



Information and Privacy
Commissioner/Ontario

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

ORDER P-968

Appeal P-9500313

Ministry of Northern Development and Mines



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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 Northern Development and Mines (the Ministry) received a request for a copy of a letter dated February 3, 1995, addressed to a named individual, in relation to a matter before a Labour Relations Tribunal. The Ministry relies on the following exemption in denying access to this record:

- solicitor-client privilege - section 19

The requester appealed this decision.

A Notice of Inquiry was provided to the Ministry, the requester and an individual whose interests may be affected by the outcome of this appeal (the affected party). In addition, as the record appeared to contain the personal information of the requester and another individual, the Appeals Officer raised the application of the section 49(a) and (b) exemptions. Representations were received from the appellant and the Ministry.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the record at issue and I find that it contains the personal information of the appellant.

Section 47(1) of the Act gives individuals a general right of access to records held by a government body which contain their own personal information. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a) of the Act, the Ministry has the discretion to deny access to records which contain an individual's own personal information in instances where certain exemptions would otherwise apply to that information. The exemptions listed in section 49(a) include the solicitor-client privilege exemption provided by section 19. The Ministry claims that the record is exempt under section 49(a) because it qualifies for exemption under section 19. Whether certain records qualify for exemption under this section is a preliminary step in determining whether the exemption in section 49(a) applies.

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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A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. 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 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.

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The record is a letter from Counsel with the Legal Services Branch of Management Board of Cabinet addressed to the affected person, a Ministry employee. Accordingly, in my view, the record was prepared by Crown counsel and the first part of the test has been met.

The record consists of the initial contact between counsel and a witness he intends to call regarding a matter before a Labour Relations Tribunal. Having carefully reviewed the record and the representations, I am satisfied that the record was prepared in contemplation of litigation and that the second part of the test has been met. Accordingly, the record qualifies for exemption under Branch 2 of section 19 of the Act and I find it is exempt under section 49(a). Therefore, it is not necessary for me to consider the application of section 49(b) of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

July 28, 1995