



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

ORDER P-586

Appeal P-9300131

Ministry of Health



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ORDER

BACKGROUND:

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a series of records relating to five compliance investigations undertaken by the Office of the Information and Privacy Commissioner (the IPC).

The Ministry located a total of 94 records which were responsive to the request and released many of them to the requester. Following mediation efforts, a total of 11 records remain outstanding. These consist of 10 memoranda (designated as Records A8, A13, A54, A55, A56, B10A, B10B, B11, B13 and B14) and one letter (Record A7). Record B11 is a duplicate of Record A8 and I will not refer to Record B11 again in this order.

The Ministry claims that these records are exempt from disclosure in their entirety pursuant to sections 19 and 52(9) of the Act. The requester has appealed this denial of access and also questions whether the person who made the decision to withhold the records had the requisite authority to do so. Finally, the appellant submits that additional records responsive to his request should exist in named locations within the Ministry.

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

PRELIMINARY ISSUE:

The appellant submits that the Director of Legal Services for the Ministry lacked the delegated authority under section 62(1) of the Act to deny access to the responsive records.

Section 62(1) of the Act provides as follows:

A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

Along with its representations, the Ministry has provided the Commissioner's office with a copy of the institution's Delegation of Authority document which was in effect at the time that the relevant decision was issued. This document indicates that the various Directors within the Ministry had, among other powers, the delegated authority to grant access to records in part and to apply exemptions under sections 12 through 22 and 49 of the Act. On this basis, I am satisfied that the Director of Legal Services had the requisite delegated authority to apply the exemption contained in section 19 of the Act.

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I note that the Ministry also denied access to the records under section 52(9) of the Act and that the delegation document does not refer specifically to this provision.

Section 52(9) of the Act provides as follows:

Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court.

Section 52(9) of the Act creates a particular type of privilege for information supplied, or documents or things produced, during an inquiry. In my view, it is not necessary that this privilege be referred to expressly in the document which delegates a head's powers under section 62(1) of the Act.

As a result, I am satisfied that the decision-maker had the authority to claim that the privilege referred to in section 52(9) applies to the records at issue.

ISSUES:

The remaining issues to be addressed in this appeal are the following:

- A. Whether the discretionary exemption provided by section 19 of the Act applies to the records at issue.
- B. Whether the privilege provided by section 52(9) of the Act applies to the records at issue.
- C. Whether the Ministry's search for responsive records was reasonable in the circumstances of this case.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 19 of the Act applies to the records at issue.

The Ministry has claimed that section 19 of the Act applies to each of the ten records which remain at issue. This provision states that:

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 provides an institution with the discretion to refuse to disclose:

- (1) A record that is subject to the common law solicitor-client privilege (Branch 1);
OR
- (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 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 a lawyer's brief for existing or contemplated litigation.

To meet the requirements for inclusion under the second branch, the institution must demonstrate that:

- (1) The record was prepared by or for "Crown counsel"; and
- (2) The dominant purpose for the preparation of the record was for use in giving legal advice, **or** in contemplation of litigation, **or** for use in litigation.

[Order P-218]

In general, legal advice will include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. It does not include information given about a matter with legal implications, where there is no

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recommended course of action, based on legal considerations, and where no legal opinion is expressed.

In its representations, the Ministry did not indicate whether it was relying on the first or the second branch of section 19 to exempt these records from disclosure nor did the Ministry demonstrate how these documents fell within the ambit of each branch of the exemption.

I will now discuss each of the records in relation to the exemption claimed. Record A7 is a letter from the Ministry's Freedom of Information Co-ordinator (the Co-ordinator) to a Compliance Supervisor at the IPC. Record A8 is a transmittal memorandum from a Ministry official to the Co-ordinator which contains no substantive advice or information. Record A13 is a further memorandum from the Co-ordinator to Crown counsel which solicits information on a particular subject but which does not seek legal advice. Records A54, A55 and A56 are documents which collectively pose and provide a response to a question regarding the proper title of a proceeding. Record B10A is a covering memorandum, dated December 2, 1992, which includes "to", "from", "cc" and "subject" headings with no substantive information contained under these titles.

In my view, the Ministry has failed to demonstrate in its representations that Records A7, A8, A13, A54, A55, A56 or B10A relate to seeking, formulating or giving legal advice, or that any of these records were created or obtained for a lawyer's brief, or that the dominant purpose of the records was for use in giving legal advice or in contemplation of litigation or for use in litigation. On this basis, the Ministry has failed to establish that these records fall within the section 19 exemption and they should, therefore, be released to the requester.

Records B10B and B13 are memoranda from two separate Ministry employees to Crown counsel. Record B14 is a memorandum from Crown counsel to the Co-ordinator. I have carefully reviewed the contents of these documents and find that Records B10B, B13 and the last paragraph of Record B14 were prepared by or for Crown counsel for use in either seeking, giving or formulating legal advice. For this reason, they qualify for exemption under the first branch of section 19 of the Act.

The first paragraph of Record B14 states simply that a particular statute has been repealed and that another piece of legislation has been enacted to take its place. In my view, this paragraph neither sets out a recommended course of action nor expresses a legal opinion. On this basis, I find that this part of Record B14 does not contain legal advice for the purposes of section 19 of the Act and should be released to the appellant.

Section 19 is a discretionary exemption and, on this basis, I have considered the Ministry's representations regarding its decision to rely on this provision to exempt all or parts of Records B10B, B13 and B14. I find nothing improper in the determination which has been made.

ISSUE B: Whether the privilege provided by section 52(9) of the Act applies to the records at issue.

The Ministry has claimed that the privilege contained in section 52(9) of the Act applies to Records B10A, B10B, B13 and B14. Under Issue A, I found that Records B10B, B13 and the last paragraph of Record B14 were exempt from disclosure under section 19 of the Act. Thus, the application of section 52(9) is relevant only to Record B10A and to the remaining part of Record B14.

As indicated previously, Record B10A is a Ministry inter-office memorandum relating to a compliance investigation being conducted by the IPC, with the "to", "from", "cc" and "subject" lines filled out, but with nothing written below. Record B14 is a memorandum from Crown counsel to the Co-ordinator.

In Order P-404, Inquiry Officer Holly Big Canoe considered the application of section 52(9) of the Act to records produced in the course of a compliance investigation. She there stated that:

In my view, the privilege afforded to records by section 52(9) extends only to records which are supplied or produced in the course of an **inquiry** by the office of the Information and Privacy Commissioner/Ontario. The inquiry process is set in motion when an appeal is filed pursuant to section 50(1) by a person who has made an access to information request, has been notified of such a request, or has made a correction of personal information request. A compliance investigation undertaken by the office of the Information and Privacy Commissioner/Ontario is not an **inquiry** for the purposes of the Act, and records which are produced in the course of a compliance investigation are not records produced in the course of an inquiry pursuant to section 52(1). Accordingly, the privilege described in section 52(9) does not extend to the records at issue in this appeal.

I adopt this view and find, accordingly, that the section 52(9) privilege does not apply to Record B10A and to that part of Record B14 which is still at issue in this appeal. The information contained in these documents should, thus, be released to the appellant.

ISSUE C: Whether the Ministry's search for responsive records was reasonable in the circumstances of this case.

The appellant takes the position that further records responsive to his request should exist and that these records should be found in two named locations within the Ministry.

Where a requester provides sufficient details about the records which he or she is seeking and a Ministry indicates that additional records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. While the Act does not require that the Ministry prove to the degree of absolute certainty that such records do not exist, the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

In its representations, the Ministry indicated that the two program areas had been thoroughly searched and that additional records did not exist. Based on these submissions, I am satisfied that the Ministry's search for records responsive to the request was reasonable in the circumstances of this case.

ORDER:

1. I uphold the decision of the Ministry to withhold access to Records B10B, B13 and the last paragraph of Record B14.
2. I order the Ministry to disclose to the appellant Records A7, A8, A13, A54, A55, A56, B10A and Record B14 (except the last paragraph) within 15 days of the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ November 25, 1993