



Information and Privacy
Commissioner/Ontario

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

ORDER P-1458

Appeal P_9700158

Ministry of Transportation



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NATURE OF THE APPEAL:

The Ministry of Transportation (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for "All documents pertaining to regulatory negligence defences in the Ministry".

The Ministry granted access to one record. Access was denied to 19 records based on section 12 (solicitor-client privilege) and section 18(1)(g) (economic interests) of the Act.

The requester (now the appellant) appealed the Ministry's decision to deny access to the records. In his letter of appeal, the appellant asked for access to the Ministry's representations. (This request was withdrawn during mediation.) The appellant also raised the possible application of section 23 - the public interest override.

This office sent a Notice of Inquiry to the Ministry and the appellant. Representations were received from the Ministry only, however, the appellant made representations in his letter of appeal and I have considered these in reaching my decision. In its representations, the Ministry withdrew its application of section 18(1)(g) to the records at issue. The Ministry also indicated it had disclosed two additional records (Records 15 and 16) to the appellant.

The records remaining at issue are Records 1-14, 17, 18 and 19. These records consist of memoranda, draft opinions, information sheets, handwritten notes, case summaries, action memos, e-mails, lists of questions, agenda, reference material, notes, a report and draft report.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the Act 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).

The Ministry claims that Branch 2 applies to all of the records at issue except Record 12.

The Ministry states that the primary purpose of the 17 responsive records is to communicate legal advice between Crown counsel and the client Ministry or to other client Ministries in the provincial government, or to communicate legal advice between Crown counsel so that legal advice could ultimately be conveyed to the client Ministry or to other client ministries in the Ontario government.

The appellant, referring to the index of records provided to him by the Ministry, questions whether the types of documents listed would fall under the section 19 exemption.

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.

[See Order 210]

I have reviewed Records 1-11, 13, 14, 17-19 and I find that they meet the criteria for exemption under Branch 2 of the section 19 exemption. They were all prepared by or for Crown counsel for use in giving legal advice. In the particular circumstances of this appeal, Crown counsel who possessed the expertise in the area of regulatory negligence were providing advice to other Crown counsel and staff who were representing various ministries. The fact that the advice was, in some instances, communicated on a somewhat larger scale than is the norm does not negate the claim of solicitor-client privilege. Therefore, Records 1-11, 13, 14, 17-19 fall under Branch 2 of the section 19 exemption.

Record 12 is made up of a memorandum and an agenda for one of the sessions I have described above. The Ministry submits that Branch 1 of the section 19 exemption applies to this record.

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 two 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 advisor, **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)

The memorandum is from an employee to Crown counsel confirming he is to speak at a meeting of staff of the client Ministry in order to provide legal advice on the subject matter of the appellant's request. The agenda is for the meeting where the Crown counsel is to speak. The Ministry states that the communication is implicitly of a confidential nature since it is addressed

exclusively to Crown counsel and that its purpose is to seek legal advice, which is to be provided when Crown counsel speaks at the meeting.

In my view, the two documents might be more accurately described as the setting up and confirming of an appointment. The only reference to statutory negligence in both documents is in relation to the time and location of the presentation. Therefore, they do not meet the requirements of Branch 1. They are not subject to solicitor-client privilege and are not exempt under section 19 of the Act. Because no other exemption has been claimed for Record 12, it should be disclosed to the appellant.

In summary, I find that Records 1-11, 13, 14, 17, 18 and 19 are exempt pursuant to section 19 of the Act.

PUBLIC INTEREST OVERRIDE

The appellant has raised section 23 of the Act. This section states that 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. Because I have found that the records at issue are exempt under section 19, section 23 has no application.

ORDER:

1. I order the Ministry to disclose Record 12 by sending the appellant a copy on or before **October 16, 1997**.
2. I uphold the decision of the Ministry with respect to Records 1-11, 13, 14, 17, 18 and 19.

Original signed by: _____
Marianne Miller
Inquiry Officer

October 1, 1997