



Information and Privacy
Commissioner/Ontario

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

ORDER P-979

Appeal P-9400669

Ministry of Natural Resources



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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 Natural Resources (the Ministry) received a request for copies of correspondence between the Ministry, the Ministry of the Attorney General (MAG), and the Ontario Native Affairs Secretariat (ONAS) regarding the Aboriginal Communal Fishing Licence Regulations (the ACFLRs). The requester indicated that the responsive documentation should cover the period from January 1, 1993 until September 2, 1994 and contain information related to the enforcement of the Williams Treaty. The requester represents a group which has been involved in this matter.

By way of background, the Williams Treaty is a treaty entered into between seven First Nations and the Crown in 1923. In return for a payment of \$500,000 certain rights of the members of the affected First Nations, including fishing rights, were surrendered, except on reserve lands.

In the case of R.v. Howard, a member of a Williams Treaty band had been convicted of unlawfully fishing during a prohibited period contrary to the Ontario Fishing Regulations. The conviction was affirmed on appeal and an appeal was taken to the Ontario Court of Appeal. In its decision dated March 13, 1992, the Ontario Court of Appeal (8 O.R. (3d) 225) held that, upon signing the Williams Treaty, the seven First Nations had surrendered their traditional right to fish for food off the reserve. The Supreme Court of Canada upheld this decision on May 12, 1994 (18 O.R. (3d) 384). This decision meant that the province of Ontario had to resume normal enforcement activities consistent with Ontario and federal law regarding hunting and fishing carried out off the reserve by members of these seven First Nations communities.

In the summer of 1992, it became apparent that, as a result of the lower court decisions, the Williams Treaty extinguished the rights of its signatories to hunt and fish off a reserve. Accordingly, Ontario and the seven Williams Treaty First Nations began negotiating agreements which would allow members of these First Nations to carry out traditional activities off the reserve. Ontario looked to the ACFLRs, enacted under the federal Fisheries Act, as the only option available to provide a legal basis for those portions of the agreements related to fishing.

The records at issue in this appeal thus relate to exchanges of information among the three named Ministries addressing how the government proposed to address the legal ramifications of these issues.

The Ministry identified 12 records that were responsive to the request and denied access based on the following exemptions contained in the Act:

- advice or recommendations - section 13(1)
- law enforcement - section 14(1)
- relations with other governments - section 15(a)
- proposed plans/policies/projects of an institution - section 18(1)(g)
- solicitor-client privilege - section 19

The requester appealed this decision. During the course of the appeal, the appellant maintained that there was a public interest in disclosing the records, thereby raising the possible application of section 23 of the Act (the so-called public interest override).

A Notice of Inquiry was provided to the Ministry and the appellant. Representations were received from both parties. At this stage, the appellant eliminated Record 11 from the scope of the appeal. The records remaining in this appeal and the corresponding exemptions are listed in Appendix A to this order.

The attachments to Record 3 are the same documents which constituted Record 7 in appeal P-9400670. That appeal was resolved by way of Order P-961 in which I found Record 7 to be exempt under section 15(a) of the Act. Accordingly, I will not consider the attachments to Record 3 in this order.

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).

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The Ministry claims that all 11 records are subject to the common law solicitor-client privilege.

For a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record constitutes a written or oral communication of a confidential nature between a client (or the client's agent) and legal advisor which relates directly to seeking, formulating or giving legal advice, or that the document was created or obtained especially for a lawyer's brief for existing or contemplated litigation.

Records 1-7 are correspondence between a Ministry solicitor and Senior Crown Counsel at the MAG concerning issues arising from the Ontario Court of Appeal's decision in the Howard case. This documentation contains instructions provided by the Ministry solicitor to counsel with respect to the preparation of a legal opinion, information related to the creation of the opinion, the opinion itself and clarifications of the opinion. I am satisfied that these records constitute confidential communications between a solicitor and his client directly related to the seeking and provision of legal advice.

Records 9, 10 and 12 are correspondence related to the Howard case before the Supreme Court of Canada. Records 9 and 10, exchanged between the government counsel and the Director of the Legal Services Branch of the Ministry, relate to motions. In this correspondence, counsel seeks instructions and provides advice as to how certain litigation matters should be resolved. Record 12, a memorandum from the government counsel to a Ministry solicitor, relates to the interpretation of the Supreme Court decision in Howard.

I find that these three records are confidential communications between a solicitor and his client directly related to the seeking and giving of legal advice.

Record 8 is a memorandum from the Ministry's solicitor to the Aboriginal Co-ordination Unit at the MAG, and the Legal Director of ONAS. It is the position of the Ministry that it contains legal advice. Appended to this document is a memorandum from the Ministry's solicitor to Ministry staff which the Ministry maintains constitutes a legal opinion. I agree that these documents contain legal advice related to issues to be raised with the Deputy Attorney General with respect to fishing agreements with Aboriginal peoples. I also find that Record 8 constitutes a confidential communication between a solicitor and his client directly related to the provision and seeking of legal advice.

In summary, based on the findings I have made, all the records are exempt under section 19 of the Act. I therefore need not consider the application of the other exemptions claimed by the Ministry.

PUBLIC INTEREST IN DISCLOSURE

The appellant maintains that there exists a compelling public interest in the disclosure of the records under section 23 of the Act which states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In this order, I have found that all the records are exempt pursuant to section 19 of the Act. Section 23 does not apply to records which are exempt pursuant to section 19. Accordingly, section 23 cannot apply to override this exemption.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Anita Fineberg
Inquiry Officer

August 22, 1995

APPENDIX A

INDEX OF RECORDS AT ISSUE Appeal Number P-9400669

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
1	Electronic mail (E-mail) message dated January 4, 1993, from solicitor at the Ministry's Legal Services Branch to counsel at the Ministry of the Attorney General (MAG)	13(1), 15(a), 14(1), 18(1)(g), 19	Decision Upheld
2	Memorandum dated February 2, 1993, from MAG counsel to Ministry solicitor in response to Record 1	13(1), 14(1), 15(a), 18(1)(g), 19	Decision Upheld
3	Memorandum dated July 8, 1993, from Ministry solicitor to MAG counsel with attachments: (i) letter dated June 29, 1993, from the Minister of Natural Resources to the Minister of Fisheries and Oceans (ii) proposed consultation plan dated June 23, 1993	13(1), 14(1), 15(a), 18(1)(g), 19	Decision Upheld
4	Letter dated July 9, 1993, from MAG counsel to Ministry solicitor	13(1), 14(1), 15(a), 18(1)(g), 19	Decision Upheld
5	Memorandum dated September 20, 1993, from Ministry solicitor to MAG counsel in response to Record 4	13(1), 14(1), 15(a), 18(1)(g), 19	Decision Upheld
6	Facsimile transmission dated October 5, 1993, from MAG counsel to Ministry solicitor	13(1), 14(1), 15(a), 18(1)(g), 19	Decision Upheld
7	Letter dated October 8, 1993, from MAG counsel to Ministry solicitor	13(1), 14(1), 15(a), 18(1)(g), 19	Decision Upheld
8	Memorandum, dated December 2, 1993, from Ministry solicitor to MAG Co-ordinator Aboriginal Co-ordination Unit and ONAS Legal Services Branch Director Attachment: (i) E-mail message from Ministry solicitor	13(1), 15(a), 18(1)(g), 19	Decision Upheld
9	Memorandum dated January 21, 1994, from MAG counsel to Ministry Legal Services	13(1), 15(a), 19	Decision Upheld

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
	Branch Director Attachment: (i) Notice of motion and supporting documentation		
10	Memorandum dated January 28, 1994, from MAG counsel to ONAS and Ministry Legal Services Branch Director	13(1), 15(a), 19	Decision Upheld
12	Memorandum dated June 7, 1994, from MAG counsel to Ministry solicitor	13(1), 15(a), 19	Decision Upheld