitor-client communications privilege.

Records 18, 20 and 55 are letters exchanged between counsel representing the Attorney General and the affected person, and Record 56 is a letter from the Attorney General's lawyer to the appellants. Records 57 and 58 are a draft Acknowledgement of Service for the appellants, and Records 72 and 73 are a letter from Justice MacPherson to the various parties involved in the section 140 application. Records 116 and 117 are the actual consent signed by the Attorney General. Records 176-180 appear to be the section 140 court application, and Records 3388-3393 are the Notice of Constitutional Question filed by the appellants in the context of challenging the section 140 application. None of these records are written communications between a solicitor and client. Rather, they are documents either exchanged among the parties or issued by the court in the context of the section 140 application process. I find that none of Records 18, 20, 55, 56, 57, 58, 72, 73, 116, 117, 177-180 or 3388-3393 satisfy the requirements of the solicitor-client privilege component of section 19.

As far as the litigation privilege component of section 19 is concerned, the Ontario Court of Appeal recently issued a judgement interpreting the doctrine of litigation privilege (*General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321). I considered this case in Order MO-1337-I, and its application to the scope of the litigation privilege component of section 19. In that order, I stated:

> In *General Accident*, the majority of the Court of Appeal questioned the "zone of privacy" approach and adopted a test which requires that the "dominant purpose" for the creation of a record must have been reasonably contemplated litigation in order for it to qualify for litigation privilege ...

...

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth=s: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document=s production, but it does not have to be both.
>
> The test really consists of three elements, each of which must be met. First, it must have been *produced* with contemplated litigation in mind. Second, the document must have been produced for the *dominant purpose* of receiving legal advice or as an aid to the conduct of litigation - in other words for the dominant purpose of contemplated litigation. Third, the prospect of litigation must be *reasonable* - meaning that there is a reasonable contemplation of litigation.
>
> Thus, there must be more than a vague or general apprehension of litigation.

Applying the direction of the Courts and experts in the area of litigation privilege, in my view, a record must satisfy each of the following requirements in order to meet the "dominant purpose" test:

1. The record must have been created with existing or contemplated litigation in mind.

2. The record must have been created for the dominant purpose of existing or contemplated litigation.

> 3. If litigation had not been commenced when the record was created, there must have been a reasonable contemplation of litigation at that time, i.e. more than a vague or general apprehension of litigation.
>
> In applying this test, it is necessary to bear in mind the time sensitive nature of this type of privilege, and the fact that, even if the dominant purpose for creating a record was contemplated litigation, privilege only lasts as long as there is reasonably contemplated or actual litigation.

In the Notice of Inquiry in the current appeal, I provided the Ministry with an opportunity to comment on the application of *General Accident* to the facts and circumstances of this case. The Ministry did not deal directly with *General Accident*, but did provide submissions explaining the litigation that was at issue among the parties:

> The application under s. 140 was heard on March 12 and 13, 1998, and by order dated March 30, 1998, the application was granted. The requesters appealed to the Court of Appeal, and their appeal was dismissed on December 16, 1998. ...
>
> In early 2000, the requesters sought permission from the Superior Court, pursuant to s. 140(3) of the *Courts of Justice Act*, to continue with some of their outstanding lawsuits. That permission was denied. Most recently, the requesters have commenced an action against the Attorney General, Her Majesty the Queen and Charles Harnick in the Federal Court (the order under s. 140 of the *Courts of Justice Act* applies only to the Ontario Court system.) That action alleges, *inter alia*, that the Attorney General conspired with the application judge, and refused to disclose documents to the requesters, and that certain parts of the *Courts of Justice Act* violate the principles of fundamental justice. ...
>
> Prior to the initial hearing of the application, the requesters indicated that they intended to challenge the consent given by the Attorney General, and in February 1998 the requesters delivered a notice of constitutional question challenging the constitutionality of s. 140(2) of the Courts of Justice Act on the basis that it failed to set out minimal (or any) procedural requirements. The requesters and the other named individual purported to serve the Attorney General with a notice of examination, in an effort to cross-examine him on the consent given.
>
> At the hearing of the application, through their counsel, the requesters withdrew that challenge, and the Attorney General's counsel was excused from the hearing. In their factum to the Court of Appeal, however, the requesters raised a challenge to the consent given by the Attorney General in their factum. The Court of Appeal ordered that the offending paragraphs be struck. ...

> During their application to the Superior Court in 2000, pursuant to s. 140(3), the requesters' son and a corporation controlled by him again attempted to challenge the validity of the Attorney General's consent. That challenge was unsuccessful.

The Ministry also submitted the following representations on the application of the law of litigation privilege.

> Litigation privilege includes records that are not direct solicitor-client communications, but which are derivative of that relationship, such as communications between the solicitor and third parties, documents generated internally by the solicitor or the client, or documents compiled for the lawyer's brief where the dominant purpose for which they were created or obtained is existing or contemplated litigation.
> ...
>
> With respect to records which are subject only to litigation privilege, rather than solicitor-client privilege, it is submitted that the privilege attaching to those records does not disappear when the litigation is concluded.
>
> Further, and in the alternative, it is submitted that the "litigation" in this situation – that is the challenge to the validity of the consent executed by the Attorney General – remains a live issue in the litigation efforts of the requesters, as it is raised in outstanding proceedings before the Federal Court.

The is no question that the appellants, their son, the affected person and the Ministry have been involved in a number of legal actions. What I must do, which is a challenge I also faced in Order MO-1337-I, is determine how to apply the "dominant purpose" test as directed by the Court of Appeal in *General Accident* to the records before me in this appeal.

In Order MO-1337-I, the institution argued that litigation arising from the initial inspection of a property was contemplated from the outset and that records created from the outset should be protected as litigation privileged. In response to this argument, I found:

> Also, in my view, based on *General Accident*, I must assess when there was a reasonable contemplation of litigation and when that reasonable expectation, or any actual ensuing litigation, came to an end. Generally speaking, litigation privilege does not survive the termination of litigation. In deciding whether the dominant purpose test has been met, it is necessary to assess the ongoing proceedings and their subject matter, as well as the date they could reasonably have been in contemplation, and to examine in detail the relationship between these factors and the records for which litigation privilege has been claimed.

I accept the Ministry's submissions that the appellants indicated their intention to challenge the consent given by the Attorney General at the outset. As a result, the Ministry would have had a reasonable contemplation of litigation at the time various records were created during the 1997-98 time period. Also, given the history of litigation involving the appellants, and the very nature of the section 140 application, it was

reasonable for the Ministry to have concluded at that time that all possible avenue of appeal and challenge would be utilized by the appellants, including the current and ongoing matter before the Federal Court. However, in my view, that is not sufficient to bring Records 18, 20, 55, 56, 57, 58, 72, 73, 116, 117, 176-180 and 3388-3393 within the scope of the "dominant purpose" test established in *General Accident*.

Records 18, 20 and 55 are correspondence exchanged between the lawyer representing the Attorney General and the affected person, not the appellants. These records have no bearing on any ongoing litigation involving the Ministry and the appellants. Records 56, 57 and 58 deal with the narrow issue of service of documents in the context of the 1998 litigation; Records 72 and 73 are a letter written by a judge to the parties in the context of the 1998 litigation; Records 116 and 117 are the actual consent signed by the Attorney General, which was filed in court as part of the section 140 application, as were Records 176-180 (the application) and Records 3388-3393 (the appellants' Notice of Constitutional Question). In my view, these records by their very nature cannot attract the protection of litigation privilege in the context of the ongoing Federal Court litigation. Most of these records were not created by Ministry counsel, and none of them were created for the dominant purpose of the current litigation before the Federal Court, as required in order to meet the test set out in *General Accident*. Accordingly, I find that Records 18, 20, 55, 56, 57, 58, 72, 73, 116, 117, 176-180 and 3388-3393 do not meet the requirements of the litigation privilege component of section 19.

Other Records

The Ministry's index identifies certain other records as being subject to exemption under sections 19 or 49(a) of the *Act*, but does not provide any representations in support of this exemption claim. Records which fall into this category are Records 22, 23, 34, 40, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 77, 78, 85 and 86. These records consist of correspondence exchanged between the affected person and the lawyers representing the Ministry, all of which concern the section 140 application involving the affected person. Without representations, I am unable to determine how these letters, which are not communications between a solicitor and client and do not appear to have been prepared by the Ministry for the dominate purpose of existing or contemplated litigation, could qualify as solicitor-client communication or litigation privilege in the hands of the Ministry. Therefore, I find that Records 22, 23, 34, 40, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 77, 78, 85 and 86 do not qualify for exemption under sections 19 or 49(a).

Summary

As a summary, I find that Records 45, 46, 47, 79, 80, 150, 162 and 163 qualify for exemption under section 19 of the *Act*. I also find the requirements of the solicitor-client communications component of section 19 have been established for Records 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 26, 27, 28, the responsive portions of Record 30, Records 48, 53, 74, 75, 81, 82, 83, 84, 88, 89, 90, 91, 92, 95, 96, 97, 98, 99, 100, 106, 108, 109, 110, 111, 112, 113, 119, 120, 121, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 151, 152, 153, 158, 159, 160, 161, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174 and 3387, all of which contain the personal information of the appellants. The Ministry has provided me with representations as to the exercise of discretion for this latter group of records, and I find that the factors considered by the Ministry were proper in the circumstances. Therefore, I find that all records in this latter group qualify for exemption under section 49(a) of the *Act*.

I further find that Records 18, 19, 20, 22, 23, 24, 25, 29, 34, 35, 36, 40, 41, 42, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 77, 78, 85, 86, 87, 107, 116, 117, 122, 123, 175, 176, 177, 178, 179, 180, 3385, 3386, 3388, 3389, 3390, 3391, 3392 and 3393 do not qualify for exemption under sections 19 or 49(a) of the *Act*.

Because Records 19, 24, 25, 29, 36, 41, 42, 51, 52, 54, 56, 70, 71, 87, 107, 122, 123, 177, 178, 179, 180, 3385 and 3386 either contain no personal information or the personal information of no identifiable individual other than the appellants, these records should be disclosed.

INVASION OF PRIVACY/DISCRETION TO REFUSE REQUESTERS' OWN INFORMATION

I will now consider the possible application of the exemptions provided by sections 21(1)/49(b) of the *Act* only for the remaining records which contain the personal information of both the appellants and the affected person or other identifiable individuals. Specifically, the discussion that follows relates to Records 17, 18, 20, 21, 22, 23, 33, 34, 37, 38, 39, 40, 43, 44, 49, 50, 55, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 72, 73, 76, 77, 78, 85, 86, 102, 103, 116, 117, 175, 176, 3388, 3389, 3390, 3391, 3392 and 3393.

As stated above, section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution.

Under section 49(b) of the *Act*, where a record contains the personal information of both an appellant and another individual and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of the other individual's personal privacy, the Ministry has the discretion to deny the appellant access to that information. Where, however, the record only contains the personal information of other individuals, section 21(1) of the *Act* prohibits the Ministry from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies.

For those records which do not contain any personal information of the appellants, I will determine whether or not the Ministry has established the requirements of section 21(1) of the *Act*. For those records which contain the personal information of the appellants, I will consider the requirements of section 21 as a preliminary step in determining whether these records qualify for exemption under section 49(b).

Section 21 is a mandatory exemption claim. If a record qualifies for exemption under this section, and none of the exceptions listed in section 21(1) are present, then the Ministry must not disclose the records. In the circumstances of this appeal, the only exception to section 21(1) which could apply 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.

In determining whether the exemption in section 49(b) or section 21(1)(f) applies, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether 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 institution 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. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) (*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

The Ministry's representations on the application of sections 21/49(b) refer, in some cases, to records which I have already determined qualify for exemption under sections 19/49(a). My discussion of sections 21/49(b) will not address these records, although I will take into account any relevant submissions in the context of those records which do remain at issue. The Ministry submits:

> None of the provisions of section 21(3) apply in this case. With respect to the considerations set out in subsection 21(2), disclosure of these records is not required for any of the purposes set out in subsections (a) - (d). Subsections (g) - (i) do not apply. The relevant subsections are (e) and (f):
>
> (e) "[whether] the individual to whom the information relates to will be exposed unfairly to pecuniary or other harm"; and
>
> (f) "[whether] the personal information is highly sensitive.
>
> As noted above, the records in this case concern an application, initially proposed and later commenced, against the requesters, their son, various corporations controlled by the requesters of their son, and another named individual. Many such records contain personal information relating to the other named individual, as well as the requesters (pages 1, 2, 9, 89-92, 95-100, 102, 103, 129, 133, 137, 138.
>
> Other records that should be exempted identify individuals who have been involved in the application process. One record (164) identifies individual(s) who may have been involved in providing background information for the proposed application. Pursuant to section 21(2)(e), release of these records will be an unjustified invasion of privacy.
>
> Two records (142, 143) refers in summary form to a number of lawsuits involving the requesters, their son, and/or their corporations, and in so doing, the record identifies various individuals who are defendants in those law suits. Another record (140) refers to an individual in respect of whom an order under s. 140 was granted in an unrelated

> application. Although it is arguable that this information is part of the public record, in the sense that all defendants and the individual could be identified from court records, pursuant to section 21(2)(e), release of these records will be an unjustified invasion of privacy.
>
> In addition, one record (139) refers to another individual in respect of an unrelated request for a consent under section 140. The individual, and the proposed application against him, are entirely unrelated to the requesters. Since an application under s. 140 is a legal proceeding which raises sensitive issues, this record should not be disclosed, pursuant to s. 21(2)(f).
>
> Finally, six records (3388-3393) contain personal information in respect of a Crown counsel, namely a home fax number. Pursuant to section 21(2)(e), release of this information will be an unjustified invasion of privacy.

I have already determined that some of the specific records referred to by the Ministry qualify for exemption under sections 19/49(a).

The appellants's representations do not address the factors under section 21(2) which favour disclosure.

Records 17, 21, 37, 60, 62, 64, 67 and 76 are facsimile transmission sheets. Records 43, 44, 102 and 103 are copies of courier slips addressed to the one of appellants. The only personal information of the affected person contained on these records is his mailing address which, based on information available to me in the appeal file, the appellants are already aware of. I find that disclosure of Records 17, 21, 37, 43, 44, 60, 62, 64, 67, 76, 102 and 103 in these circumstances would not constitute an unjustified invasion of the affected person's privacy, and these records do not qualify for exemption under section 21 (in the case of Records 17, 21, 37 and 76) and section 49(b) (in the case of Records 43, 44, 60, 62, 64, 67, 102 and 103).

Records 18, 22 and 23, are all letters written by the affected person to the lawyer representing the Ministry, and Record 20 is a response to one of these letters. One of the appellants is "cc'd" on these records. While these letters contain personal information relating to the affected person, in my view, it is not reasonable to conclude that the re-disclosure of these records would constitute an unjustified invasion of his personal privacy. Accordingly, I find that Records 18, 20, 22 and 23 do not qualify for exemption under section 49(b) of the *Act*.

Records 33, 34, 38, 39, 40, 49, 50, 55, 59, 61, 63, 65, 66, 68, 69, 77, 78, 85 and 86 all consists of letters between the affected person and lawyers representing the Crown. The appellants are not 'cc'd" on these records, and the matters discussed in these records relate primarily to the affected person and the section 140 application concerning him. The appellants' personal information consists only of their names and the fact that they too were subject to a section 140 application. The affected person did not consent to disclosure of any of his personal information, and the appellants provided no representations as to why disclosure would not constitute an unjustified invasion of the affected person's privacy. In the circumstances, I accept the Ministry's position that the factors under section 21(2)(e) and (f) are relevant to

these records, and I find that disclosure of Records 33, 34, 38, 39, 40, 49, 50, 55, 59, 61, 63, 65, 66, 68, 69, 77, 78, 85 and 86 would constitute an unjustified invasion of the affected person's privacy. Accordingly, I find that Record 55 qualifies for exemption under section 21, and Records 33, 34, 38, 39, 40, 49, 50, 59, 61, 63, 65, 66, 68, 69, 77, 78, 85 and 86 qualify for exemption under section 49(b) of the *Act*.

Records 175 and 176 are a form and draft affidavit which identifies a different individual. From what I can determine, the individual identified in these records has no involvement in the appellants' section 140 application. In my view, these records are either not responsive to the request or, if responsive, their disclosure in the circumstances would constitute an unjustified invasion of the personal privacy of these individuals and therefore qualify for exemption under section 21 of the *Act*.

Records 57 and 58 are a draft Acknowledgement of Service concerning the appellants' section 140 application. The only personal information of the affected person is his name, as it appears in the style of cause. I find that disclosure of these records would not constitute an unjustified invasion of the affected person's privacy, and that Records 57 and 58 do not qualify for exemption under section 49(b) of the *Act*.

Records 72 and 73, as described earlier in this order, are a letter sent by Justice MacPherson to the parties in the section 140 application, which include the affected person and the appellants. Records 116 and 117 are the actual consent signed by the Attorney General and filed with the court, and Records 3388-3393 are the appellants' Notice of Constitutional Question filed in the context of the section 140 application. Disclosure of these records, which have already been provided to the parties and are presumably within their knowledge and possession, could not, in my view, constitute an unjustified invasion of the affected person's privacy. Accordingly, I find that Records 72, 73, 116, 117 and 3388-3393 do not qualify for exemption under section 49(b). The Ministry submits that Records 3388-3393 contain the personal information of Crown counsel and in particular a home fax number. From the copy of these records provided to me, I am unable to locate a home fax number; however, if one does exist on the original records held by the Ministry, this fax number would qualify for exemption under section 49(b) of the *Act* and should not be disclosed.

In summary, I find that Records 55, 77, 78, 175 and 176 qualify for exemption under section 21 of the *Act*; and that Records 33, 34, 38, 39, 40, 49, 50, 55, 59, 61, 63, 65, 66, 68, 69, 85 and 86 qualify for exemption under section 49(b) of the *Act*.

I further find that Records 17, 18, 20, 21, 22, 23, 37, 43, 44, 57, 58, 60, 62, 64, 67, 72, 73, 76, 102, 103, 116, 117, 3388, 3389, 3390, 3391, 3392 and 3393 do not qualify for exemption under sections 21 or 49(b) of the *Act*.

ORDER:

1. I order the Ministry to disclose the following records to the appellant by **February 16, 2001**, but not before **February 12, 2001**:

   Records 17, 18, 19, 20, 21, 22, 23, 24, 25, 29, 36, 37, 41, 42, 43, 44, 51, 52, 54, 56, 57, 58, 60, 62, 64, 67, 70, 71, 72, 73, 76, 87, 93, 102, 103, 104, 105, 107, 116, 117, 122, 123, 124, 125, 126, 154, 155, 156, 177, 178, 179, 180, 3385, 3386, 3388, 3389, 3390, 3391, 3392 and 3393.

2. I uphold the Ministry's decision not to disclose the following records:

   1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 26, 27, 28, the responsive portions of Record 30, Records 33, 34, 38, 39, 40, 45, 46, 47, 48, 49, 50, 53, 55, 59, 61, 63, 65, 66, 68, 69, 74, 75, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 95, 96, 97, 98, 99, 100, 106, 108, 109, 110, 111, 112, 113, 119, 120, 121, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 150, 151, 152, 153, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176 and 3387.

3. In order to verify compliance with Provision 1 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, upon request.

Original signed by: January 12, 2001
Tom Mitchinson
Assistant Commissioner