



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

ORDER P-1043

Appeal P-9500310

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 records relating to an investigation into a fatal workplace accident. The Ministry released a number of responsive records and withheld access to eight others on the basis of the following exemptions:

- solicitor-client privilege - section 19
- law enforcement - section 14(1)(a)

The eight records consist of e-mail messages and handwritten notes made by various employees of the Ministry which relate to a prosecution arising from the workplace accident. The Ministry indicates that this prosecution has been scheduled for January 1996.

During the course of mediation, the Appeals Officer raised the possible application of section 21(1), the personal information exemption. Because this is a mandatory exemption, it was added as a potential exemption claim, and included in the Notice of Inquiry which was sent to the Ministry and the appellant.

Representations were submitted by both parties.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the Act reads as follows:

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 that was prepared by Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Ministry submits that all eight records qualify for exemption under Branch 2.

To qualify under Branch 2, the Ministry must establish that the document was prepared by or for Crown counsel; and the document must have been prepared (1) for use in giving legal advice, or (2) in contemplation of litigation, or (3) for use in litigation.

The Ministry points out that all eight records were identified through a search of the case files of the Ministry's lawyer in charge of the prosecution, and describes the records as file notes or exchanges between lawyers concerning the prosecution.

The appellant's representations focus primarily on Branch 1 of the section 19 exemption, but also touch on Branch 2. The appellant's position is that a Prosecution Approval and Prosecution Information document, or any other record containing the same type of information, is not subject to solicitor-client privilege. He identifies case law from previous Ministry prosecutions under the Occupational Health and Safety Act in support of this position. The appellant also argues that excluding documentation from an accused because Crown counsel may consider or use it in determining the legal grounds for a charge runs counter to the purpose of Crown disclosure and to the purpose of the Act.

Records 2, 3, 4, 5, 7 and 8 are either e-mail messages or notes prepared by Crown counsel, and Records 1 and 6 are similar documents prepared for Crown counsel, thereby satisfying the first part of the Branch 2 test. Having carefully reviewed the records and the representations provided by the Ministry, I am satisfied that all of the records were prepared by or for Crown counsel in contemplation of litigation or for use in litigation, namely the upcoming prosecution. No record at issue in this appeal is a Prosecution Approval and Prosecution Information document or other record containing the same type of information. Therefore, it is not necessary for me to determine whether this type of record would satisfy the requirements for exemption under the Branch 2 test.

Therefore, the requirements for Branch 2 have been met and the records qualify for exemption under section 19 of the Act.

Because all eight records qualify for exemption under section 19, it is not necessary for me to consider the section 14(1)(a) or 21(1) exemption claims.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

November 8, 1995