



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

ORDER P-501

Appeal P-9200803

Ministry of Environment and Energy



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ORDER

The Ministry of Environment (now the Ministry of Environment and Energy) (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all information about a named chemical company. The requester is the owner of the company. The request was subsequently limited to records that would reveal why the Ministry initially charged the company for having shipped "waste derived fuel" to a site not licensed to use such fuel, and why it subsequently dropped those charges.

The Ministry granted access to the records that revealed why the charges were laid. Access was denied to the records revealing why the charges were dropped, pursuant to section 19 of the Act. The requester appealed the Ministry's decision.

Mediation was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Representations were received from both parties.

The records at issue in this appeal are:

1. Memorandum (background section only) dated November 11, 1991;
2. Memorandum dated October 18, 1991;
3. Hand-written notes dated January 7, 1991;
4. Hand-written notes dated December 12, 1990.

The sole issue arising in this appeal is whether the discretionary exemption provided by section 19 of the Act applies to the records.

Section 19 of the Act states:

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.

Section 19 consists of two branches, which provide a head 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).

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 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 contends that all four records qualify for exemption under both branches of the section 19 exemption.

With respect to Branch 1, the Ministry submits that the client is the Ministry, represented by an investigator with the Investigation and Enforcement Branch. The solicitor is a Crown Counsel, employed by the Ministry of the Attorney General and located with the Ministry. The Ministry submits that all four records are written communications of a confidential nature between the client and the legal advisor and relate to the seeking, formulating or giving of legal advice.

Having reviewed the records, I am satisfied that they are subject to the common law solicitor-client privilege. All four records are either written communications, or a written transcription of an oral communication, between a Ministry employee and the Crown Counsel. They all directly relate to the provision of legal advice concerning the prosecution of the appellant's company.

Section 19 is a discretionary exemption. I have reviewed the Ministry's exercise of discretion in favour of refusing to disclose the records at issue. I find nothing improper in the manner in which this discretion was exercised in the circumstances of this case, and would not alter it on appeal.

In his representations, the appellant submits that the issue in this appeal is not limited to interpreting sections of the Act, but rather to matters of fundamental justice and democracy. The appellant contends that the Crown acted improperly by initiating a wrongful prosecution against

his company, resulting in loss of business and financial loss, and then withdrew those charges without explanation.

While I appreciate the seriousness of the appellant's concerns and understand that the appellant believes himself to have been treated unfairly by the Ministry, my powers and duties under the Act are specifically limited to reviewing the access decision made by the head. Many of the arguments raised by the appellant fall outside my jurisdiction in this appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Anita Fineberg
Inquiry Officer

July 20, 1993