



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER P-311

Appeal P-910188

Ministry of the Environment



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O R D E R

The Ministry of the Environment (the "institution") received a request for access to a copy of the "Southwinds Subdivision Investigation Report" relating to an investigation conducted by the institution's Investigations and Enforcement Branch in London, Ontario.

A report responding to this description, prepared by an employee of the Investigations and Enforcement Branch and dated February 18, 1991 (the "record"), was identified by the institution. The institution denied access to the record, relying on the exemption provided by section 19 of the Freedom of Information and Protection of Privacy Act (the "Act").

The requester appealed the institution's decision to this office.

Attempts to mediate this appeal were not successful. Accordingly, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution. Enclosed with the notices was a report prepared by the Appeals Officer, intended to assist the parties in making representations concerning the subject matter of the appeal.

Written representations were received from the institution and the appellant, and I have considered them in reaching my decision.

The only issue in this appeal is whether the discretionary exemption in section 19 of the Act applies to exempt the record from disclosure.

Section 19 of the Act provides as follows:

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.

The section 19 exemption consists of two branches, which provide a head with discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and
- (2) a record which was prepared by or for Crown counsel for use in giving legal advice or in

contemplation of or for use in litigation
(Branch 2).

The institution has relied on both Branches to exempt the record in this appeal.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there must be a written or oral communication; and
 - (b) the communication must be of a confidential nature; and
 - (c) the communication must be between a client (or his agent) and a legal adviser; and
 - (d) the communication must be directly related to seeking, formulating or giving legal advice.

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Orders 49]

In its representations, the institution provides evidence to indicate that the record was created in relation to existing and contemplated litigation. However, this is not sufficient to satisfy either part of the Branch 1 test. Having reviewed the record, I find that it fails to satisfy the requirements for exemption under both parts of Branch 1. First of all, the record is not a communication between a client and a legal adviser; on the contrary, it was prepared by an employee of the institution's Investigations and Enforcement Branch for one of the institution's District Managers. There is also no evidence to indicate that the record was of a confidential nature. As far as the second part of the Branch 1 test is concerned, the institution has failed to establish that the record was "created or obtained especially for a lawyer's brief", which is a

necessary component of the "litigation privilege" part of the exemption.

Turning to Branch 2 of the section 19 exemption, to qualify for exemption:

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

The record in this appeal was not prepared by Crown counsel. Despite submissions by the institution that Crown counsel was consulted by the District Manager prior to requesting the investigation which led to the creation of the record, there is no evidence that Crown counsel requested that the specific record be prepared, and I am unable to conclude that it was prepared "for" Crown counsel.

Accordingly, I find that the record does not qualify for exemption under either branch of the section 19 exemption, and I order its disclosure to the appellant.

ORDER:

1. I order the head to disclose the record to the appellant in its entirety within twenty (20) days from the date of this Order and to advise me in writing, within five (5) days from the date of disclosure, of the date on which disclosure was made. The notice concerning disclosure should be forwarded to my attention, c/o Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
2. In order to verify compliance with this order, I order the head to provide me with a copy of the record which is disclosed to the appellant, upon my request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ June 9, 1992