



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

ORDER P-949

Appeal P-9400327

Ontario Native Affairs Secretariat



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NATURE OF THE APPEAL:

The Ontario Native Affairs Secretariat (ONAS) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to a particular First Nation's land claim. Specifically, the request sought access to a copy of the claim and information about the establishment and changes in size or title of a particular reserve. ONAS identified numerous records for a total of 1,000 pages as being responsive to the request and denied access in total. The requester appealed the decision.

Upon appeal, ONAS reconsidered its decision and disclosed some of the documents which it had previously withheld. A total of 19 records consisting of summary notes, memoranda, reports and letters remain at issue in this appeal and are listed in Appendix "A" to this order.

ONAS relies on the following exemptions to deny access to the records:

- advice or recommendations - section 13(1)
- relations with other governments - sections 15(a) and (b)
- economic and other interests - section 18(1)(e)
- solicitor-client privilege - section 19.

A Notice of Inquiry was provided to the appellant, ONAS and the First Nation. Given the nature of the records requested, Notices of Inquiry were also provided to Indian and Northern Affairs Canada, on behalf of the federal government, and the Indian Commission of Ontario (the ICO).

By way of background, the ICO is governed by a tripartite council consisting of the Federal Minister of Indian and Northern Affairs, the Ontario Minister for Native Affairs and four Grand Chiefs who together, represent the majority of the First Nations in Ontario. The major responsibility of the ICO is to coordinate, facilitate and, at times, mediate negotiations between the governments of Ontario and Canada with respect to land claims from First Nations.

Representations were received from all parties.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

ONAS claims that both sections 15(a) and (b) of the Act apply to exempt Records 2, 11, 13, 15, 24, 25, 28, 37, 38, 39, 40 and 41 from disclosure and that section 15(a) applies to exempt Records 8, 18, 26 and 32.

I will first consider the application of section 15(a) to the records at issue.

In Order P-908, Commissioner Tom Wright restated the substantive requirements of the test for exemption under section 15(a) as follows:

1. the relations must be intergovernmental, that is relations between an institution and another government or its agencies; **and**
2. disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations.

Part One of the Test

The records all relate to ongoing negotiations, discussions and exchange of information between Ontario and the federal government in respect of the land claim by the First Nation. ONAS states that the resolution of the land claim involves the transfer of Crown lands to the First Nation and that the issues necessarily impact on national and provincial interests. ONAS claims that the records reflect the "intergovernmental communication, information-sharing and relationship-building that are anticipated by section 15(a) of the Act."

I have reviewed the records together with the representations of the parties and I am satisfied that the records reflect the intergovernmental relations between Ontario and Canada. Part one of the test has been satisfied.

Part Two of the Test

To satisfy this element of the test, ONAS must establish that disclosure of the records could result in a reasonable expectation of prejudice to the conduct of intergovernmental relations.

ONAS submits that land claims involve many complex and detailed historical, legal and policy issues. ONAS states that land claims generally and the subject claim specifically impact on provincial and federal interests.

ONAS claims that full and frank disclosure between the parties, on a confidential basis, is necessary for the parties to understand and resolve the complex issues involved in land claims negotiations. ONAS points out that this level of communication is tenuous during most negotiations and particularly so for complex and sensitive issues such as land claims. ONAS states that disclosure of the records could be perceived as a breach of the confidentiality of negotiations which would have a severe negative impact not only on the subject land claim negotiations but also on other ongoing and future land claims. ONAS submits, therefore, that the integrity of the process of negotiation, for this and other land claims, must be protected and the records must not be disclosed.

Indian and Northern Affairs Canada states that the records are part of confidential land claim negotiations and that the release of the records could have an injurious effect on the subject land claim and on all land claims which are the subject of negotiations between the federal government and the Province of Ontario. It states that disclosure of the records would prejudice the conduct of intergovernmental relations with the Province of Ontario, as Canada would be less willing in the future to share material with Ontario, which is related to the negotiation and settlement of land claim. ONAS further submits that the expectation of prejudice to its intergovernmental relations with Canada is reasonable, given that Canada has consistently taken the position that prejudice would result, in the context of other land claim negotiations considered in previous orders of the Commissioner's office (Orders P-630 and P-730).

The ICO submits that due to the sensitivity of the issues involved, the integrity of the negotiating process would be

seriously prejudiced if the records were to be disclosed and a chilling effect would be the immediate outcome in terms of intergovernmental relations and land claim negotiations.

Based on my review of the records and the representations of the parties, I am satisfied that, in the circumstances of this appeal, disclosure of the records at issue could reasonably be expected to prejudice intergovernmental relations between Ontario and Canada. Part two of the test has been met and Records 2, 8, 11, 13, 15, 18, 24, 25, 26, 28, 32, 37, 38, 39, 40 and 41 are exempt from disclosure pursuant to section 15(a) of the Act.

SOLICITOR-CLIENT PRIVILEGE

ONAS claims that section 19 of the Act applies to exempt Records 4, 7 and 23 from disclosure.

Section 19 of the Act consists of two branches, which provide an institution 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).

ONAS relies on Branch 2 to exempt Records 4 and 23 and both Branches 1 and 2 for Record 7. Record 4 is a status report on the land claim. Record 23 is a research report detailing the history and chronology of the land claim and Record 7 is a status report prepared by Crown counsel. I will begin by considering whether Branch 2 applies to all three records.

ONAS submits that Records 4, 7 and 23 were prepared by or for Crown counsel for use in giving legal advice. In its representations, ONAS has included affidavits from the Director of Negotiations Support Branch (the Director) and the Research Coordinator of the Negotiations Support Branch. The Director explains that when a land claim is filed, it is directed to the Negotiation Support Branch for historical research. Once the historical research is completed, the research report and the claim are then forwarded to the legal services branch for the formulation of a legal opinion. The report is considered the primary source or the historical basis for the legal opinion. Ontario's position on the land claim is then developed on the basis of the historical data and the legal opinion. ONAS, therefore, submits that the research report (Record 23) and the status report (Record 4) were prepared for Crown counsel for use in giving legal advice. ONAS further submits that Record 7 was prepared by Crown counsel for use in giving legal advice on the same land claim.

I have carefully reviewed the information in the records together with the representations of the parties. In the particular circumstances of this case, I am satisfied that legal advice regarding land claims must necessarily have a basis in historical research and evidence. Accordingly, I am persuaded that Records 4, 7 and 23 were prepared by or for Crown counsel for use in giving legal advice. I find, therefore, that the requirements for exemption under Branch 2 have been met and section 19 applies.

ECONOMIC AND OTHER INTERESTS

ONAS claims that section 18(1)(e) applies to exempt Record 1 from disclosure. Record 1 is a summary of the

provincial staff position on the land claim.

In order to qualify for exemption under section 18(1)(e) of the Act, ONAS must establish the following:

1. the record must contain positions, plans, procedures, criteria or instructions; and
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and
3. the negotiations must be carried on currently, or will be carried on in the future; and
4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

ONAS submits that the context within which the record was created is significant. ONAS points out that the land claim was initiated in 1981, Ontario has been involved in discussions and negotiation with the First Nation and Canada since that time and the negotiations between the parties have not yet been completed. ONAS acknowledges that the process of land claim negotiations are lengthy and complex and that Ontario's position has been evolving over a period of time. ONAS claims that while some criteria may have changed, other plans and positions developed in the initial period are still relevant today.

Following a review of the evidence before me, I have concluded that the information in Record 1 contains positions to be applied to negotiations carried on by the Government of Ontario and that these negotiations have yet to be concluded. I find that Record 1 is properly exempt from disclosure under section 18(1)(e) of the Act.

Sections 15(a), 19 and 18(1)(e) are discretionary exemptions. I have reviewed the factors considered by ONAS in the exercise of its discretion in favour of refusing to disclose the information to the appellant. I find nothing improper in the determination which has been made and would not alter it on appeal.

In summary, I have found that section 15(a) applies to Records 2, 8, 11, 13, 15, 18, 24, 25, 26, 28, 32, 37, 38, 39, 40 and 41. I have also found that Records 4, 7 and 11 are exempt under section 19 and that section 18(1)(e) applies to Record 1.

Because of the manner in which I have resolved the issues, I do not need to address the applicability of section 13(1) to the records.

ORDER:

I uphold the decision of ONAS.

Original signed by: _____

July 6, 1995

Mumtaz Jiwan
Inquiry Officer

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

Appeal Number P-9400327

RECORD NUMBER(S)	PAGES	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED
1	1-2	Summary Notes of staff position	18(1)(e), 13(1)
2	3-5	Memorandum to file dated December 10, 1985	15(a) and (b)
4	21-22	Status Report of Crown counsel	13(1), 18(1)(e), 19
8	31-32	Letter dated November 29, 1982 from Director, Indian Resources Policy	15(a)
11	46-48	Draft minutes of meeting dated August 26, 1982	15(a) and (b)
13	53-54	Draft minutes of meeting dated September 22, 1982	15(a) and (b)
15	57-69	Letter from counsel dated July 12, 1982	15(a) and (b)
18	78-82	Letter dated June 16, 1982 from Director, Indian Resources Policy	13(1), 15(a)
23	97-131	Research Report	13(1), 18(1)(e), 19
24	132-133	Memorandum to file dated March 3, 1982	15(a) and (b)
25	134-139	Letter from counsel dated February 22, 1982	15(a) and (b)
26	140-142	Letter dated January 7, 1982 from Director, Indian Resources Policy	15(a), 18(1)(e)
28	148-159	Memorandum	15(a) and (b)
32	183-189	Letter from ONAS dated February 5, 1993	13(1), 15(a), 18(1)(e)
37	275-290	Letter to ONAS dated November 18, 1991	15(a) and (b)
38	291	Memorandum to file dated July 13, 1991	15(a) and (b)
39	292-294	Notes to file	15(a) and (b)

RECORD NUMBER(S)	PAGES	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED
40	295-296	Letter to federal government dated May 25, 1993	15(a) and (b)
41	297-305	Letter to federal government dated March 11, 1993	15(a) and (b)