



Information and Privacy  
Commissioner/Ontario

Commissaire à l'information  
et à la protection de la vie privée/Ontario

# ORDER P-803

Appeal P-9400158

Ministry of Consumer and Commercial Relations



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Téléc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked the Ministry of Consumer and Commercial Relations (the Ministry) for information regarding the subject of "special filings" which are referenced in section 6 of the Corporations Information Act (the CIA). The requester is a solicitor who represents a named corporation.

In particular, the requester sought access to those records which described the Ministry's authority to charge fees for two special filings and to enact regulations under the CIA for this purpose. The requester also asked for any legal opinions which were obtained on these subjects as well as any explanatory documents provided to the Lieutenant Governor in Council to support the enactment of two specific regulations.

The Ministry identified two records that were responsive to the request. These documents are an information sheet attached to a draft regulation (Record 1) and a memorandum from a government official to the Minister (Record 2). The Ministry decided to deny access to Record 1 under the Cabinet records exemption found in section 12(1)(d) of the Act. The Ministry also chose to withhold Record 2 based on the following exemptions contained in the Act:

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

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

A Notice of Inquiry was provided to the Ministry and the requester/appellant. Representations were received from both parties. In his submissions, the appellant argued that there exists a compelling public interest in the disclosure of the records under section 23 of the Act.

## **DISCUSSION:**

### **CABINET RECORDS**

The Ministry has claimed that Record 1 is exempt from disclosure under section 12(1)(d) of the Act. Record 1 is composed of an "Information Sheet for Regulations" and an attached draft Regulation to Amend Regulation 189 made under the CIA.

In order for section 12(1)(d) to apply to this record, the Ministry must establish that the document:

- (a) reflects consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; or
- (b) was used for the making of government decisions or the formulation of government policy.

In its representations, the Ministry states that Record 1 was submitted to the Cabinet Committee on Legislation and Regulations and that the document was used as the basis for amending the contents of Regulation 189.

I have carefully considered the submissions of the parties on this issue in conjunction with the record in question. I have concluded that Record 1 was, in fact, used by Executive Council and one of its committees to make a government decision. The record is, therefore, exempt from disclosure under section 12(1)(d) of the Act.

### **ADVICE OR RECOMMENDATIONS**

The Ministry submits that the advice or recommendations exemption found in section 13(1) of the Act applies to Record 2. This section states that:

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 many previous orders that advice and recommendations for the purpose of section 13(1) must contain more than just information. To qualify as "advice" or "recommendations", the information contained 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.

Record 2 is a brief memorandum from an Assistant Deputy Minister to the Minister regarding the enactment of a fees regulation under the CIA. The document sets out some factual information and then requests that the Minister sign off on the wording of the regulation.

It is the Ministry's position that this document contains advice or recommendations on the subject of whether or not the Minister should endorse the regulation. The Ministry points out that, at the relevant point in time, the Minister was a member of the Cabinet Committee which considered this regulation and was free to accept or reject the advice provided to her.

I have carefully considered the Ministry's representations in conjunction with the record at issue. I find that when the memorandum was provided to the Minister for her signature, the wording of the draft regulation had already been finalized for transmittal to Cabinet. On this basis, I find that the contents of this document cannot be equated to a suggested course of action which the Minister was free to accept or reject as part of the process for developing the regulation. The record is rather a formal transmittal memorandum which is purely factual in nature.

The result is that the Ministry cannot apply the advice or recommendations exemption to withhold Record 2 from disclosure.

## **SOLICITOR/CLIENT PRIVILEGE**

The Ministry also claims that Record 2 may be withheld under the second branch of the solicitor/client exemption found in section 19 of the Act. Under this provision, the Ministry has the discretion to refuse to disclose 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.

In its representations, the Ministry states that the memorandum which the Assistant Deputy Minister signed was actually authored by Senior Counsel within the Ministry's Legal Services Branch. The Ministry then submits that this document was prepared by Crown counsel for use in giving legal advice to the Minister and that the memorandum contains a suggested course of action.

In Order 210, Commissioner Tom Wright interpreted the meaning of "legal advice" for the purpose of Branch 2 of the section 19 exemption. He dealt with the issue in the following fashion:

The term "legal advice" is not defined in the Act. In my view the term is not so broad as to encompass all information given by counsel to an institution to his or her client. Generally speaking, 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 recommended course of action, based on legal considerations, and where no legal opinion is expressed.

For the purposes of this appeal, I will accept the Ministry's assertion that Record 2 was prepared by Senior Counsel for the Ministry official who signed the memorandum. Following a careful review of this document, however, I find that it does not contain a legal opinion about a legal issue. Rather, the memorandum transmits some general information and indicates that the proposed regulation is enclosed for the Minister's signature. This is clearly not the type of record which qualifies for exemption under section 19 of the Act.

## **PUBLIC INTEREST IN DISCLOSURE**

As indicated previously, the appellant has submitted that there exists a compelling public interest in the disclosure of the records under section 23 of the Act. Based on the findings which I have made in this order, I need only consider Record 1 for the purposes of this provision.

I have previously found that Record 1 is exempt from disclosure under section 12(1)(d) of the Act. The public interest consideration in section 23 is only available to override those exemptions specifically referred to in that provision. This list excludes section 12(1)(d). On this basis, I am precluded from considering whether section 23 of the Act might apply to Record 1.

The result is that this record must not be disclosed to the appellant.

## **ORDER:**

[IPC Order P-803/November 25, 1994]

1. I uphold the Ministry's decision to deny access to Record 1.
2. I order the Ministry to disclose Record 2 to the appellant within fifteen (15) days of the date of this order.
3. In order to verify compliance with the provisions of this order, I reserve the right to require that the Ministry provide me with a copy of the record which is disclosed to the appellant under Provision 2.

Original signed by: \_\_\_\_\_  
Assistant Commissioner

November 25, 1994

\_\_\_\_\_ Irwin Glasberg