



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1446

Appeal P_9700085

Ministry of Health



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NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Health (the Ministry). The request was for access to a briefing note on ancillary student health services fees at the University of Western Ontario.

The Ministry provided partial access to the responsive record, claiming the following exemptions:

- economic and other interests - sections 18(1)(c), (d) and (g)
- solicitor-client privilege - section 19

The appellant appealed the Ministry's decision. A Notice of Inquiry was sent to the Ministry and the appellant. Representations were received from both parties.

At issue in this appeal is a five page record, dated December 5, 1996 and entitled, "University of Western Ontario Student Health Fees".

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry applied section 19 to exempt two bullet points on page 3, two bullet points on page 4 and page 6 in its entirety. Section 19 consists of two branches, which provide a head 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).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
 - (b) the communication must be of a confidential nature, **and**
 - (c) the communication must be between a client (or his agent) and a legal adviser, **and**
 - (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

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.

[Order 210]

The Ministry claims that the severed portions of the record fall within part 1 of Branch 1 and/or Branch 2.

The Ministry submits:

The information severed from the briefing note ... reflects the legal advice and comments of counsel in the Legal Services Branch of the ministry regarding the issue at hand in conjunction with related statutory provisions.

...

Page 6 of the briefing note summarizes for the minister the legal opinion provided to the program area by Crown counsel

After reviewing the record and considering the representations of the parties, I am of the view that the severed portions meet criteria 1, 2 and 4 of the test for solicitor_client privilege, namely:

1. there has been a written communication;
2. this communication was of a confidential nature; and
4. this communication directly related to seeking, formulating or giving legal advice.

The only remaining question for me to consider is whether or not the communication was "between a client (or his agent) and a legal advisor" (criterion 3).

In my view, the employee responsible for briefing the Minister acts as the agent of the Minister in the review and analysis of issues. If legal advice from a legal advisor is required, the employee acts as the agent of the Minister in seeking and receiving this advice. In my view, the third criteria has been met, as the employee received the advice as agent for the Minister, and passed it to the Minister via this record.

In summary, I find that the four criteria for the first branch of the common law solicitor_client privilege have been met, and the severed portions of the record are exempt under section 19 of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ August 28, 1997