



Information and Privacy
Commissioner/Ontario

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

ORDER P-776

Appeal P-9400266

Ministry of Labour



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Labour (the Ministry) received a request for access to copies of all records relating to policies and procedures on prosecutions under the Occupational Health and Safety Act (the OHSA). The requester is counsel to a number of employer groups which have members who are, from time to time, subject to charges under the OHSA.

The Ministry located the responsive record, which was entitled "Prosecution Policy" dated April 6, 1992, and denied access in its entirety, relying on the following exemptions contained in the Act:

- proposed plans, policies or projects of an institution - section 18(1)(g)
- solicitor-client privilege - section 19

The Ministry indicated in its decision letter that it was relying on the second branch of the exemption under section 19.

A Notice of Inquiry was provided to the appellant and the Ministry. Representations were received from both parties.

In its representations, the Ministry indicated that it was no longer relying on the exemption contained in section 18(1)(g). Consequently, it is not necessary for me to consider the application of this section in this order.

The Ministry also indicated in its representations that it was in possession of earlier drafts of the Prosecution Policy. The Appeals Officer confirmed with the appellant that he was only interested in obtaining access to the Prosecution Policy dated April 6, 1992.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Previous orders of the Commissioner's office have held that for a record to be exempt under the second branch of section 19 of the Act, the following criteria must be met:

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 its representations, the Ministry states that the Prosecution Policy was prepared by Crown counsel. An affidavit of a Ministry employee attesting to this fact was submitted with the Ministry's representations. I find, therefore, that the first criterion for the application of the second branch of the test has been satisfied.

The Ministry further submits that the Prosecution Policy was prepared for the purpose of providing legal advice with respect to the development of a prosecution policy relating to enforcement of the OHSA.

In Order 210, Commissioner Tom Wright held that legal advice includes, among other things, "a legal opinion about a legal issue". I find, following my review of the Prosecution Policy, that this document cannot reasonably be characterized as containing a legal opinion. Rather, the record outlines proposed policies and administrative procedures with respect to the investigation and prosecution of offences under the OHSA. The document does not provide a legal opinion based on legal considerations, nor does it provide a legal opinion on the current state of the law as it relates to the procedures contained in it.

I find, therefore, that the Prosecution Policy document does not meet the second criterion of Branch Two of the section 19 test. Accordingly, section 19 of the Act is not applicable and the Prosecution Policy document dated April 6, 1992 should be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose the record at issue to the appellant within fifteen (15) days of the date of this order.
2. 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 record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ October 12, 1994