Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-2995

Appeal PA09-73-2

Ministry of the Environment

September 21, 2011

Summary: The appellant sought access to legal opinion that had been obtained by a third party who subsequently provided it to legal counsel representing the Ministry of Energy and Infrastructure. It was later shared with legal counsel representing the Ministry of Environment to whom the access request was directed. The Ministry of Environment denied access under section 19, claiming that the legal opinion contains solicitor-client privileged information. The third party claims that the legal opinion contains third party information under section 17(1). The Ministry of Environment's decision to withhold the record under section 19(a) is upheld and the appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as am., ss.17(1), 19

Cases Considered: *Canada v. Central Cartage Co (1987)* 10 F.T.R. 225 (T.D.) aff'd without mention of this point (1990), 35 F.T.R. 1670 (C.A.) leave to appeal to SCC refused (1991), 126 N.R. 366; *Stevens v. Canada (Prime Minister)* (1997) 2 F.C. 759 (T.D.); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

OVERVIEW:

[1] A community organization (the appellant) requested records from the Ministry of the Environment (the ministry or MOE) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) relating to a wind installation project. The wind installment project is operated and was developed by a third party company (the third party or proponent).

[2] Initially, the ministry issued a preliminary access decision, accompanied with a fee estimate and denial of fee waiver. The ministry and requester worked together to clarify and narrow the scope of appeal and the ministry issued a final access decision requesting a significantly lower fee. As a result, the requester no longer sought a fee waiver.

[3] At the same time, the ministry notified the third party under section 28 of the *Act* and received representations detailing the third party's position that the records were subject to the third party information (section 17(1)) and solicitor-client privilege (section 19) exemptions. After considering the third party's representations, the ministry issued a decision letter to the requester granting it full access to the responsive records. The ministry, however, revised its access decision after receiving and considering requests to reconsider from the Ministry of Energy and Infrastructure (MEI) and the third party.

[4] The ministry's revised decision denied the requester access to a number of records under sections 17(1) and 19, and in addition, the ministry claimed section 13(1) (advice and recommendations), 21(1) (personal privacy) and 22 (publicly available) for some of the records. The appellant subsequently filed an appeal of the ministry's decision with this office.

[5] During mediation, the scope of the appeal was narrowed to one record - a letter, dated August 30, 2007. The ministry only relies on section 19 for this record. The third party advised the mediator that the record also qualifies for exemption under section 17(1)(third party information).

[6] Accordingly, the scope of the appeal was narrowed to the application of the exemptions in sections 17(1) and 19 to the record at issue. The possible application of sections 13(1), 21(1) and 22 are no longer at issue in this appeal.

[7] During the inquiry into this appeal, representations were provided by the ministry, the third party and the appellant. The representations were shared in accordance with Section 7 of the IPC's Code of Procedure and Practice Direction 7. The appeal file was then transferred to me to issue a decision.

[8] In its sur-reply representations, the appellant questions whether the third party should be allowed to rely on the third party information exemption given that the third party did not file a Notice of Appeal to this office within 30 days of receiving the ministry's revised decision. If the ministry had decided not to claim any exemptions at all, and to grant access to the record, and had so advised the third party, then a third party appeal would have been required. But that is not what occurred in this case. Rather, the ministry decided to withhold the record under section 19. The third party was given notice of the appeal by this office, and takes the position that the mandatory

exemption in section 17(1) of the *Act* also applies. In such a situation, because of the mandatory nature of section 17(1), the proper approach is to consider its possible application as part of the inquiry process. In addition, there is no unfairness in this process, as the appellant was given the opportunity to provide representations with respect to both section 17(1) and 19.

[9] The appellant also raised the possible application of the public interest override to the record (section 23 of the *Act*). However, since this office's receipt of the parties' representations on this issue the Supreme Court of Canada released its decision in *Ontario (Public Safety and Security) v Criminal Lawyers' Association*[1]. In that decision, the court decided not to read in section 19 in the wording of section 23 (public interest override). As a result, section 19 is not subject to the public interest override.

[10] In this order, I reach the following conclusions:

- the record constitutes part of the working papers of Crown Counsel and thus falls within the ambit of solicitor-client communication privilege;
- the privilege attached to the record has not been waived; and
- the ministry properly exercised its discretion in withholding the record.

RECORD:

[11] The only record at issue is a letter from a law firm to the third party, dated August 30, 2007 (6 pages)

ISSUES:

A. Does the record contain solicitor-client privileged information?
B. If the record contains solicitor-client privileged information, did the ministry properly exercise its discretion in denying access to the record?
C. Does the record contain third party information?
D. If the record contains third party information, is there a compelling public interest in its disclosure?

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Does the discretionary exemption at section 19 apply to the records?

[1] [2010] SCJ No. 23

[12] Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[13] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies.

[14] In the circumstances of this appeal, the ministry claims that both branches 1 and 2 apply.

Branch 1: common law privilege

[15] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of 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.[2] In this case, it is only necessary to consider the solicitor-client communication privilege aspect of branch 1.

Solicitor-client communication privilege

[16] 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.)].

[17] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[18] The privilege applies to "a continuum of communications" between a solicitor and client:

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[2] [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

> . . . 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.)].

[19] 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].

[20] 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.)].

[21] In support of its position that the record qualifies for exemption under section 19, the ministry states:

> In 2007, MEI worked with the [wind installer project] developer on its wind farm proposal. In the course of the ministry's review, a legal issue was identified by MEI that required an assessment and decision in order for the project to proceed. MEI sought the advice of its legal counsel on this question.
>
> In the course of seeking advice on the issue, counsel identified that the answer to the question potentially affected both the Crown and proponent responsibilities in relation to the project.
>
> At the direction of the MEI client, [MEI] counsel engaged in a confidential consultation with the proponent and requested that the proponent provide him with a legal opinion on the legal question, setting out the proponent's position on the issue.

[22] In support of its position that the record forms part of MEI's counsel's working papers, the ministry advises that upon MEI's counsel's receipt of the legal opinion, he "reviewed the opinion and used it, along with other legal advice and information available to MEI, to formulate and provide legal advice to his ministry client". Attached to the confidential portions of the ministry's representations was a letter from the MEI counsel who requested that the third party obtain the legal opinion at issue.

[23] The appellant does not dispute that, during the project's consultative process, a legal question arose and MEI requested that the third party obtain a legal opinion. However, the appellant questions whether the record falls within the ambit of solicitor-

client communication privilege having regard to the fact that the legal opinion was prepared by the third party's lawyer and subsequently provided to the ministry.

[24] In particular, the appellant argues that any privilege that may have been attached to the record was waived when a copy of it was provided to the MEI and ministry. Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[3]

[25] The appellant also argues that the record does not contain solicitor-client privileged information as the ministry was "neither the solicitor or client connected to the document." The appellant also argues that the ministry failed to "provide evidence or argument to indicate how the [r]ecord became privileged in the hands of the MEI prior to being shared."

[26] I have carefully reviewed the representations of the parties, MEI counsel's letter and the record itself and I am satisfied that the record forms part of MEI counsel's working papers directly related to seeking, formulating or giving legal advice. Though MEI was neither the solicitor or client identified on the record, I am satisfied that the legal opinion was provided to MEI counsel on a confidential basis to assist him with providing advice to MEI.

[27] Having regard to the above, I find that the record falls within the ambit of solicitor-client communication privilege under Branch 1, subject to my finding, below, as to whether the privilege has been waived.

[28] The appellant provided lengthy representations on the issue of whether the third party waived its claim to privilege when it disclosed the legal opinion to MEI. In support of its position, the appellant argues that the third party and the ministries cannot share a common interest given the context of the environmental assessment and approvals systems in place in Ontario.

[29] However, my finding, above, that the record is privileged (subject to the waiver analysis) does not arise from the solicitor-client relationship of the third party and its lawyer. Rather, it arises from the fact that the record constitutes part of the working papers of Crown counsel that related to the provision of legal advice to the Crown. In that situation, no common interest with the third party is required in order to find that the record is privileged in the hands of the ministry, which is a client of Crown counsel.

[30] Accordingly, the issue I must determine is whether MEI did anything that could be construed as a waiver of privilege once the record was in its hands.

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[3] 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.).

[31] 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.)].

[32] Disclosure to outsiders of privileged information normally constitutes a waiver of privilege. Waiver has been found to apply where, for example:

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]
- the communication is made to an opposing party in litigation [Orders MO-1514 and MO-2396-F]
- the document records a communication made in open court [Orders P-1551 and MO-2006-F].

[33] The ministry's representations address the issue of waiver as follows:

> In the present case, the legal opinion was prepared for Crown counsel to assist in his provision of legal advice to the Crown. The fact that the opinion was shared between ministries in the context of Crown Counsel providing legal advice does not waive the Crown's privilege because i) the Crown is indivisible as it relates to solicitor-client privilege, ii) the communication of the legal opinion was confidential and there was no intention to waive privilege in the document.

[34] In support of its position that the Crown is indivisible, the ministry refers to *Canada v. Central Cartage Co (1987)*[4] which stands for the proposition that when it comes to solicitor client privilege one cannot parse the various branches of government. In that case, Justice Reed states:

> The Attorney General and those working for him as legal advisors are solicitors for the purposes of advising the executive branch of the government of Canada. Since the Minister of Justice is ex officio the Attorney General (see section 3 of the Department of Justice Act) one

[4] 10 F.T.R. 225 (T.D.) aff'd without mention of this point (1990), 35 F.T.R. 1670 (C.A.) leave to appeal to SCC refused (1991), 126 N.R. 366.

> usually finds these persons referred to as legal advisors who are members of the Department of Justice. Also included, of course, would be anyone hired on contract to provide legal advice or services or someone doing so voluntarily even though such person might not officially be a member of the Department of Justice. The client in its broadest sense is the executive branch of the government of Canada. At the apex is the Governor in Council including more particularly the Minister of Industry, Trade and Commerce. Entities such as the Foreign Investment Review Agency and the Interdepartmental Committee on International Bridges are branches of the client. One cannot parse the various branches or governmental entities so that legal advice given, for example, to the Department of Transport by someone whose usual position is providing legal advice to the Foreign Investment Review Agency is somehow less confidential because it is being given to the Department of Transport rather than to the Foreign Investment Review Agency itself.

[35] The ministry also refers to *Stevens v. Canada (Prime Minister)* (1997) 2 F.C. 759 (T.D.) which states:

> In general, with respect to solicitor-client privilege as between government institutions, "[t]he release of privileged information by one institution to another would not normally constitute a waiver as this action is internal to the government, the ultimate beneficiary of the privilege" see: McNairn and Woodbury, Government Information: Access and Privacy (Scarborough, Ont.: Carswell, 1992) at page 3-36.

[36] The appellant's representations did not address this issue specifically.

[37] I accept the Ministry's submission that the Crown, as a client, is indivisible and, as a result, find that the privilege attaching to the record did not cease when a copy was provided to the ministry.

[38] In addition, there is no evidence that counsel for MEI disclosed the record to anyone outside MEI other than Crown counsel representing the ministry, or that counsel for MEI or the ministry ever disclosed it to anyone other than internal staff whom they were advising. Having regard to the actual content of the record, I am also satisfied that counsel for MEI and the ministry served the same client – the Crown. Therefore I conclude that neither the action of counsel for MEI sharing the record with counsel for the ministry, nor the action of Crown counsel sharing the record with internal staff members, would constitute waiver of privilege.

[39] Accordingly, I conclude that the record is subject to common law solicitor-client communication privilege, and that this privilege has not been waived. I therefore find that the record is exempt under section 19(a) of the *Act*.

[40] Under the circumstances, it is not necessary for me to also consider whether branch 1 litigation privilege or either of the branch 2 privileges would apply.

EXERCISE OF DISCRETION

[41] The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[42] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[43] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[44] The parties were not invited to provide representations specifically addressing the exercise of discretion issue. However, in my view, the ministry's representations in support of the application of the section 19 exemption reflect the manner in which discretion was exercised. Having regard to the ministry's representations, I am satisfied that the ministry properly exercised its discretion and in doing so took into account relevant considerations such as the confidential nature of the information at issue and the significance and sensitivity attached to it. I am also satisfied that the ministry did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into consideration irrelevant considerations.

[45] I also note that, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court remitted the appeal back to the Commissioner to examine the institution's exercise of discretion under the section 14 law enforcement exemption, but did not remit the Ministry's exercise of discretion under section 19. The Court explained its different approach to section 19 as follows:

> We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see

how these records could have been disclosed. Indeed, Major J., speaking for this Court in McClure, stressed the categorical nature of the privilege:

> . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, *and does not involve a balancing of interests on a case-by-case basis*. [Emphasis added; para. 35.]

[46] Given that I have found that the legal opinion is a privileged communication, and the purpose of the solicitor-client communication privilege is to protect such communications, I find that the ministry properly exercised its discretion in the circumstances of this appeal.

[47] Having reached this conclusion, it is not necessary to deal with issue C or D.

ORDER:

I uphold the ministry's decision and dismiss this appeal.

Original Signed By: September 21, 2011
Jennifer James
Adjudicator