



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-1985

Appeal PA-010067-1

Office of the Public Guardian and Trustee



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NATURE OF THE APPEAL:

The Office of the Public Guardian and Trustee (the OPGT) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for access to:

All records dated from 1991 to present, in the possession of the Office of the Public Trustee and the Ministry of the Attorney General, referencing the following issues:

1. Income referred to in each of:

section 27(2) of the *Cemeteries Act*, R.S.O. 1990, c. C-4; and
section 36(5) of the *Cemeteries Act (Revised)*, R.S.O. 1990, c. C-4; and
2. Capital gains realized on monies held in pre-need assurance funds established by cemeteries pursuant to the requirements of section 36 of the *Cemeteries Act (Revised)*, R.S.O. 1990, c. C-4, and its predecessor legislation.

The OPGT identified 56 pages of responsive records, and issued a decision letter granting access to pages 1-4, and denying access to the remaining 52 pages on the basis of the following exemptions:

- Section 19 (solicitor-client privilege) - all pages
- Section 13 (advice or recommendations) - pages 39 and 51-56

The requester (now appellant) appealed the OPGT's decision.

Resolution of the appeal through mediation was not successful, and it was transferred to the adjudication stage. I sent a Notice of Inquiry to the OPGT initially, and received representations in response. I then sent the Notice of Inquiry to the appellant, along with the OPGT's representations. The appellant chose not to provide representations.

RECORDS:

The records consist of handwritten notes prepared by OPGT's legal counsel (pages 5-25) and various notes, memoranda and correspondence received by OPGT's legal counsel from his client (pages 26-56).

BACKGROUND:

In its representations, the OPGT outlines its responsibilities and functions under the *Charities Accounting Act* and the *Cemeteries Act*, and reviews its role over perpetual care funds, pre-need assurance funds and cemetery trust funds under that legislation. The OPGT also explains the role played by the Ministry of Consumer and Business Services (MCBS) in administering portions of this legislation.

The OPGT explains that the appellant, which is a law firm, has ongoing issues with MCBS regarding certain requirements under the legislation. One issue concerns the definition of the term “income” used in the legislation. In the course of responding to issues raised by the appellant, MCBS consulted with the OPGT and asked for legal advice on the proper interpretation of the term “income”. According to the OPGT, it was advised by MCBS that the appellant intended to commence court proceedings to resolve this issue.

In this context, OPGT’s legal counsel requested and received various records from MCBS (pages 26-56). After discussions with other lawyers at the OPGT, OPGT’s legal counsel communicated his opinion orally to MCBS. The OPGT identifies that pages 5-25 consist of legal counsel’s handwritten notes regarding this matter, including the handwritten notes of the actual opinion provided verbally to MCBS (pages 14-18).

DISCUSSION:

Solicitor-Client Privilege

The OPGT submits that section 19 of the *Act* applies to all 52 pages of records. Section 19 reads:

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: (1) solicitor client communication privilege; and (2) litigation privilege. The OPGT’s representations address both heads. I will consider solicitor client communication privilege first.

Solicitor-Client Communication Privilege

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

The Supreme Court of Canada has described this privilege 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 also 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].

The OPGT submits that the records are protected from disclosure by solicitor-client communication privilege. As set out above, the OPGT has identified that its lawyer provided legal advice to MCBS, and that a solicitor-client relationship existed between the OPGT (as solicitor) and MCBS (as client).

The OPGT submits:

In this matter there was a communication, being legal advice and opinion given orally by the OPGT legal counsel to the Team Leader, who is also a lawyer, and MCBS. The communication was of a confidential nature and was given by a lawyer advising his client. The legal advice and opinion was given in contemplation of litigation. The client has treated the opinion as confidential. The communication was directly related to seeking, formulating or giving legal advice relating to the interpretation of "income" under the past and present cemeteries legislation.

Although the OPGT is a different institution from MCBS for purposes of the *Act*, its counsel is Crown counsel. The legal advice was within his expertise and was given to a Ministry of the Crown. The legal advice given was requested by MCBS and was given to MCBS as the client. Branches of government outside the

OPGT consult with legal counsel in the Charitable Property Program on legal issues and request legal opinions on trust and charities law issues from time to time.

With respect to the specific records at issue in this appeal, the OPGT submits:

Records 14 to 18 are the notes of legal counsel's analysis and advice that was given orally to MCBS. These records are the written record of the opinion given by legal counsel. They are clearly within the exemption for solicitor client privilege, containing the actual legal advice given.

The remaining documents at issue fall into the area that is described by the English Court of Appeal in *Balabel v. Air India* as being in the continuum of communications occurring between the time that an opinion is requested and the time that it is given.

Records 5 to 13 and 19 to 25 are legal counsel's notes of background information including notes of discussions with OPGT staff and with legal counsel at MCBS on the issue of the interpretation of the relevant portions of the *Cemeteries Act (Revised)* and on the interpretation of the word "income". These records include legal counsel's rough notes on the formulation of issues and opinion. These records are obviously legal counsel's working papers and are directly related to the formulation of the legal advice and opinion.

Records 26 to 56 are documents that legal counsel at the OPGT received from MCBS to assist him in preparing his legal advice. These are all documents containing background information that was necessary to formulate the requested legal advice and opinion and that were used by legal counsel to assist in formulating his legal opinion. It is submitted that these records meet the requirements of solicitor-client communication privilege on the basis that they are the legal advisor's "working papers" because the OPGT legal counsel obtained and directly used these records in the preparation of legal advice that was communicated to the client.

Based on the submissions provided by the OPGT, I am satisfied that a solicitor-client relationship existed between the OPGT (as solicitor) and MCBS (as client). I will now examine the different categories of records to determine whether they qualify as solicitor-client communication privilege.

Pages 14-18 are handwritten notes, which identify a legal issue and an opinion, as well as a number of reasons supporting the opinion. The OPGT has indicated that these are the notes of legal counsel's analysis of the issue raised by MCBS, and the advice that he gave to his client. I am satisfied that these pages are the written record of the confidential legal opinion provided by OPGT's legal counsel to his client. Accordingly, I find that these records fall within the scope of solicitor-client communication privilege and qualify for exemption under section 19 of the *Act*.

Pages 5-13 and 19-25 are handwritten notations. The OPGT has identified that they were made by legal counsel and consist of background information on the issue of the interpretation of the relevant portions of the legislation. I accept that these records are legal counsel's working papers, which are directly related to the formulation of the legal advice and opinion contained in pages 14-18. Accordingly, I find that they too fall within the scope of solicitor-client communication privilege as defined in *Susan Hoisery*, and qualify for exemption under section 19 of the *Act*.

As far as pages 26-56 are concerned, the OPGT submits that these records are documents provided by its client, MCBS, to legal counsel to assist him in preparing his legal opinion. Page 26 is a fax cover sheet from MCBS to OPGT, transmitting pages 27-56. Page 27 is a memorandum from a legal counsel at MCBS to OPGT's legal counsel framing the request for a legal opinion, and attaching pages 28-56. These remaining pages consist of copies of letters, memoranda, e-mail messages and draft correspondence, all of which relate to the general subject matter of the requested legal opinion. The OPGT has indicated that all of these documents contain background information that was necessary to formulate the requested legal advice and opinion, and that these records were used by legal counsel to assist in formulating his opinion.

Pages 28-25 and 41-45 consist of correspondence sent by the appellant to MCBS in 1998 and 2000. The PGT explains:

Further explanation may be required regarding records 28 to 35 and 41 to 45. These records were originally received by MCBS from [the appellant] and subsequently forwarded to the OPGT's legal counsel to assist him in preparing his opinion. Solicitor-client privilege is claimed for these records on the basis that they are documents that formed part of OPGT legal counsel's working papers; provided by the client to its legal counsel for purposes of obtaining legal advice. It is submitted that OPGT's claim of solicitor-client privilege is not dependent on the author of the documents.

The OPGT submits that all of pages 26-56 meet the requirements of solicitor-client communication privilege because the OPGT's legal counsel obtained them from MCBS and directly used them in preparing the legal advice that was communicated to his client.

I accept the OPGT's position. It is clear that all of these records, including pages 28-35 and 41-45, were provided as attachments to a specific request by a client (MCBS) for a legal opinion from its solicitor (OPGT), and were provided for the purpose of assisting counsel in providing his advice. I am satisfied that these documents were communicated to OPGT on a confidential basis, for the purpose of seeking and obtaining legal advice, and I agree that the privilege attached to these records is not dependent on the author of the documents (see also MO-1316). In my view, these records form part of the "continuum of communications" between solicitor and client referred to in *Balabel v. Air India*, above. As such, I find that they fall within the scope of solicitor-client communication privilege and qualify for exemption under section 19 of the *Act*.

In summary, I find that all pages of withheld records qualify for exemption under the solicitor-client communication privilege component of section 19 of the *Act*.

In the circumstances, it is not necessary for me to consider whether the records qualify for litigation privilege, or whether pages 39 and 51-56 qualify for exemption under section 13 of the *Act*.

ORDER:

I uphold the OPGT's decision.

Original signed by:
Tom Mitchinson
Assistant Commissioner

December 31, 2001