



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1511

Appeal P-9700220

Ministry of Finance



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant made a three-part request to the Ministry of Finance (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). Generally, the request was for access to information pertaining to the policies and practices of the Ministry regarding the collection and/or calculation of the amount of provincial sales tax payable. The Ministry located responsive records and granted access to those records which were responsive to part three of the request. The Ministry responded regarding part one of the request as well and this part was resolved at the time of decision.

The Ministry denied access to records responsive to the second part of the request, which asked for information generated by the Ministry in considering and arriving at decisions regarding the collection of Retail Sales Tax on beverage alcohol between January 1, 1996 and June 3, 1997. The Ministry denied access on the basis of sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the Act. The appellant, represented by counsel, appealed the denial of access. In his letter of appeal, the appellant raised the possible application of section 23 of the Act.

This office provided a Notice of Inquiry to the Ministry and the appellant. Representations were received from both parties.

RECORDS:

The records at issue in this appeal consist of:

- a memorandum, prepared by senior counsel at the office of legal services, addressed to an Assistant Deputy Minister (ADM), Tax Division (Record 1);
- two one-page memoranda - the first from an ADM, Tax Division, to an ADM, Office of the Budget and Taxation, and, the second from a Director, Retail Sales Tax Branch, to an ADM, Tax Division (Records 2 and 3, respectively);
- a Position Paper (Record 4) which was attached to Records 2 and 3;
- an Issue Sheet (Record 5).

Both Records 4 and 5 were prepared by the Retail Sales Tax Branch.

PRELIMINARY MATTER:

LATE RAISING OF A MANDATORY EXEMPTION

In its representations, the Ministry raises, for the first time, the application of the mandatory exemption in section 17(2) to Record 1 and portions of Record 2. There is no indication that the Ministry has issued a new decision letter to the appellant in which this exemption is claimed. As

a result, the appellant is not aware that the exemption has been claimed and has not had an opportunity to address the issue.

As section 17(2) is a mandatory exemption, I am required to consider its application. In the usual case, this would require notification of the appellant, which would lead to further delay in the processing of this appeal: a delay which, had the Ministry acted earlier, could have been avoided.

However, in the circumstances of this appeal, because of the findings I have made regarding the portions of the records to which this section has been claimed, it is not necessary for me to address the application of section 17(2). I would suggest to the Ministry, however, that it take due care in preparing its decision letters in response to requests under the Act, as well as in the processing of these files prior to inquiry, so that all issues are canvassed in a timely fashion.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that portions of the records qualify for exemption under section 19.

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]

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 this regard, the Ministry states that Record 1 is a legal opinion, and is a typical tax analysis of applicable statutes and cases to the facts of a particular tax payer other than the requester. Further, the Ministry indicates that the legal opinion was prepared by Crown Counsel employed by the institution for use in giving legal advice. The Ministry submits that the legal opinion gives a recommended course of action with broad application to the client.

The Ministry submits further that the other records contain details taken directly from the legal opinion and that disclosure of portions of these records would reveal the legal opinion.

The appellant submits that not all communications between a solicitor and a client are privileged, and that there is a distinction to be drawn between a privileged communication and a communication regarding a matter of fact, which is not privileged. In this regard, the appellant states that where a communication is made to a solicitor for the purpose of conveying or receiving information on a matter of fact, the communication is not privileged. The appellant refers to Susan Hosiery Limited v. Minister of National Revenue, [1969] C.T.C. 353 (Ex.) in support of this position.

The appellant submits that in the case of this appeal, the facts upon which counsel's legal opinion was based are not subject to solicitor-client privilege.

The appellant submits further, that even if the legal opinion is subject to privilege, that privilege has been waived in the circumstances of this appeal. In this regard, the appellant states:

It is our understanding, based on discussions with [the Ministry's Freedom of Information and Privacy Coordinator], that the memoranda, position paper and issue sheet in question were not disclosed because the Minister had disclosed the solicitor's legal opinion in these documents. If this is the case, it is our submission that, by disclosing the legal opinion to third parties, the Minister has waived his right to deny disclosure on the basis of solicitor-client privilege not only for these documents, but also for the legal opinion itself.

I have reviewed the records at issue and the submissions of the parties. I find that Record 1 contains a legal opinion concerning a Tax Rate under the Retail Sales Tax Act. The opinion was prepared by a senior Crown counsel for the ADM Tax Division. The opinion refers to the factual circumstances of a particular tax payer, and provides analysis of the legislation and case law as it applies to this fact situation. The opinion goes further and advises on the tax implications in a more general sense. I am satisfied that this record was prepared by Crown counsel for use in

giving legal advice to the ADM and therefore, qualifies for exemption under Branch 2 of section 19.

Record 2 is a memorandum from the ADM Tax Division to the ADM, Office of the Budget and Taxation. Paragraphs 1, 3 and 4 of the record do not contain nor do they reflect the information contained in the legal opinion and do not qualify for exemption under this section. Paragraph 2, however, does reveal the contents of the legal opinion. I do not agree with the appellant that, by revealing the contents of the legal opinion to other employees of the Ministry, the Ministry has waived solicitor-client privilege. The inclusion of Branch 2 in this exemption was designed to address this very issue. That is, the legislature recognized that there is often not one client in the government context, but that there is a commonality of interest amongst different departments and ministries of the government. Therefore, in passing the information contained in the legal opinion on to other departments or individuals within the Ministry, it has not waived the privilege in this document. Accordingly, I find that paragraph 2 of Record 2 qualifies for exemption under section 19 as its disclosure would reveal the legal opinion in Record 1.

Similarly, paragraph 2 of Record 3, which is a memorandum from the Director, Retail Sales Tax Branch to the ADM Tax Division, is also exempt under section 19 as it would reveal the contents of the legal opinion. The remaining portions of Record 3, however, do not reflect the contents of Record 1 and do not qualify for exemption under this section.

Record 4 contains a Position Paper prepared by the Tax Advisory, Retail Sales Tax Branch. In my view, disclosure of pages 1, 2 and the top of page 3 would reveal the contents of the legal opinion in Record 1 and this information is properly exempt under section 19. The remaining portions of this record do not qualify for exemption under section 19.

Finally, only paragraphs 1 to 4 of the Background section of Record 5, which is an Issue sheet, would reveal the legal opinion in Record 1. These portions of the record are exempt under section 19. None of the remaining portions of Record 5 qualify for exemption under this section.

ADVICE OR RECOMMENDATIONS

The Ministry claims that the advice or recommendations exemption found in section 13(1) of the Act applies to Records 2, 3, 4 and 5. 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 already found that some portions of the records to which section 13(1) has been claimed are properly exempt under section 19. I will, therefore, only consider the remaining portions of

the records in this discussion.

In reviewing the records and considering the parties' representations, I find that neither Record 2 nor 3 contain advice or recommendations in the sense contemplated by this section. These are, rather, covering memoranda which forward information to the recipient. As no other exemptions have been claimed for these records, they should be disclosed to the appellant (subject to the exemption in section 19).

With respect to Record 4, I find that only the section titled "Recommendation" at the bottom of page 3 contains advice or recommendations. The remaining portions of this record contain factual information only and should be disclosed to the appellant (again, subject to the exemption in section 19).

Record 5 can be divided into different sections. The "Issue" section, in my view, contains factual information and does not qualify for exemption under section 13(1). Similarly, paragraphs 5 and 6 of the "Background" section are informational only and therefore, do not qualify for exemption under this section.

The section titled "Suggested Response" contains information provided by an employee of the Ministry as to the manner in which the recipient should respond to questions on this issue. However, in my view, this information is provided to the recipient specifically for the purpose of public consumption. That is, this section of the Issue sheet is designed to be read out by the recipient in response to questions on the issue. As such, I find that it does not contain "advice" or "recommendations" in the sense contemplated by this section, but is, rather, informational in nature. Moreover, there is no suggestion that this part of the record was intended or would be used by the recipient during the deliberative process. Again, it is merely informational and intended to be disseminated to the public through a public process of government.

Therefore, subject to the exemption in section 19, Record 5 should be disclosed to the appellant.

PUBLIC INTEREST OVERRIDE

The appellant submits that section 23 applies to override the exemptions claimed by the Ministry. This section provides:

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.

The primary 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 with respect to these portions of the record in this order.

With respect to section 13(1), the appellant submits that the public interest in the disclosure of the documents significantly outweighs the purpose of the exemption. In this regard, the appellant indicates that the Ministry recently changed its policy towards the application of retail sales tax to alcohol for own use or provided free of charge. The appellant argues that the basis

for this decision is unclear, particularly in light of the Ministry's historical position. The appellant submits further that the Ministry's new policies have a significant impact on all restaurant, food and beverage services. The appellant concludes that without access to all of the Ministry's records in respect of its retail sales tax policy on beverage alcohol, it is difficult to appreciate the Ministry's position or to challenge its decisions.

I note that the appellant has already received a considerable amount of information as a result of this access request. The only portion of the records at issue in this discussion consists of the "Recommendation" section of Record 4. The Ministry states that what needed to be disclosed to the public has been disclosed in an appropriate format: the tax bulletin and the Retail Sales Tax Act. Moreover, the Ministry indicates that case law further explains "own use". The Ministry submits that there is no compelling public interest in disclosing the information in the records, whether it adds to or merely repeats the tax guide and the Retail Sales Tax Act.

I have considered the representations of the parties. In my view, the disclosure of the recommendations section of Record 4 would not add significantly to information already available to the appellant. Further, I find that the appellant's interest in the records is essentially a private one, that is, the interest of a particular segment of the public which is impacted by the matter to which these records relate. Accordingly, I find that there is no compelling public interest in disclosure of this portion of the records which outweighs the purpose of the exemption.

ORDER:

1. I uphold the Ministry's decision to withhold from disclosure Record 1 in its entirety, paragraph 2 of Record 2, paragraph 2 of Record 3, pages 1, 2 and 3 of Record 4, and paragraphs 1 - 4 of the "Background" section in Record 5. For greater certainty, I have highlighted on the copies of the records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator, those portions of Records 2, 3 and 5 which are exempt. The other exempt portions of the records are clearly identifiable.
2. I order the Ministry to disclose the remaining information to the appellant by providing him with a copy of the records on or before **January 27, 1998**.
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 portions of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Laurel Cropley
Inquiry Officer

January 6, 1998