



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

ORDER P-475

Appeal P-9200276

Ministry of Health



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ORDER

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the following information, for the time period of November 26, 1991 through January 14, 1992:

1. Application for Judicial Review (G2081 & G2082);
2. Court Orders G2002 (Feb. 20 & Sept. 17, 1991);
3. Crown Law Office - Civil, File No. 142019;
4. Information and Privacy Commissioner/Ontario Orders P-215 & P-216;
5. Court File No. 575/91, issued in the Ontario Court (General Division) on December 7, 1991 by the Hon. Justice Steele in Toronto;
6. Court File Nos. G2081 & G2082, issued in the Ontario Court (General Division) on December 17, 1991 by the Hon. Justice R. Hogg in Barrie.

The requester appealed the Ministry's failure to respond to his request within the 30-day time limit as a "deemed refusal" pursuant to section 29(4) of the Act.

The Ministry subsequently issued a decision in respect of the appellant's request and denied access in full to the requested records pursuant to sections 19 and 67(3)(6) of the Act. The requester appealed the Ministry's decision to deny access to the requested records.

As a result of mediation, the only records that remain at issue in this appeal are Records 4b and 5a, which were withheld by the Ministry pursuant to section 19 of the Act. The records consist of three draft affidavits to be sworn by the Ministry's Director of Legal Services, the Administrator and Associate Administrator of the Penetanguishene Mental Health Centre. Although they are not dated, the records indicate that they were drafted in January, 1992.

Further mediation was not possible. Accordingly, notice that an inquiry was being conducted to review the decision of the Ministry was sent to the appellant, the Ministry and the counsel for the applicant for Judicial Review of Order P-215 (the affected person). Representations were received from all parties.

The sole issue in this appeal is whether section 19 of the Act applies to Records 4b and 5a. 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.

This section consists of two branches, which provides the Ministry with the 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 Ministry claims that the records qualify for exemption under both Branch 1 and 2 of the section 19 exemption.

In order to qualify for exemption under Branch 1 (the common law solicitor-client privilege), the Ministry must provide evidence that the record satisfies either of the following tests:

1.
 - a) there is 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 advisor; **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.

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In its representations, the Ministry appears to claim that the records qualify under the first part of Branch 1 of the section 19 exemption. The Ministry states:

Records 4a and 5b are communication between senior counsel at the Ministry of the Attorney General and counsel at the Ministry of Health regarding the application for Judicial Review. These records fall within the section 19

exemption as the communication is in writing between solicitor and client and it relates to the seeking or providing of legal advice, and or in contemplation for use in litigation.

The Ministry further states:

All three draft affidavits (Records 4a and 5b) are proposed draft affidavits prepared by counsel for the applicant to Judicial Review and provided to Senior Legal Counsel, of the Attorney General of Ontario, forwarded to the Ministry of Health, for review regarding an application for Judicial Review, brought forward by the appellant (sic) in response to Order P-215, which was subsequently dropped.

The Ministry continues:

The records are unsigned drafts provided by the Office of the Attorney general of Ontario ... seeking legal advice from the Ministry's Legal Services Branch ... regarding a specific issue, and is a recommended course of action, based on legal considerations, regarding a matter before Divisional Court.

The Ministry's representations do not specifically state who the client and the legal advisor are with regard to the matter relating to the records at issue. It is clear, however, that the records were prepared by counsel for the affected person and were submitted to counsel for the Ministry for comments. These affidavits were intended to be filed in support of the application for Judicial Review by counsel for the affected person. The records may represent communication between the Ministry and the counsel for the affected person; however, I have not been provided with any evidence that would indicate that a solicitor-client relationship existed between the Ministry and the counsel for the affected person.

The counsel for the affected person was notified of the appeal and given an opportunity to make representations on the issues. He states: "I have reviewed the matter, and am instructed not to make any formal representations on the matter."

Having carefully reviewed the contents of the records, the representations of the Ministry and the circumstances in which copies of the records came in the possession of the Ministry, I find that the Ministry has failed to establish the requirements for exemption under part 1 of the Branch 1 test. In my view, Records 4a and 5b are not a communication between a client and a legal advisor, nor are they "directly related to seeking, formulating or giving legal advice"; they merely contain accounts of factual matters which the lawyer for the affected person wished the employees of the Ministry to attest to.

Accordingly, the Ministry cannot rely on the first part of Branch 1 of the section 19 exemption.

I have not received any representations with regard to the application of the second part of Branch 1; therefore, I will not deal with this issue.

With respect to Branch 2, two criteria must be satisfied in order for the records 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.

In my view, the records do not qualify for exemption under Branch 2. As I stated earlier, the records were prepared by counsel for the affected person, who is not a "Crown counsel" or a person acting in the capacity of legal advisor to the Ministry. The reason they were sent to the Ministry was to assist counsel for the affected person in having the affidavits sworn by the employees of the Ministry named in each of the draft affidavits. In my opinion, the records were neither prepared by nor prepared for Crown counsel, and they fail to satisfy the requirement in part 1 of the test for exemption under Branch 2 of the section 19 exemption.

Therefore, it is my view that the records at issue do not qualify for exemption under section 19 of the Act.

ORDER:

1. I order the Ministry to disclose the records at issue to the appellant within 15 days of the date of this order.
2. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon my request.

Original signed by: _____
Asfaw Seife
Inquiry Officer

June 14, 1993