Information and Privacy
Commissioner/Ontario

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

ORDER P-1578

Appeal P-9800021

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of any minutes, notes or any other record of meetings between the Deputy Solicitor General, the Deputy Attorney General, the Deputy Minister of Natural Resources, and the Executive Assistant to the Premier, or any combination of these people, from September 4 to September 9, 1995, regarding the occupation of Ipperwash Provincial Park. The Ministry located 13 pages of responsive records and denied access to them in their entirety based on the following exemptions:

- advice or recommendations - section 13(1)
- relations with other governments - sections 15(a) and (b)
- solicitor-client privilege - section 19
- invasion of privacy - section 21

The appellant appealed the Ministry's decision.

During mediation, several events occurred. It was determined that the first three pages of records had been the subject of a previous order (P-1409) involving the same parties and, therefore, they are not at issue in this appeal. The Ministry withdrew the sections 15(a) and (b) exemption claims, and claimed that three lines on page 9 are not responsive to the appellant's request. Finally, the appellant raised the application of section 23 of the Act, claiming that there is a compelling public interest in the disclosure of the records.

The records that remain at issue consist of ten pages of handwritten notes made by the then Acting Assistant Secretary, Land Claims and Self Government Negotiations at the Ontario Native Affairs Secretariat (ONAS) in the context of his attendance at meetings between September 4 to September 10, 1995 dealing with the occupation of Ipperwash Park.

This office sent a Notice of Inquiry to the Ministry and the appellant. Representations were received from both parties. In its representations, the Ministry claims that the first four lines on page 4 and all of pages 9-13 are not responsive to the appellant's request, and raises the application of the discretionary exemption pursuant to section 13(1) of the Act for part of page 12.

PRELIMINARY MATTER:

RESPONSIVENESS OF THE RECORDS

Because of the way in which I will be disposing of the issues in this appeal, it is not necessary for me to address the issue of the late raising of the discretionary exemption claim by the Ministry with respect to page 12. However, I will address the Ministry's claim that portions of the records are not responsive.

The Ministry submits that the three lines originally identified on page 9, the first four lines on page 4, and the first seven lines on page 9, fall outside the scope of the request because they do not relate to "notes of meetings between the three Deputy Ministers and the Executive Assistant to the Premier", or combinations thereof. The Ministry also submits that the rest of page 9 and

all of pages 10 through 13 are notes of a teleconference meeting which took place on September 10, 1995, which is outside of the timeframe specified in the request.

The issue of responsiveness of records was canvassed in detail by former Inquiry Officer Anita Fineberg in Order P-880. That order dealt with a re-determination regarding this issue which resulted from the decision of the Divisional Court in Ontario (Attorney-General) v. Fineberg (1994), 19 O.R. (3rd) 197.

In the Fineberg case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance. In her discussion of this issue in Order P-880, Inquiry Officer Fineberg stated as follows:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I agree with these conclusions and adopt them for the purposes of this appeal.

The Ministry was made aware of Order P-880 in the Notice of Inquiry. In response, the Ministry submits that records not involving the combinations of people identified by the appellant, or those created outside the stated timeframe, were not intended to be provided and are therefore not reasonably related to the request.

The three lines on page 9 originally identified by the Ministry as being non-responsive relate to matters unrelated to the Ipperwash incident. I accept the Ministry's explanation with respect to these three lines, and find that they are not responsive to the appellant's request.

I do not accept the Ministry's position with respect to the remaining parts of pages 4 and 9-13 which the Ministry claims are non-responsive. In my view, while the first four lines on page 4 and the first seven lines on page 9 may not be notes of the actual meetings which occurred, they are clearly notes made in preparation for those meetings. As such, I find that they are reasonably related to the request and therefore responsive.

As far as the notes of the September 10, 1995 teleconference meeting are concerned, they fall squarely within the type of information requested by the appellant. In my view, no useful purpose would be served by taking an overly technical interpretation of the scope of the request, for the sake of a one-day discrepancy. This is an issue that could easily have been resolved by the Ministry at an early stage through conversation with the appellant, and the Ministry in fact treated these records as responsive up to the point of making representations in response to the Notice of Inquiry. I find that the notes of the September 10, 1995 meeting are responsive, and

the appellant will not be required to submit a new request in order to receive a decision on these records.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the Act states:

> 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 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 Ministry 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]

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 P-1342]

The Ministry relies on both branches, however, I will first deal with Branch 2.

The Ministry submits that the notes were taken by the then Acting Assistant Secretary, who was also the former Director of Legal Services for ONAS and a Crown lawyer since 1979. The Ministry submits that the Assistant Secretary attended the meetings "because of his experience and knowledge as a lawyer and Legal Director involved in providing advice on previous Aboriginal emergency situations".

The Assistant Secretary also provided an affidavit, where he states that "[p]rior to, during and following those meetings, I provided legal advice to the Deputy Attorney General and other government officials concerning the emergency."

The appellant submits that:

> This record was clearly not prepared for or by Crown counsel, but as a record of a meeting that was held. Because of a quirk of government structure, [the Assistant Secretary's] office happens to fall under the Attorney General's Ministry, but his role is as a senior civil servant in the native Affairs Secretariat, a body concerned with the province's aboriginal population in general, not legal matters specifically.

In Order P-1409, former Inquiry Officer John Higgins dealt with similar records prepared by the Assistant Secretary. In fact, pages 1-3 have been removed from the scope of this appeal because they were already specifically dealt with in Order P-1409. Parenthetically, I would add that some other pages were also responsive to the request which led to Order P-1409, although they were not identified as such at the time.

In Order P-1409, the Inquiry Officer made the following finding with respect to pages 1-3 and other similar records:

> I am satisfied that these records were prepared by Crown counsel, meeting requirement 1 under Branch 2 as outlined above.
>
> In my view, handwritten notes made by a lawyer and retained in the lawyer's file are quite different from the meeting minutes previously dealt with in this order. Lawyer's notes are often prepared for use in giving legal advice at a later time, if necessary. In the circumstances of this appeal, I am satisfied that these records were prepared for use in giving legal advice, meeting requirement 2.

I can see no basis for distinguishing the records in this appeal from the ones dealt with by former Inquiry Officer Higgins, and I find that pages 4-13 in their entirety qualify for exemption under Branch 2 of section 19.

Therefore, it is not necessary for me to consider the application of sections 13(1) and 21.

Section 19 of the Act is not subject to the "public interest override", so section 23 has no application in the circumstances of this appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: June 9, 1998
Tom Mitchinson
Assistant Commissioner