

same nature for the previous five year period. His November 28, 2005 request reads in part as follows:

Under the *Right to Information Act*, I request the same type of information as provided in the above quoted paragraph, going back another five years, plus, with respect to this whole ten year period, the following further information/documentation, which I do not believe would reveal personal information concerning another person:

- 1) the public financial records recording the payment of funds in settlement of personal injury claims against your department;
- 2) the records indicating which official(s) was/were responsible for the handling of each of these claims;
- 3) the correspondence or other documents indicating why your department decided not to litigate any of these claims;
- 4) the documentation of where in the province each of the personal injuries is alleged to have occurred;
- 5) the documents recording the year and month in which each personal injury claim was made, as well as the year and month in which it was finally settled.

4. In her December 19, 2005 response the Minister's predecessor in office granted the request in part, forwarding the documents requested in paragraph 1) with personal information severed. The information requested in paragraphs 2) and 3) was denied based upon the exemptions found in paragraphs 6a) and b) and 6f) respectively. The information sought in paragraphs 4) and 5) was culled from the documents and provided in the Minister's response.
5. I had an opportunity to review the documents pertaining to the Minister's files in respect of this access request on February 23, 2006. The petition concerns the applicability of the exemptions 6(a) and b) invoked by the Minister with respect to the information requesting records identifying the names of officials responsible for each of the claims and the 6f) exemption invoked with respect to documents indicating why the department decided not to litigate any of the claims.
6. The 6f) exemption raises complex issues regarding settlement information and the application of solicitor client privilege principles to this type of public record. Various hearing officers under the Ontario Information and Privacy Commissioner's office have considered this issue at great length. Apart from some earlier cases which have not been followed and some cases related to access to mediation and settlement documents in Human Rights Complaints¹, the general approach taken under the Ontario statute is that the legislative

¹ See *Barrie Public Library* Board Order M-4111, OIPC, report of January 10, 1995, Anita Fineberg, Inquiry Officer; *Ministry of Consumer and Commercial Relations* P-621 OIPC, February 2, 1994, Donald Hale, Inquiry Officer

exemption embraces the common law privileges regarding solicitor-client communications as well as litigation privileges, but does not encompass settlement privilege².

7. The reason for this has to do with the very different purposes which each of these privileges help achieve. Settlement privilege is aimed at encouraging parties to resolve disputes without litigation by disclosing their case in full to each other along with settlement offers on the condition that such disclosure, or offers, will not be admissible before the judge hearing the matter. Litigation privilege and solicitor client privilege, on the other hand are aimed at preserving the relationship between a lawyer and his or her client so that trial preparation can advance without any fear that advice, opinions or communications prepared in anticipation of litigation might be adduced in evidence. Courts have long held that settlement privilege ends when litigation is no longer contemplated.
8. The 6f) exemption, under the New Brunswick Statute, is a broad exemption concerning not only legal opinions or advice provided by a law officer of the Crown, but indeed any privileged communications as between solicitor and client in a matter of departmental business. The Ontario Statute has a similar provision which is worded more narrowly, but the better view may be that there is no compelling reason to distinguish the statutory exemption in New Brunswick from the most recent decisions in Ontario. Under that analysis, the 6f) exemption would not apply to settlement documents per se.
9. In this case however, the petitioner has carefully framed his access request to try and respect the pertinent exemptions under which departmental officials must operate. His request is not for the release of settlement documents per se but for “documents indicating why the department decided not to litigate any of these claims”. This request, asks squarely for the legal advice received, or for the record of departmental decisions based upon such advice. This in my view falls within the paragraph 6f) exemption. There remains a question as to whether the exemption has any application if the advice was offered in contemplation of litigation and the possibility of litigation in respect of that dispute no longer exists.
10. The common law litigation privilege in such a case would clearly be exhausted. I am not satisfied that this is an appropriate case in which such a complex issue of statutory interpretation should be determined. The parties have not made any submissions on this point and there is an insufficient evidentiary record, given the restricted nature of the request, to adequately address the issue.

² *Liquor Control Board of Ontario* PO-2405, OIPC report of June 30, 2005, John Higgins, Adjudicator; *ff Ministry of Tourism, Recreation and Culture* PO-2112, OIPC report of February 17, 2003, Donald Hale , Adjudicator.

11. In my view however, it is not necessary to decide the issue in this case. Even in the absence of a 6f) exemption, I would be unable to recommend further disclosure from the requested records than has already been granted on the basis that to do so would infringe the privacy interests of parties to the settlements in question. Thus while the Department's exemption may not be valid under 6f) the information sought is exempted by application of paragraph 6b) of the Act.
12. In a recent decision from this office, I have suggested that any assessment of the validity of a 6b) exemption concerning a refusal to disclose a settlement record must be carefully conducted, with due regard to the balancing of interests in play³. On the one hand, when a public body expends public funds to settle a civil action or other dispute against it, legitimate concerns about public liability and accountability are bound to arise. Strong interests favour public disclosure and transparency with respect to such processes. On the other hand, where settlement terms are directly related to a private individual's health status, his private residence, employment situation or financial information, privacy interests arise which public bodies' are required to sedulously protect.
13. In the present case the petitioner was investigating settlement practices of the department particularly as they related to southwestern regions of the province. The disclosure provided clearly indicates that there were no settlements reached in the past ten years by the Department in those regions. In the circumstance there is no compelling interest that would justify any further erosion of the privacy interests at stake of individuals, from other regions in the province, who have settled private disputes with the department over the past ten years.
14. There remains one further matter raised in the petition which must be addressed. The Department has relied on the paragraph 6b) exemption to expunge from the records it has provided, the name of the departmental official responsible for obtaining and approving the settlements disclosed.
15. Having reviewed the case-law it is my recommendation that this information is not exempted under 6b) and should be disclosed. I adopt the reasons of John Higgins, Ontario Inquiry Officer, when he stated in the 1995 *Town of Pickering* Case: "Many past orders have held that information relating to individuals in their professional, as opposed to personal, capacity, is not personal information."⁴
16. I therefore recommend that the department's refusal to disclose further settlement information be upheld under paragraph 6b) of the Act with the exception that the names of departmental officials responsible for the handling

³ *Whittaker v. Minister of Education*, NBRIOR-02, February 14, 2006

⁴ *The Corporation of the Town of Pickering* OIPC M-477 John Higgins Inquiry Officer, February 28, 1995

of each of the claims not be withheld from the petitioner as the 6a) and b) exemptions have no application in this instance.

Dated at Fredericton, this 24th day of March, 2006.

Bernard Richard, Ombudsman