



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

# **ORDER P-1015**

**Appeal P-9500276**

**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).

Before I describe the request which is under consideration in this appeal, some background information is necessary. Prior to the request, the Ministry of Labour (the Ministry) initiated proceedings to prosecute the appellant (a corporation) under the Occupational Health and Safety Act (the OHSA) in connection with an explosion. The appellant's counsel was not satisfied with the degree of disclosure given by the Crown in connection with the prosecution. His attempts to obtain further Crown disclosure were not successful, and accordingly, he brought a motion to stay the prosecution on the basis of inadequate disclosure. The Justice of the Peace hearing the matter held that the defence had not established the relevance of the undisclosed information to its case, and denied the application.

The appellant's request under the Act represents a further attempt to obtain the undisclosed information which is the basis for the appellant's "inadequate disclosure" argument in the prosecution proceedings. The appellant has requested the Prosecution Approval and Prosecution Information forms completed in connection with the explosion.

The Ministry identified a responsive record (an Investigation Report which set out recommendations regarding prosecution). The Ministry denied access to this record in full, based on the following exemptions in the Act:

- advice or recommendations - section 13(1)
- law enforcement - section 14(1)(a)
- solicitor-client privilege - section 19.

A Notice of Inquiry was provided to the appellant and the Ministry. Because the record appears to contain personal information, the Notice of Inquiry also raised the possible application of the mandatory exemption in section 21(1) of the Act (invasion of privacy).

In response to the Notice of Inquiry, representations were received from the Ministry only. The Ministry's representations include an affidavit by the prosecuting attorney. I note that during this appeal, the appellant's counsel submitted case law pertaining to the Crown's obligation to disclose the requested information as part of the prosecution process. I will consider this case law in reaching my decision.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

This exemption is set out in section 19 of the Act, which states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 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).

I will begin my analysis with Branch 2.

In his letter of appeal, counsel for the appellant argues that the record cannot be privileged. However, as noted in Order 49, a record can be exempt under Branch 2 of section 19 regardless of whether the common law solicitor-client privilege criteria under Branch 1 are satisfied. I agree with this interpretation.

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 (Order 210).

In order to qualify as being prepared in contemplation of litigation, it must be established that:

- (a) the dominant purpose for the preparation of the document must be contemplation of litigation, and
- (b) there must be a reasonable prospect of such litigation at the time of preparation of the document; litigation must be more than just a vague or theoretical possibility (Order 52).

The record at issue lists the potential defendants to prosecute, and then sets out the recommendations of two officials as to whether prosecution should occur, and which parties should be prosecuted. The Ministry states that this document was prepared for Crown counsel's use in deciding whether or not to prosecute.

With respect to criterion (1), above, on the basis of the Ministry's evidence I am satisfied that the record was prepared for Crown counsel.

With respect to criterion (2), the requirements regarding contemplation of litigation are amplified by items (a) and (b) above, quoted from Order 52. In view of the record's contents (including the nature of the recommendations), I am satisfied that the dominant purpose for its preparation was contemplation of litigation. Given that prosecutions have been commenced, I am also satisfied that litigation was more than just a vague or theoretical possibility when this record was prepared. Accordingly, I find that the record was prepared in contemplation of litigation.

Again with regard to criterion (2), in view of the fact that the record was prepared to assist counsel in advising the Ministry with respect to prosecutions to be undertaken, I am also satisfied that the record was prepared for use in giving legal advice.

Therefore, I find that the record has met the requirements for exemption under Branch 2 of section 19.

On the basis of the case law submitted to me, counsel for the appellant appears to be arguing that disclosure requirements which apply to the Crown should outweigh any exemptions under the Act which might otherwise apply. I will now consider this argument to determine whether it has a bearing on the application of the section 19 exemption.

It is clear that, in some cases, the existence of other proceedings could affect the application of an exemption. An example is the factor favouring disclosure in section 21(2)(d). This provision can result in a finding that disclosure of personal information which is relevant to the determination of a requester's rights would not be an unjustified invasion of personal privacy. A finding of that nature can mean that such information is not exempt under section 21(1) or 49(b).

However, that factor only relates to the "invasion of privacy" exemptions in sections 21(1) and 49(b). I have not been provided with any basis for concluding that disclosure requirements in another forum have any bearing on whether the section 19 exemption should apply in the circumstances of this appeal.

Accordingly, I find that the section 19 exemption properly applies to the record.

Because of the way I have determined this issue, it is not necessary for me to consider whether sections 13(1), 14(1)(a) and 21(1) apply.

**ORDER:**

I uphold the Ministry's decision.

Original signed by:  
John Higgins  
Inquiry Officer

October 6, 1995