COURT FILE NO.: 527/02
DATE: May 3, 2004

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

FERRIER, SWINTON AND LINHARES de SOUSA JJ.

B E T W E E N:	)	
	)	
MINISTRY OF COMMUNITY AND SOCIAL SERVICES	)	Anita Lyon, for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
	)	
LAUREL CROPLEY, ADJUDICATOR, and JOHN DOE, REQUESTER	)	John Higgins and William S. Challis, for the Respondent
	)	
Respondents	)	
	)	
	)	**HEARD AT TORONTO:** March 24, 2004

LINHARES de SOUSA J.:

INTRODUCTION

[1] This is an application brought by the Ministry of Community and Social Services ("Ministry") for judicial review of Order PO-2034 issued by the Information and Privacy Commissioner, and, more particularly, Adjudicator Laurel Cropley (Commissioner), dated August 21, 2002, made under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, (*FIPPA*). Under that order, the Commissioner required full disclosure of documents requested by John Doe (Requester) after finding that the exemptions claimed by the Ministry under *FIPPA* did not apply. The Ministry had sought exemptions from disclosure under ss. 13(1), 14(1)(c), 18(1)(e) and 19 of *FIPPA*. These sections read as follows:

> 13(1) 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.
> . . .
>
> 14(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
> . . .
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> . . .
>
> 18(1) A head may refuse to disclose a record that contains,
> . . .
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
> . . .
>
> 19. 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.

[2] The Ministry seeks an order quashing the order of the Commissioner and upholding the decision of the Ministry to withhold the disclosure of the records in question.

[3] The documents that are the subject of dispute came before this court under seal by order of Carnwath J., dated November 12, 2002, and have been examined by this court during its deliberations. The source and general subject matter of the documents were not disputed by the parties. All of them deal with s. 41 default hearings under the *Family Responsibility and Support Arrears Enforcement Act*, 1996, S.O. 1996, c. 31 (*FRSAEA*), one of the legal proceedings available to the Director of the Family Responsibility Office (Director) in fulfilling its mandate under *FRSAEA* as stated in s. 5(1) of *FRSAEA*:

> 5(1) It is the duty of the Director to enforce support orders where the support order and the related support deduction order, if any, are filed in the Director's office and to pay the amounts collected to the person to whom they are owed.

[4] The documents are described and categorized in para. 13 of the Ministry's Factum. A group of these documents were created by in-house counsel of the Family Responsibility Office at the request of the Director, for the Director and the Director's enforcement officers. Generally, they deal with how and when default proceedings should be commenced and how to proceed with the default proceedings. Some of these documents come from a Policy and Procedures Manual. Others are

entitled "Default Hearings, Prepared for CSA/CSC", with the CSA, the Client Services Associates, and the CSC, the Client Services Clerks.

[5] The other group of documents was also created by in-house counsel of the Family Responsibility Office at the request of the Director to communicate, at training sessions and otherwise, the Director's instructions to panel lawyers who are retained to act for the Director concerning the handling of s. 41 default hearings. The evidence indicated that there are approximately 100 of these panel lawyers across the province of Ontario that appear in local courts on s. 41 default hearings in specific cases as agents of the Director. Some of these documents come from a record entitled *Manual for Counsel Representing the Director of the Family Responsibility Office*. The rest of the documents come from a record with a cover sheet entitled, *Family Responsibility Office Panel Lawyers Training Sessions, Fall 2000*.

[6] After hearing the submissions of the Ministry with respect to its claimed exemptions, the court requested argument from the Commissioner with respect to only two of them, namely, the exemptions claimed by the Ministry pursuant to ss. 18(1)(e) and 19 of *FIPPA*.

STANDARD OF REVIEW

[7] The appropriate standard of review of the Commissioner's decisions to be used by this court is dependent on the nature of the question. For those issues that come within the unique range of the expertise of the Commissioner, namely, balancing the need for access to information against the right to protection of privacy, the courts will bestow a "high degree of curial deference", although there is no privative clause found in *FIPPA*. In these instances, the appropriate standard of review is that of reasonableness. (See *Right to Life Assn. of Toronto and Area v. Metropolitan Toronto District Health Commission*, [1991] O.J. No. 2129, 86 D.L.R. (4th) 441 (Div. Ct.), and *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767, [1993] O.J. No. 1527 (Div. Ct.).)

[8] An unreasonable decision is one that is "irrational", "not in accordance with reason" or "not supported by any reasons that can stand up to a somewhat probing examination". (See *Canada (Director of Investigation and Research) v. Southam Inc.* (1996), [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1.)

[9] The Divisional Court has applied the reasonableness standard of review to the Commissioner's determinations under ss. 13, 14 and 18 of the *FIPPA*, based on the expertise of the Commissioner. (See *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2003), 66 O.R. (3d) 692, [2003] O.J. No. 3522 (Div. Ct.), leave to appeal granted (January 30, 2004) Doc. M30291 (C.A.); *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224, 181 O.A.C. 171 (Div. Ct.), leave to appeal applied for, Doc. M30912 (C.A.); *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395, [1999] O.J. No. 4560 (C.A.); *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163, 181 O.A.C. 251 (Div. Ct.), leave to appeal applied for, Docs. M30913 and M30914 (C.A.)).

[10] Where the Commissioner deals with questions that go to its jurisdiction or questions of law, then the standard of review is that of correctness. In these instances, there is reduced deference as the Commissioner is in no better a position to deal with the matter than a court of law. The interpretation and application of s. 19 of *FIPPA* is one such area because it relates to questions of common law and statutory solicitor-client privilege and litigation privilege. On these kinds of questions, the relative expertise of the court is overwhelming. (See *Ontario (Attorney General) v. Big Canoe* (2002), 220 D.L.R. (4th) 467 (C.A.), leave to appeal dismissed, [2003] S.C.C.A. No. 31 (May 15, 2003), S.C.C. 29572; Ontario *(Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, [2003] B.C.J. No. 1093, 226 D.L.R. (4th) 20 (C.A.)).

[11] On questions of fact, the Commissioner continues to be entitled to curial deference. (See *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, 99 D.L.R. (3d) 385). However, in this case, all of the Commissioner's conclusions of fact were based on the parties' written and oral submissions and on the Commissioner's own examination of the documents in question. The Commissioner has no greater expertise than this court in determining whether the documents in issue are privileged.

DISPOSITION WITH RESPECT TO EXEMPTIONS CLAIMED PURSUANT TO SECTIONS 13, 14 AND 18

[12] With respect to the exemptions claimed pursuant to ss. 13, 14 and 18 of *FIPPA*, after examining the reasons of the Commissioner and the documents in question; after hearing the arguments of counsel; and, after applying the appropriate standard of review, this court is of the view that the Commissioner's decision is reasonable and there is no basis for quashing the decision.

THE DECISION OF THE COMMISSIONER ON THE SECTION 19 EXEMPTION CLAIM

SOLICITOR-CLIENT PRIVILEGE

[13] In the Commissioner's reasons, she accepts the description and source of the documents in question as described in paras. 4 and 5 of those reasons. She goes on to state as follows:

> . . . I accept that the records were prepared by legal counsel for the Director, and that during their preparation, any communications between the Director and/or her staff and/ or agents with respect to the interpretation of the relevant sections of the *FRSAEA*, and the content of the procedures and guidelines may well have attracted privilege. However, once the document was completed, its purpose was not to communicate advice from legal counsel to the Director and her staff and agents, but rather, to be then used by her in overseeing the procedures to be followed by staff in applying and enforcing the legislation. I am not persuaded that simply because these records pertain to one specific section of the *FRSAEA* that they pertain to a "particular legal context" in the requisite sense. These are guidelines, procedures and instructions for "general application" in the default hearing process under section 41 of the *FRSAEA* as opposed to being in relation to a particular proceeding on which

> legal advice is sought or given. Accordingly, I find that the records are not exempt under the solicitor-client communication privilege aspect of the section 19 exemption.

[14] Hence, for the Commissioner, any communications between the Director and her staff and legal counsel during the preparation of the records by legal counsel for the Director may be subject to privilege. However, once the records or documents were completed and became used by the Director to direct the procedures to be followed both by her enforcement staff and panel lawyers and to instruct those individuals in their enforcement work under s. 41 of the *FRSAEA*, no such privilege remained. The documents then, in the view of the Commissioner, became guidelines, procedures and instructions for "general application" in the default hearing process under s. 41 of the *FRSAEA*. As such, in the opinion of the Commissioner, the documents lacked a "particular legal context" or the quality of relation to a "particular proceeding" necessary to qualify for solicitor-client privilege. As the Commissioner said earlier in her reasons (see p. 24), to exempt training and instructional records designed for general application would frustrate the legislative intent reflected in ss. 33(1)(b) and 35(2) of *FIPPA* which read as follows:

> 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. R.S.O. 1990, c. F.31, s. 33(1).
> . . .
>
> 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. R.S.O. 1990, c. F.31, s. 35(2).

[15] The Commissioner concluded that the documents in question were similar types of records as those found in the decision of former Adjudicator Nipp in Order PO-1928.

ANALYSIS

[16] In our view, the Commissioner appears to have put too much emphasis on the fact that these documents were entitled manuals and were to be directives and guidelines for the Director's agents. Even though s. 33(1) of *FIPPA* does not exempt from disclosure "manuals, directives or guidelines" of general application prepared by an institution for its officers, s. 33(2) of *FIPPA* recognizes that even in the case of these "manuals, directives or guidelines" of general application, exemptions from disclosure can still be claimed if it can be otherwise justified under the statute or in law:

> 33(2) A head may delete from a document made available under subsection (1) any record or part of a record which the head would be entitled to refuse to disclose where the head includes in the document,

(a) a statement of the fact that a deletion has been made;
(b) a brief statement of the nature of the record which has been deleted; and
(c) a reference to the provision of this Act on which the head relies.

[17] After examining the decision of the Commissioner and the jurisprudence dealing with the legal principle of solicitor-client privilege, this court is of the view that the Commissioner erred in her interpretation of the common law principle of solicitor-client privilege. Specifically, she erred in finding that the documents, in order to be exempt under the common law solicitor-client privilege, must relate to particular proceedings, or a "particular legal context" and that the records in question, records pertaining to s. 41 of the *FRSAEA* did not have a "particular legal context" in the requisite sense so as to enjoy the exemption. In coming to that conclusion, she applied an incorrect legal test in considering the documents in question. For this reason the Commissioner's decision with respect to the s. 19 exemption cannot stand.

[18] At p. 24 of her reasons, the Commissioner discusses the various parts of s. 19 of *FIPPA*. She correctly states:

> 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].

[19] In its comparative examination of solicitor-client privilege and litigation privilege, the Divisional Court in *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer), supra*, confirmed the essential elements of common law solicitor-client privilege:

> 1. Confidential communication between the client and his solicitor.
>
> 2. The seeking of legal advice from the solicitor by the client, whether or not litigation is involved.

[20] On appeal, the Ontario Court of Appeal went on to state at p. 172 O.R., p. 473 D.L.R., that

> ...Solicitor-and-client privilege protects confidential matters between client and solicitor forever. Litigation privilege protects a lawyer's work product until the end of the litigation. . . . Solicitor-client privilege for confidential matters does not come to an end.

[21] It is well accepted that solicitor-client privilege protects both written and oral communications. Furthermore, there is no requirement that solicitor-client communications relate to a discrete transaction or particular litigation. (See *Ontario (Attorney General) v. Big Canoe, supra.*)

[22] The legal advice covered by solicitor-client privilege is not confined to a solicitor telling his or her client the law. The type of communication that is protected must be construed as broad in

nature, including advice on what should be done, legally and practically. In *Balabel and Another v. Air India*, [1988] 2 W.L.R. 1036, [1988] 2 All E.R. 246 (C.A.), the English Court of Appeal stated:

> ...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. The negotiations for a lease such as occurred in the present case are only one example. 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] An examination of the records in dispute reveals that the documents were created by legal counsel at the instruction of the Director. Without getting into any specific discussion that would necessarily divulge the contents of the documents, all of the documents include instructions and advice as to how and when s. 41 default proceedings should be commenced and how they are to proceed. Among other things, they include discussions of the statutory requirements of these proceedings and the evidentiary requirements of such cases; they include a discussion of criteria to be considered when deciding to proceed with these types of cases; they include an examination of options to be considered, depending on how the default hearings unfold before the court; and, they include a discussion of how the enforcement officers should interact with the panel lawyers on these matters.

[24] The Commissioner appears to recognize that the communications between the Director and her legal counsel and/ or her staff (all being agents of the Director) may be privileged in the preparation of the documents. We fail to see how that privilege can be lost once the documents are completed. Based on the court's examination of the records, the documents are clearly the product of those confidential communications. In the unique circumstances of this case, the fact that the Director then instructs the in-house counsel to share the documents for the purpose of instructing its enforcement officers and the panel lawyers, all of whom are clearly agents of the Director, in our view, does not change the source of those documents as arising from confidential communications from legal counsel. In essence, through the medium of those documents, the agents of the Director are receiving the instructions of the Director with respect to how s. 41 default proceedings are to be conducted in the name of the Director, as the Director has been so instructed by its legal counsel. There is no basis in law for terminating the solicitor-client privilege on these facts.

[25] We are also of the view that the Commissioner's interpretation and application of the term "particular legal context" cited in the cases on which the Commissioner relied was too narrow. It need not be limited to a single discrete transaction or particular litigation. In this, the Commissioner appears to have been confusing litigation privilege with solicitor-client communication privilege (see

p. 28 of the Commissioner's reasons). While the advice and instructions found in the documents in question can apply to many individual cases brought before the courts by the many agents of the Director throughout the province, all of the cases will be s. 41 default proceedings under *FRSAEA* on which the Director had sought legal advice from her in-house counsel. The s. 41 default proceedings are one of the litigation tools accorded to the Director under the *FRSAEA* in order to fulfill its legislative mandates on which it has sought legal advice. It can, therefore, be considered a "particular legal context" as described in the case of *Balabel and Another v. Air India, supra*.

[26] We have examined the facts of Order PO-1928, decided by Adjudicator Nipp, on which the Commissioner relied. The Commissioner found that Adjudicator Nipp was dealing with similar types of records. We cannot agree. The subject matter of the documents in question in that case was very different. They did not deal with a particular type of litigation. They could not be considered to relate to a particular matter on which legal advice was sought. Rather, they concerned training material prepared by the staff of the Office of the Children's Lawyer to be given to both lawyers and social workers with the help of clinicians, such as a psychologist or psychiatrist. The records in question suggested a course of action for the trainees to follow when interviewing children. They were indeed generic training materials on a non-legal subject. As described earlier, the documents in this case are very different. Contrary to the Commissioner's findings, the conclusions reached in PO-1928 are not similarly applicable in the circumstances of this case.

[27] For these reasons, we conclude that the Commissioner erred in the legal test applied by her to determine whether the documents in question were exempt for reason of solicitor-client privilege. Based on this court's examination of the documents in light of the proper test as discussed earlier, we conclude that the documents are exempt from disclosure on the grounds of common law solicitor-client privilege as provided for in s. 19 of *FIPPA*.

[28] Having come to this conclusion, it is not necessary to consider the other branch of s. 19 of *FIPPA* that is discussed in the reasons of the Commissioner, namely, litigation privilege.

[29] With respect to the part of the decision of the Commissioner as it relates to the s. 19 exemption and requiring the disclosure of all of the remaining records in contention, (see paras. 2 and 3 of the order of Adjudicator Laurel Cropley, dated August 21, 2002) the decision is quashed. It is substituted by an order of this court upholding the Minister's decision to withhold disclosure of the remaining records and part of the records that are in issue. The documents are to remain sealed as ordered by Carnwath J. dated November 12, 2002.

[30] Neither party has requested costs in this matter. There will be no order as to costs.

FERRIER J.
SWINTON J.
LINARES de SOUSA J.

Released: May 3, 2004

COURT FILE NO.: 527/02
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B E T W E E N:

MINISTRY OF COMMUNITY AND SOCIAL SERVICES

Applicant

- and -

LAUREL CROPLEY, ADJUDICATOR, and JOHN DOE, REQUESTER

Respondents

REASONS FOR JUDGMENT

LINHARES de SOUSA J.

Released: May 3, 2004