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

ORDER PO-1928

Appeal PA-000205-1

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

NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of the Attorney General (the "Ministry") under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester had sought access to records of the Office of the Children's Lawyer (the "OCL") (formerly the Office of the Official Guardian). He initially requested access to the OCL's "Policies and Procedures Manual and training manual", and "anything that pertains to how the office conducts their investigations and decision-making practices." The requester is a non-custodial parent whose children were represented by the OCL.

The Ministry initially identified a number of records as responsive to the request and granted partial access to them. The Ministry withheld three records (Records 1, 2 and 3) on the basis of the exemptions at section 13 (advice to government) and section 19 (solicitor-client privilege) of the *Act* to withhold records.

The requester, now the appellant, appealed the Ministry's decision to withhold the three records.

During mediation of the appeal, the appellant advised the Mediator that he was seeking access to:

> Records showing interviewing techniques, procedures followed, and if they exist, training manuals used by OCL lawyers to determine a child's wishes in determining questions of custody and/or access [emphasis in original].

The Mediator advised the Ministry of the appellant's statement concerning his request and it conducted a further search. The Ministry identified an additional responsive record, a videotape and an accompanying guide (record 4). The Ministry issued a subsequent decision letter denying access to the guide under section 19, and to the videotape under section 21(1) (invasion of personal privacy).

Mediation of the appeal was not successful. I sent a Notice of Inquiry to the Ministry initially, setting out the facts and issues in this appeal. The Ministry returned detailed submissions. The Notice of Inquiry was then sent to the appellant, together with the non-confidential portions of the Ministry's representations. The appellant also submitted representations.

In its representations, the Ministry took the position that due to the appellant's "narrowed request", the only record at issue is record 4, and the Ministry's representations focused on that record. Still, the Ministry maintained its initial position that records 1, 2 and 3 are exempt on the basis of sections 13 and 19, without providing supporting representations. In the circumstances, I decided to invite the Ministry to provide further representations with respect to these three records. It did so, but still maintains that records 1, 2 and 3 are not responsive to the appellant's "narrowed request". In the circumstances, I determined that it was not necessary for me to share the Ministry's additional representations with the appellant.

DISCUSSION:

SCOPE OF THE REQUEST

The Ministry submits that "given the narrowed nature of the request", it is "only required to make representations on record 4" which it asserts "is the only record at issue":

> None of [records 1, 2 and 3] contain any information about how the OCL lawyers determine a child's wishes, and accordingly, are not the subject of the narrowed request that is at issue on this appeal.

The appellant's position is that his request should be construed as covering all of records 1 to 4. He states:

> The request for information was narrowed because of the OCL avoidance tactics. My request was and still is for any and all information pertaining to the decision making process and interviewing techniques used by the OCL in determining their position on behalf of their child clients.

The Ministry acknowledges that the original request was extremely broad and states that "as a result the [OCL] located all documents relevant to the manner in which cases are conducted by both lawyers and social workers." It initially located records 1, 2 and 3 as responsive to the request.

From the materials before me, I note that the Mediator had discussions with the Ministry and the appellant in order to clarify the request. The appellant subsequently advised the Mediator that he was seeking "records showing interviewing techniques, procedures followed, and if they exist, training manuals used by OCL lawyers to determine a child's wishes in determining questions of custody and/or access." The Mediator provided the Ministry with this exact wording. In response, the Ministry carried out an additional search and located record 4.

Mediation was not successful and the Mediator prepared, and shared with the Ministry and the appellant, a Report of Mediator (the Report). In the Report, the Mediator identified all four records as being at issue. The Mediator sent out a covering letter with the Report to both parties stating:

> The purpose of this Report is to provide the parties to an appeal with a record of the result of mediation and to provide the Adjudicator with information regarding records and issues that remain to be adjudicated.

The Ministry and the appellant were invited to review the Report and to contact the Mediator by a specified date "if there are any errors or omissions." Neither party contacted the Mediator and the appeal proceeded to adjudication.

In my view, records 1, 2 and 3 should remain at issue in this appeal. Although the appellant describes the revised wording of his request as "narrowed", this is not determinative of the issue, and there are no other indications to support the Ministry's contention that the appellant removed

the three records from the scope of his request. In addition, the Ministry had an opportunity to object to the Mediator's description in the Report of the scope of the request, but failed to do so. Accordingly, I will consider the application of the claimed exemptions to all four records.

PERSONAL INFORMATION

Introduction

The Ministry claims that the videotape portion of record 4 contains personal information which is exempt under section 21 of the *Act*. Because section 21 is a mandatory exemption, and because other records at issue may contain personal information, I have decided to consider its application to all four records.

Section 21 applies only to personal information. Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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)].

Representations

The Ministry submits that " the film consisted of 4 children, being interviewed individually by social workers, to provide examples of interviewing techniques." It further states:

> The videotape clearly contains personal information as defined in section 2(1) of the *Act*, in that it is personal information about identifiable individuals. Four children are seen on screen, and their ages are given. The information is highly sensitive as envisaged by the *Act* as it gives private information about the families. During the course of the interviews, the narrator gives details and the children talk about intimate aspects of their lives . . ."

The appellant makes extensive representations detailing the history of his legal and other interactions with various individuals and the OCL. For the most part, however, the representations do not directly address the specific issues arising in this appeal, as described above and in the Notice of Inquiry sent to the appellant.

Record 4: Videotape

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

I have reviewed the videotape and am satisfied that the interviewers' actions were undertaken in their professional rather than personal capacity. I conclude that the information associated with the interviewers does not qualify as their personal information.

Having said this, I accept the Ministry's position that, as a whole, the videotape contains personal information of the children. Not only does the face of each child appear, making them identifiable, but much of the verbal information revealed by the videotape is personal in nature, including the children's names, information about their parents and siblings, where they attend school, and their living arrangements. I do not accept the appellant's submission that the videotape can be edited to delete this information. A child appears in each frame together with the interviewer. In the circumstances, the videotape cannot reasonably be severed without disclosing personal information of the children.

I find that the videotape as a whole qualifies as the children's personal information within the meaning of the definition of section 2(1) of the *Act*.

Record 4: Guide

The guide consists of interviewing techniques and suggestions for interviewing children and accompanies the videotape. I have reviewed the guide and note that page 8 contains the names of individuals who appear in the video, an interviewer and a child. The name of the interviewer appears in a professional capacity and, for the reasons stated above, does not constitute personal information.

The child's name appears in a personal capacity and as such qualifies as "personal information" under section 2(1) of the *Act*.

Record 2

Record 2 consists of a memorandum to "OCL Panel Lawyers and Social Workers" from a named individual who is identified as the "Children's Lawyer". It asks that panel lawyers and social workers familiarize themselves with the OCL's Policy Statement concerning social work information.

The name of this individual appears in a professional capacity and therefore does not qualify as "personal information".

Records 1 and 3

Record 1 consists of guidelines setting out the role of social workers in assisting legal counsel. It includes two appendices, a checklist and a discussion of solicitor-client privilege for OCL lawyers and social workers representing children. Record 3 contains tabbed inserts, from a social work manual, about services rendered by social workers on behalf of the OCL. It includes information on writing and preparing reports, and guidelines on case management, disclosure/settlement meetings, and supervision and training. Neither record contains personal information as defined under the *Act*.

Because the videotape and the guide both contain personal information, I will consider the application of the section 21 exemption to both parts of record 4.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (h) of section 21(1) applies. The only exception which could apply in the circumstances is paragraph (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.

Sections 21(2) and (3) 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 the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which 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 appellant makes a general assertion that the requested information will make up part of a report that he is preparing for a Senate Committee that is reviewing divorce laws, but provides no further details. He has not suggested the application of any of the factors in favour of disclosure at section 21(2).

In the absence of any factors under section 21(2) weighing in favour of disclosure, I am unable to conclude that disclosure of personal information in record 4 would *not* constitute an unjustified invasion of personal privacy. Therefore, all of the videotape and the name of the child at page 8 of the guide are exempt under section 21 of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

Introduction

The Ministry claims that the section 19 exemption applies to all four records at issue. As I have found that the videotape portion of record 4 is exempt under section 21 of the *Act*, I will consider the application of section 19 to the guide portion of record 4 and to records 1, 2 and 3.

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 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-1879].

The Ministry's representations are focused on litigation privilege, but suggest the application of solicitor-client communication privilege as well. I will consider the application of both heads of privilege to the records (except for the videotape, which I found above to be exempt under section 21), beginning with litigation privilege.

LITIGATION PRIVILEGE

Introduction

In Order MO-1337-I, Assistant Commissioner Mitchinson discussed the scope of litigation privilege, particularly in light of a landmark decision of the Court of Appeal for Ontario in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321:

> 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 Order MO-1337-I, Assistant Commissioner Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief. This aspect of litigation privilege arises from a line of cases that includes *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.) and *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.). As the Assistant Commissioner points out in his analysis, the test for this aspect of litigation privilege from *Nickmar* was quoted with approval by two of the three judges in *General Accident*. As a result, the Assistant Commissioner concluded that this aspect of privilege remains available after *General Accident*, and he adopted the test in *Nickmar*:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

The Assistant Commissioner then elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere," and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief." Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation under the *Nickmar* test and should be tested under "dominant purpose."

I agree with the Assistant Commissioner's approach to litigation privilege as set out above, and I will apply it for the purpose of this appeal.

Dominant purpose

The Ministry submits:

> . . . The dominant purpose for which [record 4] was created was the type of litigation the [OCL] is involved in on a daily basis.
>
> The Children's Lawyer, who is Crown counsel, protects the legal interests of children in custody/access and child protection proceedings only when so ordered by the Court under section 89(3.1) or 112 of the *Courts of Justice Act* or section 38 of the *Child and Family Services Act* in the context of ongoing litigation . . .
>
> . . . . .
>
> . . . The dominant purpose for the creation of these records is the litigation in which the [OCL] is involved. The litigation was reasonably contemplated at the time the records were created; involvement in this litigation is an important part of the [OCL's] functions.
>
> Although the [appellant's] own litigation has ended by the signing of Minutes of Settlement, . . . disclosure should still be refused, on the basis that the records are relevant to all ongoing litigation in the Personal Rights Department of the [OCL]. The reasons set out above for not releasing the records under section 19 apply to all of the personal rights cases, not only that of the requester.

In its submissions on records 1, 2 and 3, the Ministry re-iterates the above position and adds:

> It is submitted that the adversary system of justice would be harmed through the disclosure of the records. Child's counsel or social worker may, after investigating a case, take a position or make a recommendation adverse in interest to one of the parties . . .

In order to qualify for litigation privilege, a record must meet the three-part test articulated above. Each element of the test requires a specific nexus between the creation of the record and "existing" or "contemplated" litigation. The Ministry's position is essentially that litigation privilege can apply to a record created not for the dominant purpose of a particular piece of litigation, but rather for litigation in general. In my view, it is apparent from the authorities that litigation privilege is an *ad hoc* type of privilege, designed to protect documents that pertain to a particular piece of litigation while that litigation is continuing or reasonably in contemplation, but no longer. This type of privilege was subjected to extensive analysis by the court in *General Accident*, above. Justice Carthy, the author of the majority reasons, quoted several authorities which support this view:

> The origins and character of litigation privilege are well described by Sopinka, Lederman and Bryant in The Law of Evidence in Canada (Toronto: Butterworths, 1992), at p. 653:
>
> > As the principle of solicitor-client privilege developed, the breadth of protection took on different dimensions. It expanded beyond communications passing between the client and solicitor and their respective agents, to encompass communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation. Although this extension was spawned out of the traditional solicitor-client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, *it was founded upon our adversary system of litigation by which counsel control fact-presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case . . .*
>
> [emphasis added]
>
> R.J. Sharpe, prior to his judicial appointment, published a thoughtful lecture on this subject, entitled "Claiming Privilege in the Discovery Process" in Law in Transition: Evidence, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) at p. 163. He stated at pp. 164-65:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege . . . Litigation privilege . . . is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. *Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate . . .*
>
> [emphasis added]

In my view, these extracts, quoted with approval by the Court of Appeal for Ontario, indicate that documents which may qualify for litigation privilege under the dominant purpose test must have been produced with *particular* litigation in mind, and not litigation generally. This view is reinforced by the following extract from *Susan Hosiery Ltd. v. M.N.R.*, [1969] 2 Ex. C.R. 27 at 33-34:

> . . . [U]nder our adversary system of litigation, *a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared*. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.

[emphasis added]

In my view, based on the records themselves and the surrounding circumstances, the dominant purpose for preparing the records was to train OCL staff in discharging their duties. While one of the lesser purposes for creating the records may have been to foster the conduct of litigation generally, this would not attract litigation privilege, even if it were the dominant purpose, since they were not prepared with any particular litigation in mind.

For these reasons, I find that the guide portion of record 4, and records 1, 2 and 3, do not meet the dominant purpose test.

Nickmar test

The Ministry has not argued that the guide or records 1, 2 and 3 were part of a lawyer's brief, and there is nothing else in the material before me to support such a finding. Accordingly, I find that these records do not qualify for litigation privilege.

In conclusion, I find that the guide portion of record 4, and records 1, 2 and 3, are not subject to litigation privilege.

Other issues

The OCL submits that disclosure of these records would harm the adversary system of justice. While such protection is the essential purpose of litigation privilege, this purpose is achieved by creating "a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate", which does not extend to generic training materials not created for a specific case, such as those at issue here.

SOLICITOR-CLIENT COMMUNICATION PRIVILEGE

Introduction

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].

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].

Representations

With respect to the videotape and guide, the Ministry submits:

> The Commissioner has recognized that there is a solicitor-client relationship between the child and counsel. In Order P-1075, Inquiry Officer Donald Hale stated:
>
> > I find, however, that a solicitor-client relationship exists only between the appellant's son and counsel. Counsel represents the interests of the son, which may not be concurrent with those of the appellant or his former wife. The child's lawyer may take positions which are adverse in interest to those of the appellant or his former wife. In order to fairly and properly represent the interests of the child, the solicitor-client relationship must be exclusively between counsel and the child, without the involvement of the appellant or his former wife.
> >
> > . . . . .
>
> The [OCL] has considered it crucial that its lawyers and social workers, both in-house and agents, be trained to interview the children they are involved with in the context of the ongoing proceedings. As a result, the videotape and accompanying guide were prepared by staff at the [OCL], to be used at training sessions in the fall of 1997 as examples of interviewing techniques. The two records were designed to be used together; the guide is an elaboration of what is on the video . . .
>
> Both of these records suggest a course of action for lawyers and social workers to follow when interviewing children. It is important to note, however, that these records were not simply given to lawyers and social workers with no accompanying explanations; instead, at each training session, a clinician, for example a children psychologist or psychiatrist from the local area, as well as in-house staff, were present to provide guidance and criticism about what was both good and bad about the videotape and guide. Examining either the videotape or guide in isolation would not provide an accurate depiction of interviewing techniques, because both were prepared under the assumption that they would be analyzed in the presence of a clinician and in-house staff.

With respect to records 1, 2 and 3, the Ministry states:

> These records are not meant to be read without any accompanying discussion or explanations; they were discussed at training sessions, where in-house staff was present to provide guidance about the documents.

Findings

Records 1, 2 and 3, and the guide portion of record 4 do not constitute 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.

First, the evidence before me indicates that these documents, being generic training materials, were not treated in a confidential manner, but were widely distributed among most if not all OCL staff and agents. While early drafts of these documents may have been treated confidentially (and in fact may have been privileged), once this record was finalized and widely distributed OCL staff and agents, it cannot be said to constitute a confidential communication.

Second, in a similar vein to my finding above under litigation privilege, to be subject to solicitor-client communication privilege, the communication in question must relate to a particular matter on which legal advice is being sought or provided. This privilege is not intended to apply to general guidelines to staff or agents, or policies about how to carry out their duties, in the absence of a specific legal issue on which advice is being sought. By contrast, had legal advice been sought and given on the specific legal issue of what the guidelines should contain, then confidential communications between legal counsel and an OCL client made for this purpose may well have attracted privilege.

Third, while I accept that there may be a solicitor-client relationship between a child and the OCL in certain circumstances, these records do not constitute confidential communications between a client child and OCL counsel made for the purpose of giving or receiving legal advice and, therefore, they are not privileged in that respect.

To conclude, section 19 does not apply to the guide portion of record 4, or to records 1, 2 or 3. Since no other exemptions are claimed for the guide, I will order the Ministry to disclose it, subject to the severance for personal information as described above.

ADVICE OR RECOMMENDATIONS

The Ministry claims that section 13 applies to records 1, 2 and 3. That section reads:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> ... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take

> actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the *Act*. (Orders 94, P-122, M-847 and P-1709).

The Ministry submits:

> The documents were prepared by in-house staff for use by staff and panel lawyers and social workers when rendering services to OCL on behalf of children. The records are intended to provide suggestions and guidance to lawyers and social workers who are providing legal representation to children or preparing an investigation and report in personal rights cases when so ordered by the court. The documents at issue were used for discussion purposes at province-wide training. At no time were they intended for public distribution.

I do not accept the Ministry's position. Although these records contain guidelines for OCL staff, they do not constitute the type of advice or recommendations that may be accepted or rejected in the deliberative process of government decision-making and policy-making [see Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)]. The fact that the records were used for discussion purposes and not intended for public distribution does not bring these otherwise non-exempt records within the scope of the exemption.

Therefore, I find that records 1, 2 and 3 do not qualify for exemption under section 13(1).

CONCLUSION:

None of the claimed exemptions applies to records 1, 2 and 3. All of the videotape portion of record 4, and parts of the guide portion of record 4, are exempt under section 21.

Although sections 33(1)(b) and 35(2) of the *Act* do not apply in a determinative way to the facts of this case, these provisions indicate that records of the type at issue in this case should be available to the public. These sections read:

> 33. (1) A head shall make available, in the manner described in section 35,
>
> (b) instructions to, and guidelines for, officers of the institution on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration or enforcement of the provisions of any enactment or scheme administered by the institution that affects the public.
>
> 35. (2) Every head shall cause the materials described in sections 33 and 34 to be made available to the public in the reading room, library or office designated by each institution for this purpose.

In my view, the records can be described as instructions to, and guidelines for, OCL staff and agents on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration of certain provisions of the *Child and Family Services Act* and the *Courts of Justice Act*, both of which are enactments or schemes that affect the public. Sections 33(1)(b) and 35(2) thus signal the Legislature's intent that records of this nature ought to be made available to the public, subject to any necessary severances for exempt information.

ORDER:

1. I uphold the decision of the Ministry to deny the appellant access to the videotape portion of record 4.

2. I order the Ministry to disclose the guide portion of record 4 to the appellant, with the exception of the information highlighted on the copy of this record included with the OCL's copy of this order, no later than August 30, 2001, but not earlier than August 25, 2001.

3. I order the Ministry to disclose records 1, 2 and 3 to the appellant no later than August 30, 2001, but not earlier than August 25, 2001.

4. To ensure compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the materials sent to the appellant.

Original signed by: July 26, 2001
Dora Nipp
Adjudicator