

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3728

Appeal PA16-76

Ministry of Natural Resources and Forestry

April 28, 2017

Summary: A request was submitted to the Ministry of Natural Resources and Forestry for records relating to a specific incident. The ministry provided access to some of the records and denied access to two records, citing the discretionary exemption at section 19 (solicitor-client privilege). In this order, the adjudicator upholds the ministry's application of the exemption to the records and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 19(a).

BACKGROUND:

[1] A request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) was submitted to the Ministry of Natural Resources and Forestry (the ministry) for records related to:

1. The washout of the culverts beneath the Redditt Road in the Township of Redditt, in the District of Algoma, which occurred on or about the 17th day of June 2010 including any findings relating to the cause of this washout, the cost of the repairs of the culvert and where the responsibilities for the repairs rested;
2. The break-up of a beaver dam along with the tributary leading to the Redditt Road which occurred in or about June 2010;

3. Applications made in regard to the installation of culverts on the English River Road, previous to the 27th day of June, 2010 together with all permits granted, all documentation submitted in support of the Application, any analysis or report prepared in regard to the said application to install culverts including any engineering reports;
4. Any and all public notices provided in regards to the Application to install culverts on the English River Road;
5. Any permits provided by [the ministry] for installing culverts along the English River Road;
6. Any analysis performed by [the ministry] in regard to the installation of the said culverts along the English River Road;
7. Any documentation or reports in regards to any work performed on the street at Kilometer 30.8 on the English River Road.

Time Period: June 01, 2009 to December 12, 2012

[2] The ministry conducted a search for responsive records and, following third party notification and receipt of the requester's fee, the ministry issued a final access and fee decision which granted full or partial access to some of the responsive records. The ministry withheld access to some responsive records pursuant to sections 13 and 19 of the *Act*, in accordance with an index of records provided by the ministry.

[3] The requester (now the appellant) appealed the ministry's decision to this office and a mediator was assigned to the appeal.

[4] During the mediation process, the appellant confirmed that the fees already paid to the ministry are not at issue in this appeal. The appellant advised that he wishes to continue to pursue access to two records that have been withheld either in full or in part (identified below). Therefore, the remaining withheld records on the index of records are no longer at issue.

[5] As mediation did not resolve the dispute, this appeal was transferred to adjudication. I sought and received representations from the parties that were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

[6] In this order, I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[7] The records at issue involve emails and attachments at:

- A0266492, pages 11 to 17
- A0266501, pages 62 to 69

ISSUES:

- A. Does the discretionary exemption at section 19 apply to the records?
- B. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[8] According to the ministry's index of records, it claimed the discretionary exemption under section 13 to withhold pages 62 to 69 of A0266501 and also claimed the discretionary exemption under section 19 to withhold pages 64 to 69 of this same record. However, upon receipt of its representations, it was clear that the ministry was no longer claiming that section 13 applied to this record and instead relied on section 19 to continue to withhold all of pages 62 to 69. The appellant addressed this in their representations stating, incorrectly, that the ministry relied on section 13 and not section 19 to withhold the entire record. The appellant submits that the ministry relied on an incorrect legislative provision in attempting to withhold the document and suggests that this calls into question the true reason for the non-disclosure. However, as highlighted above, the ministry claimed the section 13 and 19 exemptions in relation to pages 64 to 69 of the record and only relied on section 13 alone for pages 62 and 63.

[9] I find that the ministry is able to rely on this exemption in relation to these two pages at the adjudication stage. I note that the email contained on pages 62 and 63 is the duplicate email found in record A0266492 for which the ministry only claimed the section 19 exemption. Furthermore, even though pages 62 and 63 were originally withheld under section 13, and even though the ministry raised the section 19 exemption late in relation to these two pages, I find that this did not result in any delays to the adjudication process that have unduly prejudiced the appellant. Accordingly, on my review of the circumstances in this appeal, I am satisfied that the integrity of the adjudication process will not be compromised if I permit the ministry to rely on the application of the discretionary exemption under section 19 to pages 62 and 63 of A0266501.

[10] 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 or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[11] Section 19 contains two branches. Branch 1 (“subject to solicitor-client privilege”) is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[12] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[13] 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.¹ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.² The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.³

[14] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.⁴

[15] 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.⁵ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁶

¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

² Orders PO-2441, MO-2166 and MO-1925.

³ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁴ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁶ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

Litigation privilege

[16] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need 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.⁷ Litigation privilege protects a lawyer’s work product and covers material going beyond solicitor-client communications.⁸ It does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.⁹ The litigation must be ongoing or reasonably contemplated.¹⁰

Parties’ representations

[17] In its representations, the ministry confirms that it is claiming solicitor-client communication privilege under Branch 1 for the withheld records.

[18] The ministry notes that A0266492 contains an email communication between an area supervisor and the adjusters [a specified company] acting on behalf of the Ministry of Transportation (the MTO) where the adjuster is requesting information concerning the culverts on English River Road. The ministry noted that the responses were copied to counsel at Legal Services Branch and the MTO.

[19] With regard to A0266501, the ministry notes that this is an email communication between district office staff and the specified adjusting company with questions concerning the culverts. It was noted that legal counsel was copied on all of these emails.

[20] The ministry notes that a specified law firm represented the MTO in respect of a court action concerning the washout and a specified lawyer from the Legal Services Branch was involved in the carriage of the file on behalf of the ministry. It is the latter of the two that was copied on the emails.

[21] The ministry refers to the Supreme Court of Canada decision *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*¹¹, where the court stressed the importance and scope of such privilege noting that “[s]olicitor-client privilege is fundamental to the proper functioning of our legal system,” and *R. v. McClure*¹² where

⁷ *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).

⁸ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

⁹ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

¹⁰ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

¹¹ [2008] S.C.J. No. 45.

¹² [2001] 1 S.C.R. 445.

it held that “[s]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance.” The ministry states that it is in the public interest that the free flow of legal advice be encouraged as without it, access to justice and the quality of justice in this country would be severely compromised.

[22] Speaking to the scope of the privilege, the ministry refers to the decision in *Balabel v. Air India*¹³ where Lord Taylor, when commenting on privilege being extended to non-litigious business, stated:

. . . the test is whether the communication or other 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 communication 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.

[23] The ministry states that accordingly, facts may also be subject to solicitor-client privilege, if they are part of a communication that satisfies the criteria for the privilege. Therefore, it submits, to the extent that factual information was provided to legal counsel for the purpose of providing counsel with the necessary facts upon which to apply the law and provide legal advice, the facts will fall within the scope of solicitor-client privilege.

[24] The ministry stated that it applied the above reasoning to the records at issue noting that the documents constitute communications involving legal counsel and the client and accordingly the two documents fall within the scope of solicitor-client privilege and section 19 of the *Act*.

[25] In its representations, the appellant stated that pages 15 and 16 of A0266492

¹³ [1988] 2 W.L.R. 1036 (Eng.C.A.)

were withheld despite the fact that the records in question pre-date the date of the referenced cause of action. The appellant states that any document pre-dating the accident could not be privileged with respect to the litigation now before the courts.

[26] The appellant states that the action of copying legal counsel on emails, in and of itself would not be sufficient in creating the necessary privilege over said document. Forwarding a document to legal counsel, especially a document created prior to any cause of action, does not create a solicitor-client privilege, nor a litigation-privilege pursuant to section 19 of the *Act*. The appellant refers to Order MO-3330 where Adjudicator Diane Smith held that simply copying legal counsel on an e-mail is not sufficient to create a privilege over the document being forwarded. In referring to MO-3330, the appellant notes that the purpose of the solicitor-client exemption is to restrict the disclosure of legal advice sought and to ensure the free passage of information between the client and the solicitor. Further, the information must be used to "obtain legal advice" and not simply for "informational purposes".

[27] The appellant submits that, barring an implicit acknowledgement of liability prior to the date of the referenced cause of action, the ministry could not have been obtaining legal advice on the referenced cause of action prior to the date the referenced cause of action arose.

[28] The appellant concludes that without the benefit of documents which pre-date the accident, it will not have full disclosure of the relevant and public documents in this litigation. The appellant states that it believes that the ministry is simply attempting to withhold these documents after the fact without legal authority. The appellant states that the ministry cannot shield itself from liability by improperly relying on the *Act*.

Analysis and finding

[29] Record A0266492 (pages 11 to 17) is identified by the ministry as an email communication (with attachments) between the area supervisor and [a specified adjusting company] who had specific questions about the culverts on the English River Road. As noted by the ministry, the responses were forwarded to legal counsel at Legal Services Branch.

[30] I have examined this record and note that it is an email from the area supervisor to counsel for the ministry attaching an earlier email with questions from the specified adjusting company. The area supervisor had input his responses to the questions and copied the email to counsel. I note that the original email from the adjuster, which as stated was attached to the email, was also copied to the same ministry counsel when it was originally sent. I am satisfied that solicitor-client privilege attaches to this record. Although the record does not contain actual legal advice, I find that it consists of 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. This is clearly solicitor-client communication as it speaks to a statement of claim that

had been served on the ministry with specific legal questions for the ministry lawyer. I am satisfied that this record forms part of the continuum of communications aimed at keeping both legal counsel and the client informed so that advice may be sought and given as required. Accordingly, I find that the withheld portions of A0266492 qualify for exemption under Branch 1 of section 19.

[31] With regard to pages 15 and 16 of this record which the appellant argues should be disclosed since they predate the cause of action, these were included as attachments to the email mentioned above. I find that within the context of this record, the attachments form a part of the lawyers' working papers and the section 19 exemption applies.

[32] Record A0266501 (pages 62 to 69) is identified by the ministry as an email communication (with attachments) between district office staff and [a specified adjusting company] discussing further questions of the adjusters concerning the culverts. The ministry claimed section 19 in respect of this record noting that legal counsel was copied on all of these emails.

[33] I have examined this record and note that it is an email chain that originates from the same area supervisor, sent to the specified adjusting company and copied to counsel. In fact, the first email in the chain is a duplicate of the email that is found in record A0266492, being questions from the adjuster with the area supervisor's comments input into the email. The chain continues with the adjuster thanking the area supervisor for his responses with further questions. The chain of emails continues for two more emails, all of which counsel for the ministry is copied on. As mentioned when commenting on the earlier record, the content of the original email from the adjuster concerns a statement of claim that the ministry has been served with.

[34] I find that the information is clearly confidential solicitor-client communication as it speaks to a statement of claim that had been served on the ministry with specific legal questions for the ministry lawyer. I am satisfied that this record forms part of the continuum of communications aimed at keeping both legal counsel and the client informed so that advice may be sought and given as required. Accordingly, I find that A0266501 qualifies for exemption under Branch 1 of section 19.

[35] In summary, I find that there has not been a waiver of solicitor-client privilege in relation to the records at issue subject to my consideration on the exercise of discretion below.

B: Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[36] 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.

[37] 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.

[38] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁴ This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[39] In its representations, the ministry states that in considering its discretion to exempt the records, it attempted to balance the purpose of the section 19 exemption and all other relevant interests and considerations, on the basis of the facts and circumstances of this particular case. The ministry notes that in the first instance, the head determined whether the exemption applied and then having regard to all relevant interests, including the public interest in disclosure, the head concluded that disclosure should not be made. The ministry notes that in this case, the interest in disclosure was of a private nature, i.e. advancing a legal claim against the ministry, rather than a broader public interest of holding the ministry to greater scrutiny on public issues. In addition, the ministry notes that one of the purposes of the exemption is to protect the Crown from having its legal interests undermined in a litigation context by disclosure of communication to legal counsel or disclosure of information provided to legal counsel to be used in the provision of legal services or advice. The ministry confirms that to the extent possible, it severed records in order to allow for whatever public interest there was in disclosure.

[40] Having regard to the circumstances of this appeal and the parties' representations, I am satisfied that the ministry considered a number of relevant factors when determining whether to disclose the records to the appellant, that it did not take into account irrelevant considerations or fail to take into account relevant considerations. I note that the ministry withheld only portions of the records and disclosed a number of records responsive to the appellant's request.

[41] As a result, I am satisfied that the ministry properly exercised its discretion to apply section 19 to the records and I uphold the ministry's decision that the records qualify for exemption under section 19 of the *Act*.

¹⁴ Order MO-1573.

ORDER:

The appeal is dismissed.

Original Signed by: _____

Alec Fadel
Adjudicator

_____ April 28, 2017