Court File No. 701/94

ONTARIO COURT (GENERAL DIVISION)
DIVISIONAL COURT

SAUNDERS, KEENAN, SHARPE JJ.

IN THE MATTER OF the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31

AND IN THE MATTER OF the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

AND IN THE MATTER OF Order P-771 of Irwin Glasberg, Assistant Information and Privacy Commissioner, made pursuant to the *Freedom of Information and Protection of Privacy Act*

B E T W E E N:	
Freedom of Information and Protection of Privacy Co-ordinator, Ministry of Finance	Leah Price for the Applicant
Applicant	
- and -	
Irwin Glasberg, Assistant Information and Privacy Commissioner and John Doe	D. Goodis for the Respondent, Irwin Glasberg, Assistant Information and Privacy Commissioner
Respondents	
- and -	Sharon Wong and Heather Ritchie for the Respondent, John Doe
An Affected Party, an affected party under the Act	No one appearing for the Respondent, An Affected Party
Respondent	
	Heard: February 20, 1997

SHARPE J.:

REASONS FOR JUDGMENT

[1] This is a application for judicial review of an order of Irwin Glasberg, the Assistant Information and Privacy Commissioner (the "Commissioner") under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 as am. (the "Act"). The order at issue concerns a request by "John Doe", a law firm which presented the request on behalf of a client, for access to "any legal opinions, policy papers, submissions, memoranda, reports, agreements, or any other written material dealing with Ontario Regulation 712/92." This regulation was enacted pursuant to the *Pension Benefits Act*, R.S.O., 1990, c. P.8. The requester's interest focused on s. 5.1 of Regulation 909 (enacted by s. 4 of Reg. 712/92), the effect of which was to exempt employers having pension plans with a value of more that $500 million, so called "jumbo plans", from the obligation to make special payments in respect of actuarially calculated solvency deficiencies.

[2] Under the Act, the "head" of the institution is required to respond to a request for access. In its response, the Ministry of Finance identified 58 records. Eight of these were released. The Ministry reed access to the remaining records, claiming a number of statutory exemptions. The requester appealed to the Commissioner. In the order under review, the Commissioner upheld the Ministry's decision to refuse access to 34 of the records, but ordered disclosure of the remaining 16 records, either in whole or in part.

ISSUES

[3] On this application for judicial review, the Ministry submits that the Commissioner committed reviewable errors of law with respect to the interpretation and application of the statutory exemptions for "solicitor-client privilege," "Cabinet privilege" and "advice or recommendations." It is also submitted that the Commissioner committed a reviewable error in requiring disclosure of portions of certain records under s. 10(2) of the Act, the severance provision.

ANALYSIS

(1) Solicitor and Client Privilege

[4] The Ministry claimed solicitor and client privilege with respect to six records (8, 20, 23, 27, 49, 50) under s. 19 of the Act which provides:

> s. 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] All of the records for which solicitor-client privilege was claimed came from the file of the Senior Legal Counsel at the Pension Commission. It is not disputed that the documents in question are communications between the client and legal counsel and that legal counsel gave legal advice relating to the preparation of the regulation in question.

[6] For obvious reasons, this Court, like the Commissioner, can only describe the records at issue in general terms without reference to their specific contents. The disputed portions of the records at issue consist of factual information which passed between legal counsel and the client. Two of the records, 8 and 20, were prepared by the Senior Counsel and sent to a client in the course of seeking instructions and giving advice. Records 23 and 50 are essentially the same document and were prepared within the Ministry. They outline certain points raised in the process of consultation with various parties and recommend that certain action to be taken. These documents were sent to the Senior Counsel by the client to assist her when drag the regulation and giving legal advice. Record 27 was prepared by the Ministry Policy and Planning Branch and forwarded to Crown Counsel as part of her instructions in the drafting process and to be used in giving legal advice on the proposed regulation. Record 49 was prepared by a actuarial consultant and was forwarded by the Ministry to counsel for use in giving advice on drafting the regulation.

[7] The Commissioner's order required disclosure of portions of all of these records. The reasons for this part of the order are as follows:

> In the case of Records 8 and 20, the information which I have ordered to be disclosed is factual in nature and does not relate to the provision of legal services. While the Ministry characterizes Records 23, 27 and 50 as containing 'drafting instructions', there is nothing on the face of these records to support this assertion. Based on their titles and content, Records 23 and 50 are more accurately described as consultation summary documents whereas Record 27 is a status report. Neither of these documents is subject to protection under section 19 of the Act.

> Finally, with respect to Record 49, the Ministry asserts that this document was prepared by Senior Legal Counsel for use in advising her client and Legislative Counsel on how to draft the new regulation. Since the document was, in fact, authored by the Ministry's actuarial consultant and only copied to the Senior Legal Counsel, I find that the solicitor-client exemption has no application to this record.

[8] It is apparent that the Commissioner has interpreted s. 19 narrowly, effectively limiting its application to those portions of records which contain actual instructions to the legal counsel or legal advice rendered by her to the client. His decision was defended before us on the ground that the exemption in s. 19 must be read in light of the overall purposes of the Act set out in s. 1(a), namely "to provide a right of access to *information* under the control of institutions" (emphasis added). Reference is also made to the provision of s. 1(a)(ii) that "exemptions from the right of access should be limited and specific," and to the severance provision, s. 10(2), which requires a head to "disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions" and which applies to s. 19. It is also clear that there is a onus on the party claiming a exemption under the Act: s. 53.

[9] It was further submitted that at common law, solicitor-client privilege does not preclude compelled disclosure of facts contained in a document subject to solicitor-client privilege in certain contexts. Discovery rules in civil proceedings require a party to disclose facts relevant to the action, and a party cannot resist disclosure on the ground that those relevant facts are found in a privileged document. Similarly, disclosure of facts may be compelled in criminal or professional discipline hearings and a party may not resist disclosure on the ground that those very facts have been communicated to counsel for the purpose of obtaining advice: see *Law Society of Upper Canada v. Baker*, [1997] O.J. No. 69 (Div. Ct.).

[10] Counsel for the Commissioner urges us to adopt a deferential approach to the decision under review. This Court has stated on a number of occasions that the Commissioner's decisions on findings of fact, weighing of evidence and the interpretation and application of the Act are ordinarily entitled to a high degree of curial deference: *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 at 782-3 (Div. Ct.).

[11] On the other had, where decisions of specialized administrative bodies relate to questions of law as to fundamental rights which do not fall within the specialized expertise of the tribunal and with which the Courts deal on a regular basis, the appropriate degree of curial deference may be attenuated: see *Pezim v. British Columbia (Superintendent of Brokers)* (1994), 114 D.L.R. (4th) 385 at 405. In my view, solicitor-client privilege is such an area and the deference to be accorded to the Commissioner's decisions is attenuated. Solicitor-client privilege has been identified by the Supreme Court of Canada as a fundamental right: *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 839 per Dickson J. It cannot be said that defining the scope of solicitor-client privilege is a matter within the specialized expertise of the Commissioner. I note that faced with the question of the standard of review to be applied to decisions under the comparable provision of the British Columbia Act; Lowry J. found: "This is not a case where substantial deference might be afforded if the Commissioner could be said to have adopted a reasonable interpretation of the legislation." (*Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 at 379 (B.C.S.C.)).

[12] In any event, it is my view that the Commissioner interpreted the scope of solicitor-client privilege in a manner that is fundamentally wrong in law. I accept the Ministry's submission that the exemption protecting solicitor-client privilege should be seen as "class-based". A "class-based" privilege is one that protects the entire communication and not merely those specific items which involve actual advice. This approach has been adopted with respect to a similar provision in the British Columbia *Freedom of Information and Privacy Act*, S.B.C. 1992, c. 61, s. 14: see *British Columbia (Minister of Environment, Lands & Parks) v. British Columbia Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 at 74.

[13] Solicitor-client privilege is a substantive right and not merely a evidentiary rule: *Solosky v. The Queen*, *supra*; *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 873-5. The rationale for solicitor-client privilege was expressed in the following often quoted passage from the judgment of Jackett P. in *Susan Hosiery Limited v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 at 33:

> In so far as the solicitor-client communications are concerned, the reason for the rule, as I understand it, is that, if a member of the public is to receive the real benefit of

> legal assistance that the law contemplates that he should, he and his legal adviser must be able to communicate quite freely without the inhibiting influence that would exist in what they said could be used in evidence against him so that bits and pieces of their communications could be taken out of context and used unfairly to his detriment unless their communications were at all times framed so as not only to convey their thoughts to each other but so as not to be capable of being misconstrued by others. *The reason for the rule, and the rule itself, extends to the communications for the purpose of getting legal advice, to incidental materials that would tend to reveal such communications, and to the legal advice itself. It is immaterial whether they are verbal or in writing*. [Emphasis added]

[14] In *Solosky v. The Queen*, *supra*, Dickson J. stated "the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right founded upon the unique relationship of solicitor and client." The rationale for the privilege is the need to ensure that one can make full disclosure of all the facts to one's counsel without fear of prejudice. Without the assurance of confidentiality, the client may be afraid to make full disclosure to the legal advisor and as a consequence will not have access to legal advice based upon all the facts.

[15] While solicitor-client privilege is usually thought of as a protection for the individual against the power of the State? I can see no basis for interpreting claims of privilege more narrowly when they are advanced by the state, particularly as the right is expressly preserved by s. 19. In carrying out their important mandate, public servants must be able to freely and openly communicate with legal counsel to gain appropriate access to legal advice. There is nothing in the language of s. 19 to suggest that public institutions are entitled to anything less than the full protection of solicitor-client privilege.

[16] The rules of discovery in civil actions and disclosure in criminal and quasi-criminal matters requiring the disclosure of relevant facts do not limit the substantive scope of solicitor-client privilege protected by the Act. Those rules merely provide that where there is a legal obligation to disclose facts, one cannot avoid that obligation on the basis that the facts were given to legal counsel. The distinction is an important one: a client can be asked to disclose facts relevant to a proceeding but that is not the same as forcing the client to divulge what he or she told legal counsel.

[17] It is apparent that the effect of the order under review is to compel the Ministry to disclose what it told its legal advisor to obtain legal advice. In my view, that constitutes a derogation of solicitor-client privilege and cannot be supported as a acceptable interpretation of s. 19. Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege.

[18] I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision, for there may be records which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice. I would also emphasize that the privilege protects only the communication to legal counsel. If facts communicated to legal counsel are to be found in some other form in the records of the Ministry, those records are not sheltered from disclosure simply because those same facts were disclosed to legal counsel. Similarly, documents authored by third parties and communicated to counsel for the purpose of obtaining legal advice do not gain immunity from disclosure unless the dominant purpose for their preparation was obtaining legal advice: *Ontario (Attorney General) v. Hale* (1995), 85 O.A.C. 229 (Div. Ct.).

(2) Cabinet Privilege

[19] The Ministry claimed that all but one of the 50 records are subject to Cabinet privilege. The Commissioner accepted that four records were exempt under s. 12(1)(b), two were exempt under s. 12(1) and that portions of fourteen other records were exempt. The issue before this Court was narrowed to 10 records (6, 23, 24, 27, 37, 47, 49, 50, 55, 57) and the extent to which portions of those records may be severed and disclosed. The Commissioner accepted that portions of these documents were protected by Cabinet privilege and that information ought not to be disclosed where the effect would be to reveal the substance of or permit the drawing of inferences with respect to the deliberations of Cabinet or its Committees. The Commissioner, nevertheless, ordered the disclosure of significant portions of these records. The Ministry submits that the Commissioner adopted the correct test but failed to apply it appropriately by ordering disclosure of portions of the records. As the focus of the Ministry's attack on the order relates to the extent to which the Commissioner saw fit to sever and order disclosed portions of the records at issue I say no more with respect to Cabinet

privilege and will return to these records when considering the Commissioner's interpretation of the severance provision.

(3) Advice and Recommendations

[20] The Ministry claims exemption for two records (47 and 49, already discussed in relation to solicitor-client privilege), pursuant to s. 13 which protects "advice or recommendations":

> 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 a institution.

Portions of both documents were ordered disclosed, portions were excluded on other grounds, and the Commissioner rejected the claim of "advice and recommendations" on the ground that these records "do not contain advice or recommendations for the purposes of this exemption." Again, I am precluded from disclosing the contents of the records at issue, but based on the documents themselves and the description provided by the Ministry, it seems apparent that the remaining portions of these documents do, indeed, contain the substance of the advice and recommendations being given by the consultant. Although this is a area where the Commissioner's decision is entitled to a high degree of deference, I find it impossible to understand how the Commissioner reached his conclusion and conclude that, on this point, the order should be quashed.

(4) Severance

[21] There is a fundamental difference between the parties with respect to the application of the severance provision of the Act:

> 10(2) Where a institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can be reasonably severed without disclosing the information that falls under one of the exemptions.

[22] The Ministry took the position that s. 10(2) could not be applied to any of the records. In its submission to the Commissioner, the Ministry contended that severance was not possible on the ground that severed material would not be responsive to the request, and that "in light of cabinet

confidentiality being so interwoven with the facts, recommendations, options and opinions contained in the records at issue a reasonable severance is not possible and the records must be exempt in their entirety." The Commissioner rejected that contention for the following reasons:

> In this order, I have directed that [16] of the records at issue be disclosed in part which means that I have applied the severance principle to these documents. While admittedly the records which I have reviewed are technical in nature and form part of a complex policy development process, I have not found it especially difficult to separate out that information which is subject to the exemptions and that which must be released to the appellant. I would suggest that experienced Ministry staff could equally have undertaken this task when the original decision letter was issued to the appellant.

The Ministry had requested the opportunity to consider severance if the Commissioner rejected its submission but the Commissioner refused to give the Ministry a second chance and proceeded to conduct the severance exercise himself.

[23] While I am constrained by the fact that I cannot at this stage disclose the records themselves, I will attempt to describe in general terms the results of the Commissioner's severance exercise. It is apparent from the treatment accorded to the records at issue, that the Commissioner interpreted the severance provision as requiring a painstaking word-a-word review of the records and to require disclosure of every single word that is not subject to a exemption. In several cases (ie. records 6, 8, 25, 47, 55), the result is that little is left of a letter or memorandum other that the letterhead, date, salutation and concluding paragraph. In the case of at least one record (27), words or names are excised in one place, but undeleted in others. In several instances, while specific words, names or phrases are deleted, it would appear to be a relatively simple matter for a sophisticated reader of the document to deduce the content of some of the severed portions (ie. records 23, 27, 50).

[24] I would accept that this is a area where deference is to be paid to the specialized expertise of the Commissioner in relation to the interpretation of the Act, and that this court should intervene only if the Commissioner's decision is patently unreasonable. I find, however, on the record before this Court that the Commissioner's interpretation and application of the severance provision is patently unreasonable. It is impossible to discern the reasoning which led the Commissioner to

decide what to delete and what to leave from the reasons given for the order or from a examination of the records themselves. Counsel for the Commissioner was unable to offer more than the submission that we should accept that the Commissioner had made these distinctions after careful consideration of all the relevant documents. Where the order is inexplicable on its face, we cannot uphold it on blind faith. More important, the result cannot, in my view, be justified on the basis of s. 10(2) which requires disclosure of "as much of the record as can be *reasonably* severed *without disclosing the information that falls under one of the exemptions*." In my view, the Commissioner has ignored the word "reasonably" and has taken a literal and mechanical word-by-word approach. His interpretation appears to ignore the injunction not to apply the severance provision where the result would be to disclose exempted information. While it is apparent that a enormous amount of time and attention has been devoted to the word-by-word review, that painstaking effort has, in my view, produced a result which is, on its face, impossible to understand, and the reasons offered shed no her light on the matter. I can only conclude that the decision is patently unreasonable.

[25] I would note, however, that while the Commissioner has taken a excessively aggressive approach with respect to s. 10(2), the Ministry's position that 49 of the 50 documents were subject to Cabinet privilege and that s. 10(2) has no application whatsoever to the records at issue plainly went too far. The Act requires the institution head to disclose what can be severed and it is contemplated that the severance exercise will be conducted by those most familiar with the records. Had the Ministry made a effort to disclose what is severable, it is possible that the request could have been dealt with much more efficiently and much more expeditiously. While the Commissioner's order is, in my view, patently unreasonable, it should not go unmentioned that the situation before this Court was to some extent produced by the unreasonably hard line taken by the Ministry in its response.

[26] In my view, it would not be appropriate to this Court's function on judicial review to engage in a detailed record-by-record review of what should and should not be disclosed. That task should be left to the Commissioner in light of the legal principles enunciated here. Accordingly, I will say no more about precisely what, if anything, must be disclosed from the records at issue here.

[27] I would, however, adopt as a helpful guide to the interpretation of s. 10(2) the following passage from the judgment of Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551 at 558 interpreting the analogous provision in the Access to Information Act, S.C. 1980-81-82-83, c. 111, sch. I, s. 25:

> One of the considerations which influences me is that these statutes do not, in my view, mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. There are two problems with this kind of procedure. First, the resulting document may be meaningless or misleading as the information it contains is taken totally out of context. Second, even if not technically exempt, the remaining information may provide clues to the content of the deleted portions. Especially when dealing with personal information, in my opinion, it is preferable to delete a entire passage in order to protect the privacy of the individual rather than disclosing certain non-exempt portions or words.
>
> Indeed, Parliament seems to have intended that severance of exempt and non-exempt portions be attempted only when the result is a reasonable fulfilment of the purposes of these statutes. Section 25 of the Access to Information Act, which provides for severance, reads:
>
>> 25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of an institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains any such information or material. [Emphasis added]
>
> Disconnected snippets of releasable information taken from otherwise exempt passages are not, in my view, reasonably severable.

[28] Similarly, in *Montana Band of Indians v. Canada (Minister of Indian & Northern Affairs)* (1988), 51 D.L.R. (4th) 306 at 320, Jerome A.C.J. stated:

> To attempt to comply with s. 25 would result in the release of a entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such severance would require on the part of the department is not proportionate to the quality of access it would provide.

CONCLUSION

[29] For these reasons, I would allow the application for judicial review, quash the Commissioner's order with respect to the records referred to in these reasons (6, 8, 20, 23, 24, 25, 27, 37, 47, 49, 50, 55, 57). The portion of the record subject to the sealing order shall remain sealed, provided that the records not dealt with here and ordered disclosed by the order under review are, subject to any other order, to be disclosed after the expiry of the time for seeking leave to appeal from this decision. Ordinarily the matter would be remitted to the Commissioner for reconsideration in light of these reasons. However, in the circumstances, the appropriate order is simply to quash the decision without prejudice to the right of the requesting party to resubmit its request to the Ministry. That will allow the Ministry to reconsider what ought to be disclosed in light of these reasons. In the circumstances, there should be no order as to costs.

DATED AT TORONTO, THIS 14th DAY OF APRIL, 1997

SHARPE J.
I agree. – SAUNDERS J.
I agree. – KEENAN J.

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B E T W E E N:

Freedom of Information and Protection of Privacy Co-ordinator, Ministry of Finance

Applicant

\- and -

Irwin Glasberg, Assistant Information and Privacy Commissioner and John Doe

Respondents

\- and -

An Affected Party, an affected party under the Act

Respondent

SHARPE J.

REASONS FOR JUDGMENT

Released: April 14, 1997