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

ORDER PO-2441

Appeal PA-040219-1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act (the Act)* for the following information:

> I am seeking a letter that was written by a [named] Crown Counsel on November 24, 2000 regarding myself and the charge of breach of trust and the decision to withdraw the charges.

The Ministry denied access to the one responsive record on the basis that it qualified for exemption under section 19 of the *Act*.

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

During the course of mediation, the Ministry raised the application of section 49(b), in conjunction with section 21(3)(b), as a new exemption claim. The sections 21(1)/49(b) claims relate to one sentence on page one of the record, which the Ministry claims contains the personal information of a third party.

Mediation was not successful, and the appeal was transferred to the adjudication stage.

I began my inquiry by sending a Notice of Inquiry to the Ministry, setting out the facts and issues in the appeal and seeking written representations. The Ministry responded with representations. I then sent a Notice of Inquiry to the appellant, along with a copy of the Ministry's entire representations. The appellant responded with representations.

RECORDS:

The record consists of a three-page letter from a lawyer in the Ministry's Crown Law Office, Criminal to an RCMP officer, dated November 24, 2000.

DISCUSSION:

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/SOLICITOR-CLIENT PRIVILEGE

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

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemption in section 19 (among others) would apply to the disclosure of that information. Section 19 reads as follows:

> 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 contains two branches as described below. An institution must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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 privilege applies to "a continuum of communications" between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege

prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co*.].

Courts have described the "dominant purpose" test 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 [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co*.; see also Order PO- 2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd*. (1985), 3 N.S.W.L.R. 44 (S.C.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Representations

The Ministry submits that the record contains information as to steps anticipated to be taken by the Crown during the course of the litigation. The record, it states, came into existence as a result of litigation. The Ministry submits that Branch 2 of section 19 is specifically designed to protect information prepared by or for Crown counsel in connection with proceedings being conducted by Crown counsel on behalf of the government.

The appellant submits that the purpose of the litigation privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege, it is said, prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel. The appellant submits that by releasing the record to him, the purpose of litigation privilege will not be broken. He asserts that no litigation is proceeding on this matter and the issues are resolved; therefore, any zone of privacy will not be broken. There are no policy reasons to support the continuation of litigation privilege in the circumstances.

Analysis

In this appeal, it is only necessary to consider the application of the statutory litigation privilege in section 19.

In its representations, the Ministry refers to the decision in *Ontario (Attorney General) v. Big Canoe* (2002), 62 O.R. (3d) 167 (C.A.). In that decision, arising out of a judicial review application concerning an order of this office, the Court considered whether some photos and a video in a Crown prosecutor's file were exempt from disclosure once the prosecution was completed and the file closed. The issue was whether the termination of litigation, which ends common law litigation privilege, would apply in the context of Branch 2.

In addressing this issue, the Court considered comments by then Attorney General Ian Scott, made during the committee hearings prior to the passage of the *Act* concerning the effect of Branch 2. The former Attorney General stated that its intent was "…just to expand the coverage designed to ensure protection for solicitor-client material to crown counsel, who according to how you view the law, may or may not have a client and therefore may or may not have, technically, the benefit of solicitor-client privilege." The Court stated:

> The Minister appears to have thought that the words used in branch two described the ambit of solicitor-client privilege and could be applied where there was no true client. In fact those words describe the work product or litigation privilege which covers material going beyond solicitor-client confidences and embraces such items as are the subject of this proceeding, photographs and a video gathered in the preparation for litigation.
>
> If we are assisted in any way by the context of this statement, it is in knowing that the intent was to give Crown counsel permanent exemption…The error made by the inquiry officer was in assuming the intent was to grant litigation privilege to Crown counsel and then reading in the common law temporal limit.

It must also be noted that the common law litigation privilege encompasses not just communications passing between a client and solicitor, but also those between a client or his/her solicitor and third parties (see the excerpt from Sopinka, Lederman and Bryant, The Law of Evidence in Canada (Toronto: Butterworths, 1992), cited in *General Accident Assurance Co. v.*

Chrusz, above). However, it is also significant that litigation privilege depends on a "zone of privacy" protecting such communications. I accept the evidence given in the Ministry's representations as to the circumstances in which the record was prepared. The letter was written by the Ministry prosecutor during the course of a prosecution to an RCMP officer who was the Officer-in-Charge, regarding the prosecution.

In *R. v. Campbell* [(1999), 171 D.L.R. (4th) 193], the Supreme Court of Canada considered the relationship between counsel with the federal Department of Justice and an RCMP officer. The Court adopted a functional definition of the solicitor-client relationship and found that this one fell squarely within it. In my view, the relationship between the Ministry's prosecutor and the RCMP officer in the case before me is similar, and I am satisfied that whether or not it meets the functional definition of a solicitor-client relationship, there is an inherent element of confidentiality that supports the "zone of privacy."

Applying the reasoning in *Big Canoe* to the effect that termination of litigation does not end statutory litigation privilege under Branch 2, I find that the record was prepared "by or for Crown counsel for use in litigation." This statutory privilege belongs to the Crown, in this case represented by the Ministry.

However, this does not end the matter. The appellant submits that privilege in the record has been waived. In support of this position, the appellant relies on the fact that the record was given to the RCMP. The appellant states that the record was then circulated by the RCMP by means of a fax into open offices with numerous employees at Public Works Government Services Canada (PWGSC), a department of the federal government.

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

The Ministry states that it is not aware of any actions on its part that would constitute waiver. It submits that disclosure by the Crown to the RCMP does not constitute waiver. On the facts before me, I find that the Crown did not waive its privilege in the record. I have already concluded that the RCMP officer was within the "zone of privacy" contemplated by common law litigation privilege. Communications within the zone of privacy do not result in waiver of this type of privilege. On that basis, I have concluded that sending the letter to the RCMP officer

also does not constitute waiver of the Crown's statutory litigation privilege. In addition, I find that the re-transmission of the letter by the RCMP to PWGSC does not amount to waiver of the Crown's privilege, in the absence of any indication that the Crown was aware of or authorized this transmission. On the material before me, including the representations of the parties, it has not been shown that the Crown "voluntarily [evinced] an intention to waive the privilege" as discussed in *S & K Processors Ltd.*, above.

In conclusion, I find that the record is covered by the statutory litigation privilege in section 19, and that the privilege has not been waived. The record is therefore exempt under section 19.

Given my finding that section 19 is applicable and can be relied upon by the Ministry to deny access to the record, I am not required to deal with the Ministry's application of section 21 to one line of the record.

ORDER:

I uphold the decision of the Ministry.

Original signed by: December 29, 2005
Brian Beamish
Assistant Commissioner