COURT FILE NO.: 190/02
DATE: March 24, 2004

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

O'DRISCOLL, KEALEY AND SWINTON JJ.

B E T W E E N:	)	
	)	
MINISTRY OF THE ATTORNEY GENERAL	)	*Sara Blake*, for the Applicant
	)	
	)	
Applicant	)	*W.S. Challis* for the Respondent Tom Mitchinson
	)	
- and -	)	
	)	
	)	*No one for Jane Doe*, Requester
TOM MITCHINSON, Assistant Information and Privacy Commissioner and JANE DOE, Requester	)	
	)	
	)	
Respondents	)	**HEARD at Toronto: March 10 & 11, 2004**
	)	

THE COURT:

I. Nature of the Proceedings, Background and Chronology

[1] On November 22, 2000, the requester, a journalist with a daily newspaper, the Hamilton Spectator, filed a request with the Ministry of the Attorney General of Ontario (Ministry), under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31, as amended (the Act) and requested: "All records and correspondence during the last two years about trial delays because of a shortage of judges".

[2] The Ministry disclosed some records but refused to disclose a memorandum written by the Director of Crown Operations, a lawyer. The memorandum dealt with trial delays in criminal proceedings. The Ministry also refused to disclose other documents which are no longer at issue.

[3] The memorandum has three (3) parts:

(1) factual information,

(2) "explanations" as to the probable causes of the situation under review,

(3) recommendations.

[4] The Ministry, by letter, dated June 29, 2001, refused to disclose the memorandum claiming that it was exempt from disclosure under:

> (a) Section 19 of the Act because of a claim that the memorandum is subject to solicitor-client privilege and because it was prepared by Crown counsel for use in giving legal advice or in the contemplation of or for use in litigation,
>
> (b) Section 13 of the Act because of a claim that the memorandum contains "advice and recommendations" of a public servant and did not lend itself to being severed pursuant to the provisions of s. 10 of the Act.

[5] In her letter of July 29, 2001, the requester from the Hamilton Spectator appealed to the Information and Privacy Commission from the Ministry's refusal to disclose the material requested.

[6] On February 28, 2002, the Assistant Commissioner issued Order PO-1994 and ordered disclosure of the disputed memorandum severing out, pursuant to s. 10(2) of the Act, only the lawyer's recommendation and the final sentence of the lawyer's advice and opinion.

[7] In his ten (10) page written reasons, the Assistant Commissioner:

> 1. held that the memorandum was not exempt under s. 19 of the Act (solicitor-client privilege) because he found that the advice was "operational and not legal in nature" (p. 4). Alternatively, even if "some portions of the memorandum constitute legal advice.... such advice would not be the dominant purpose of the communication between the Director and the Attorney General". (p. 5)
>
> 2. held that "the final sentence in the "analysis" portion... and the specific recommendations that follow qualify for exemption under s. 13(l), and the remaining... do not qualify for exemption under this provision" (p. 14).

[8] On March 19-20, 2002, the Ministry launched this application for judicial review seeking an order quashing that portion of Order PO-1994, dated February 28, 2002, which orders disclosure of all or part of the disputed memorandum.

[9] Counsel for the Ministry submits that:

> (a) the Assistant Commissioner incorrectly interpreted s. 19 of the Act as it applies to the memorandum, and
>
> (b) the Assistant Commissioner's interpretation of s. 13 of the Act, as it applies to the memorandum, is unreasonable.

[10] Copies of the memorandum in question, sealed in brown envelopes pursuant to the order of Coo J., dated October 7, 2002, were filed with the Court.

[11] In reading the material prior to the hearing, the facta disclosed that counsel had read the disputed memorandum. At the commencement of the hearing, counsel agreed that the members of the panel should open the sealed envelope and read the disputed memorandum. A brief recess took place during which the members of the Court read the memorandum in dispute.

II. Section 19 of the Act

> 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.

III. Standard of Review

[12] With regard to s. 19 of the Act, counsel agree that the standard of review is one of correctness: *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167, 169-70 (Ont. C.A.) – the "Big Canoe case": leave to appeal to S.C.C. refused on May 15, 2003.

IV. The Memorandum in Dispute

[13] A reading of the three (3) page memorandum discloses that:

(i) the memorandum is written by a senior prosecutor in the criminal law division of the Ministry on the subject of litigation strategy in proceedings in which the Attorney General of Ontario conducts prosecutions on behalf of the Crown, a party to the prosecution.

(ii) on first reading, the memorandum, being devoid of legal citations and quotations from legal authors, may appear to be a collection of statistics regarding the operations of the courts of the province and criminal charges. However, on closer scrutiny, the memorandum reveals that it incorporates legal advice encompassing the author's legal opinion and his prognosis of the legal ramifications and consequences of the vintage and growing number of outstanding cases in the criminal courts of Ontario. The memorandum contains the advice of an experienced prosecutor about dealing with the problem of criminal trial delays. This memorandum could not have been authored by anyone except an experienced prosecutor who is alive to the state of the law and what has transpired "in the field" in recent years. The memorandum synthesizes cause, effect and the strategy required to solve the legal problem that arises with criminal trial delays.

[14] *In Balabel v. Air India*, [1988] 2 W.L.R. 1036, 1046, Taylor L.J., in giving the judgment of the English Court of Appeal, said:

> ... 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.

Thus, litigation strategy advice is protected by legal advice privilege.

> (iii) the memorandum is not a derivative communication. It gives legal advice directly to the client. Therefore, the "dominant purpose" test does not apply.
>
> See: *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716 at 726-727 (Man. C.A.); Manes & Silver, *Solicitor-Client Privilege in Canadian Law*, Butterworths, at 89-91; *Ontario (Attorney General v. Hale)*, [1995] O.J. No. 1143 (Div. Ct.)

V. The Submissions directed to s. 13 of the Act

[15] In view of our determination of the submissions made under s. 19 of the Act, it is not necessary to address the submissions regarding s. 13 of the Act.

VI. Conclusion

[16] In our view, the Assistant Commissioner erred when he failed to hold that the memorandum was exempt from disclosure under s. 19 of the Act because it was "subject to solicitor-client privilege".

VII. Result

[17] The application is granted and an order will issue setting aside Provision 2 of Order PO-1994, dated February 28, 2002, to the extent that it orders disclosure of all or part of Records 1, 2 and 3.

VIII. Costs

[18] Neither party appearing asked for costs. No order as to costs.

O'DRISCOLL J.
KEALEY J.
SWINTON J.

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MINISTRY OF THE ATTORNEY GENERAL

Applicant

- and -

TOM MITCHINSON, Assistant Information and Privacy Commissioner and JANE DOE, Requester

Respondents

REASONS FOR JUDGMENT

THE COURT

Released: March 24, 2004