



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

ORDER P-702

Appeal P_9400056

Ministry of the Attorney General



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ORDER

NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant requested copies of correspondence from the Ministry of the Attorney General (the Ministry) relating to a decision made by the Attorney General, and the reasons behind it. The decision in question was a refusal to consent to prosecute a gas company for charging an interest rate which the appellant alleged contravened section 347 of the Criminal Code.

The Ministry did not respond to the requester within the 30 day time frame established in section 26 the Act. The Ministry did respond to the appellant, however, and provided partial access to the records requested. Access was denied, in total or in part, to 14 pages (out of a total of 117 pages) pursuant to the following sections:

- advice or recommendations - section 13(1)
- solicitor-client privilege - section 19

The appellant appealed the denial of access and indicated that he wished to pursue his appeal of the Ministry's denial of access under section 29(4) of the Act (deemed refusal).

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 the Ministry only.

The records consist of memoranda and correspondence between counsel for the Ministry. Throughout this order I will refer to the records by their page numbers as numbered by the Ministry.

PRELIMINARY MATTER

The appellant indicated during mediation that he wished to pursue the matter of the Ministry's failure to provide a decision letter within the 30 day time frame.

I have reviewed the circumstances in this appeal. The request was received by the Ministry on December 24, 1993. Pursuant to section 26 of the Act, a decision letter should have been provided by January 22, 1994 (30 days following the receipt of the request). The Ministry provided a decision letter dated January 25, 1994 to the appellant along with approximately 106 pages of records.

Where a government organization has not responded to a request for information within the 30 day period required by law, section 29(4) of the Act deems the institution to have refused to have provided access to this information.

By issuing its decision letter on January 25, 1994, in which specific exemptions have been claimed to deny access to a portion of the records, the Ministry has responded to the access request. In responding, the Ministry has provided access in full to 103 pages of records and

partial access to another 3 pages. The exemptions claimed by the Ministry to deny access to the remaining records will be determined in this order.

In my view, no useful purpose would be served by continuing with this issue. I will now turn, therefore, to the issues arising from the Ministry's January 25, 1994 decision letter.

DISCUSSION:

SOLICITOR/CLIENT PRIVILEGE

Under section 19 of the Act, the Ministry may 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 indicates in its representations that it is relying on Branch 2 of this exemption for all portions of the exempted records. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

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

[See Order 210]

In this case, the Ministry submits that all portions of the records at issue were prepared by Crown counsel for use in giving legal advice.

Page 1 is a facsimile cover sheet from Crown counsel to the Regional Director of Crown Attorneys on which comments have been made. The Ministry submits that the comments are a request for a particular type of document, and that part of this document contains legal advice, therefore, the cover sheet is essentially a request for legal advice. Not all records prepared by Crown counsel automatically qualify for exemption under section 19. I am not satisfied that this record was prepared for use in giving legal advice. Accordingly, it does not qualify for exemption under section 19.

Pages 5, 102, 103 and 104 consist of memoranda between the Regional Director of Crown Attorneys and Crown counsel. I am satisfied that these pages were prepared by Crown counsel for use in giving legal advice, and accordingly, they qualify for exemption under Branch 2.

Page 110 is a handwritten note to the Regional Director of Crown Attorneys from Crown counsel relating to the receipt of unidentified information and the manner in which it should be dealt

with. I am not satisfied that this record was prepared for use in giving legal advice, and it, therefore, does not qualify for exemption under section 19.

Pages 111 and 112 make up a memorandum to the Director, Crown Law Office - Criminal from Crown counsel. Page 113 is a draft letter attached to the memorandum. Pages 114 and 115 are duplicates of pages 111 and 112 with the addition of a handwritten comment made to page 114. I am satisfied that these pages were prepared by Crown counsel for use in giving legal advice, and accordingly, they qualify for exemption under Branch 2.

Page 61 is the second page of a two-page document entitled "Critical Issue" and pages 106 and 107 are the second and third pages of a three-page document entitled "Critical Issue Update". Both documents were prepared by Crown counsel. The Ministry has withheld from disclosure the portions of these pages which are contained under the heading "Suggested Ministry Response". I am satisfied that the information which the Ministry has withheld was prepared by Crown counsel for use in giving legal advice, and accordingly, they qualify for exemption under Branch 2.

In summary, I have found that pages 5, 102, 103, 104, 111, 112, 113, 114 and 115, and portions of pages 61, 106 and 107 all qualify for exemption under section 19. I have found that pages 1 and 110 do not qualify for exemption under this section.

ADVICE AND RECOMMENDATIONS

The Ministry submits that section 13(1) applies to pages 1 and 110.

Section 13(1) of the Act states as follows:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information in the records must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118 and P-628).

As I indicated above, page 1 is a facsimile cover sheet from Crown counsel to the Regional Director of Crown Attorneys on which comments have been made which indicate the type of action requested, and page 110 is a handwritten note to the Regional Director of Crown Attorneys from Crown counsel relating to the receipt of unidentified information and the manner in which it should be dealt with. In my view, the information in both pages does not relate to a suggested course of action which will be determined during the deliberative process. This information, therefore, does not qualify for exemption under section 13(1).

ORDER:

1. I uphold the Ministry's decision to deny access in full to pages 5, 102, 103, 104, 111, 112, 113, 114 and 115.

2. I also uphold the Ministry's decision to deny access to the severed portions of pages 61, 106 and 107.
3. I order the Ministry to disclose pages 1 and 110 to the appellant within fifteen (15) days after the date of this order.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ June 14, 1994