



Information and Privacy
Commissioner/Ontario

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

ORDER P-1437

Appeal P_9700119

Ministry of Natural Resources



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NATURE OF THE APPEAL:

The appellant made a request to the Ministry of Natural Resources (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to:

Any request for proposals, consultant's contracts with terms of reference, interim reports, draft reports and final reports with supporting materials which your Ministry has for any historical, anthropological and/or economic studies that have been done relating to the territorial extent or value of the Saugeen Ojibway fisheries or fishing territories, including any studies intended to examine or quantify the allocation of a subsistence commercial fishery within that region.

The Ministry granted partial access to the records it identified as responsive to the request and claimed the following exemptions to deny access to the remainder:

- advice or recommendations - section 13
- economic or other interests - section 18(1)(e)
- proposed plans or policies of an institution - section 18(1)(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.

There are three records at issue in this appeal:

Record 1: "Evaluation of Evidence Presented in: H.M.Q. v. Howard Jones and Francis Nadjiwon (June 9, 1992 to April 26, 1993)".

Record 2: A draft report on primary and secondary research pertaining to Saugeen Ojibwa fisheries.

Record 3: A Memorandum of Agreement between Praxis Research Associates and the Ministry.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

The Ministry claims that the records qualify for exemption under section 18(1)(e). In order to qualify for exemption under this section, the Ministry must establish the following:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; **and**
3. the negotiations must be carried on currently, or will be carried on in the future; **and**
4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

The Ministry submits that the records "... reveal part of the position or the basis for the position which the Ministry takes with respect to aboriginal commercial fishing." The Ministry states that the records contain information and reveal weaknesses in the arguments presented by the First Nations in the Jones and Nadjiwon case, and that the Ministry position in any negotiation will be based on capitalizing on those weaknesses.

I accept the Ministry's statement that the records would be used to form the basis of its position. However, the records themselves cannot be said to actually **contain** the Ministry's position. Specifically, within negotiations, the Ministry may consider some items non-negotiable, while others might be identified as worthy of compromise. In my view, the records simply are not developed to the point of being capable of classification as positions, plans, procedures, criteria or instructions, and I find that section 18(1)(e) does not apply.

PROPOSED PLANS OR POLICIES OF AN INSTITUTION

The Ministry submits that section 18(1)(g) of the Act applies to exempt the records from disclosure. In order for the Ministry to rely on this exemption, it must establish that the record:

1. contains information including proposed plans, policies or projects;
and
2. that disclosure of the information could reasonably be expected to result in:
 - (i) premature disclosure of a pending policy decision, or
 - (ii) undue financial benefit or loss to a person.

In its representations, the Ministry states that if the records contain information which provides details of projects of the Ministry, the disclosure of which would result in undue loss or gain. In this case, the Ministry submits that disclosure will reveal elements of Ministry strategy in future charges arising from aboriginal commercial fishing, and the information and analysis which will be the basis for the position which the Ministry takes in its ongoing negotiations with the First Nations on aboriginal commercial fisheries. The disclosure could seriously weaken the Ministry's position with respect to both charges and negotiations, and undue gain would result.

In my view, the records are not so well developed as to be properly classified as proposed plans, policies or projects, and I find that the Ministry has not provided the evidence necessary to show that the release of the information contained in the records, in its current form, could reasonably be expected to result in undue financial benefit or loss to a person. The result is that the section 18(1)(g) exemption does not apply to the parts of the records that remain at issue.

ADVICE OR RECOMMENDATIONS

The Ministry also claims that the advice or recommendations exemption found in section 13(1) of the Act applies to Records 1 and 2. This provision states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in many previous orders that advice and recommendations for the purpose of section 13(1) must contain more than just information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

I have carefully reviewed the representations which the parties have provided to me. I find that Records 1 and 2 constitute historical information and not advice or recommendations for the purposes of the Act.

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that section 19 of the Act applies to Records 1 and 2. This section 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 submits that Records 1 and 2 qualify under both branches of the section 19 exemption.

Having reviewed the records, I am satisfied that they fall within Branch 2 of the exemption. Although the records were not addressed directly to Crown counsel, I accept the Ministry's statement that the rationale for commissioning these reports was to ensure that Crown counsel would be briefed on the social scientific issues relating to the aboriginal commercial fishing rights, and find that the records were prepared for Crown counsel. I also find that the records were prepared for use in giving legal advice. Accordingly, I uphold the Ministry's application of section 19 to Records 1 and 2.

PUBLIC INTEREST OVERRIDE

The appellant submits that section 23 applies to override the exemptions claimed by the Ministry. The only exemption which I have upheld is section 19, which is not subject to override by section 23. Accordingly, it is not necessary for me to address this issue in this order.

ORDER:

1. I uphold the Ministry's decision not to disclose Records 1 and 2.
2. I order the Ministry to disclose Record 3 to the appellant by sending her a copy by **September 5, 1997**, but not before **August 31, 1997**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record which are disclosed to the appellant pursuant to Provision 2

Original signed by: _____ August 1, 1997
Holly Big Canoe
Inquiry Officer