

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

SAUNDERS, ROSENBERG and FELDMAN JJ.

B E T W E E N:)	
)	
THE ATTORNEY GENERAL OF ONTARIO	)	<u>R. H. Ratcliffe</u>
	)	for the Applicant
Applicant)	
)	
- and -)	
)	
	)	<u>W. S. Challis and</u>
	)	<u>D. S. Goodis</u> for the
DONALD HALE, ERNST AND YOUNG and	)	Respondent Donald Hale
JOHN DOE)	
	)	<u>P. M. Jacobsen</u> for the
Respondents	)	Respondent John Doe
)	
	)	No one appearing for the Respondent
	)	chartered accountants
)	
	)	<u>Heard:</u> April 11, 1995

SAUNDERS J. (orally):

[1] This is an application for Judicial review to quash parts of an order of an inquiry officer made under the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 (the "Act").

[2] The background is as follows. An agency of the Ontario government was concerned with the management of its foreign currency transactions, particularly in the area of options. Other government agencies shared that concern. As part of addressing the matter, the agency engaged the services of a firm of chartered accountants. On June 3, 1992, the accounting firm wrote an engagement letter to the agency setting out certain work that it proposed to do. On the following

July 23, 1992, the director of legal services of the agency wrote to the same firm of chartered accountants and said as follows:

As legal counsel for the (agency), I have been asked by the Board to provide advice with respect to certain legal issues emanating from activities carried out in the Board's Treasury Department.

In order to assist me in rendering that advice, I am interested in having your firm carry out a forensic accounting investigation of all activities conducted by the former Treasurer over the last three-year period with a particular view to determining what evidence there may be of wrong-doing, if any, I would need to know the value of any loss including I would need to know the value of any loss which the [agency] has suffered as a result of speculative currency trading and any other type of activities carried out by the Treasurer.

I confirm that any communication you would conduct with me, members of the (agency) Board of Directors and other [agency] staff for the purposes of conducting such an investigation would, in my opinion, (as confirmed by the Civil Law Division of the Crown Law Office - Ontario) be privileged communication. [Agency] Executive Vice President has discussed my retention of your firm with the [agency] and I have been requested to proceed to make the necessary arrangements in this regard.

In this regard, would you please contact me at your earliest convenience to discuss the parameters of the required investigation and a quote for your services. In the event that agreement can be reached, a contract would then be entered into.

Yours very truly,

Mary Fitzpatrick, Director
Legal Services [Emphasis added]

The letter was marked "Privileged & Confidential".

[3] On September 3, 1992, a formal agreement was entered into between the agency and the firm of chartered accountants. The agreement recites the proposal of June 3, 1992 and states that it has been necessary to expand the parameters of the review. It goes on to recite that the parties have

agreed to cancel the proposal contained in the June 3rd letter and to enter into an expanded agreement which would reflect both the June 3rd proposal and the requested additional activities. The agreement provided for the cancellation and the agreement as to the nature of work to be done.

[4] On February 5, 1993, the firm of chartered accountants presented its preliminary report to the agency. A request was made for the disclosure of that report and certain other documents. The head claimed an exemption under s. 19 of the Act. Section 19, provides as follows:

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.

[5] In dealing with the claim for exemption, the inquiry officer said:

I have carefully reviewed the contents of each of the records and have concluded that the majority of these records were not created by or for Crown counsel for a lawyer's brief for existing or contemplated litigation. I find that the dominant purpose for which these records were created was to formalize the accounting firm's investigation of the Board's Treasury Department.

[6] In allowing the s. 19 exemption for certain records, the inquiry officer said, "Records (setting out their numbers) however, represent communications of a confidential nature between a client and a legal advisor which are directly related to seeking, formulating or giving legal advice. Accordingly, I find that these records are exempt from disclosure under Branch 2 of the s. 19 exemption." It is to be observed that his reasons for granting the exemption are expressed in terms narrower than the statute. Under Branch 2, a document is entitled to exemption if it was prepared for use in giving legal advice.

[7] A number of issues were raised before us, but we only need to deal with one of them. A head may refuse to disclose a record that was prepared for Crown counsel for use in giving legal advice. The letter of July 23rd from the director of legal services was a request for an investigation to assist

in giving legal advice. The inquiry officer found that the letter was entitled to the s. 19 exemption. It is clear to us, on the evidence, that document 45 was a response to that request. Not only is there a statement that the document is provided for the purpose of assisting counsel to provide legal advice, but also a review of its contents reveals that it is, in substance, a report on the investigation requested in the July 23rd letter. It is true that it contains information and material that would have been pertinent to the work proposed on June 3rd, but that information and material was a necessary foundation to the investigation of the activities of the individual employee. It is abundantly clear that the dominant purpose in the preparation of the document was for use in the giving of legal advice. It was, accordingly, patently unreasonable for the inquiry officer to have determined otherwise. Furthermore, having decided that the letter requesting the investigation was exempt, it was unreasonable not to also have given exemption to the report of the investigation.

[8] Document 44 is the transmittal letter submitting the report, and document 31 is an internal memo of the director of legal services as to the conduct of the investigation. In our view, consistency requires that these documents should also be exempt and that it is unreasonable not to do so.

[9] For these reasons, we have endorsed the record as follows:

For reasons dictated, this application is allowed and the decision of the inquiry officer so far as it relates to documents 31, 44 and 45 is quashed.

[10] The Attorney General does not ask for costs and there will be no order for costs.

SAUNDERS J.
ROSENBERG J.
FELDMAN J.

RELEASED: April 18, 1995

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

SAUNDERS, ROSENBERG and FELDMAN JJ.

B E T W E E N:

THE ATTORNEY GENERAL OF ONTARIO

Applicant

- and -

DONALD HALE, ERNST AND YOUNG and
JOHN DOE

Respondents

ORAL JUDGMENT

SAUNDERS J.

RELEASED: April 18, 1995