



Information and Privacy
Commissioner/Ontario

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

ORDER P-1600

Appeal P_9800110

Ministry of the Environment



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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request pursuant to the Freedom of Information and Protection of Privacy Act (the Act) for access to copies of all records in the Ministry's possession "on environmental concerns relating to" a specified property.

The Ministry identified some 300 pages of responsive records, and provided access to all but four pages. Access to those four pages was denied pursuant to section 19 of the Act (solicitor-client privilege).

The requester appealed the Ministry's decision. His letter of appeal also indicates that he was advised the records contained some 358 pages. He notes that there are a number of duplicate pages included in the records. He is, therefore, of the view that the Ministry has failed to include approximately 138 pages in the records sent to him.

He indicates further that he has experienced misfiling of records by the Ministry in the past and believes that the Ministry's search has missed responsive records files.

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

RECORDS:

The records to which section 19 has been applied consist of four pieces of correspondence between a senior counsel at the Crown Law Office Civil of the Ministry of the Attorney General (counsel) and staff at the Ministry's London District Office - Abatement.

PRELIMINARY MATTERS:

DID THE APPELLANT RECEIVE ALL OF THE RESPONSIVE RECORDS TO WHICH HE WAS ENTITLED?

The appellant believes that, when he was first advised that the records which were to be disclosed to him consisted of 358 pages, this reflected the actual number of pages which had been located in response to his request. He submits that this number was reduced to about 300 because someone at the Ministry went through the file and decided that some information should not have been made available. He submits further that additional "tailoring" took place, as a result of further scrutiny of the records by someone at the Ministry. In this regard, he surmises that additional pages were removed and that someone made multiple photocopies of some other pages in order to arrive at 300 pages.

The appellant believes that someone at the Ministry is tampering with evidence which may be crucial in a lawsuit between the appellant and two other companies.

The Ministry indicates that it provided the appellant with an interim decision and fee estimate. It indicates further that the estimate of the number of responsive records was, in part, based on its view that records might exist at a government records centre. However, following a search of this location, no records were found. The Ministry states that this accounts for the difference in the number of records being identified in the final decision.

The appellant has made very serious accusations against Ministry staff, but he has provided no evidence whatsoever to support them. I will not consider completely unsubstantiated insinuations as a basis for delving into the Ministry's practices. I have considered the Ministry's explanation for the discrepancy between the estimated and actual number of responsive records, and I am satisfied with it.

REASONABLENESS OF SEARCH

In cases where a requester provides sufficient details about the records which he or she is seeking and the Ministry indicates that records do not exist, it is my responsibility to insure that the Ministry has made a reasonable search to identify any records that are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

A reasonable search is one in which an experienced employee(s) expends a reasonable effort to locate records which are reasonably related to the request.

With respect to this issue, the appellant argues that to ask whether the Ministry's search for responsive records was adequate in the circumstances of this appeal is really not sufficient, as he is alleging some persons in the Ministry are involved in "tailoring the records" and are possibly conspiring to eliminate the evidence. He has asked for a full investigation into the Ministry's practices. I have addressed this issue above, and will not do so again.

However, the Ministry has outlined the steps taken to search for responsive records, and I have reviewed them to determine whether they were reasonable in the circumstances of this appeal.

The Ministry advises that the request was originally for "environmental concerns, orders, spills, charges/prosecutions and certain types of certificates of approval in relation to the [named] property". The Ministry states that the request was clarified by the appellant at an early stage such that records in the Approvals Branch (such as Certificates of Approval and supporting documentation) were no longer being sought. The Ministry further clarified with the appellant that he was seeking records in the amalgamated Southwestern Regional Office (technical support sections) and London District Office (abatement).

The Ministry indicates that the search for responsive records was conducted by the District Assistant at the London office. She is the person responsible for access matters at that office and has held this position for over two years. The Ministry indicates that she is familiar with the records management system at that location. The District Assistant provided a memorandum outlining the steps she took to search for and locate responsive records.

The Ministry advises that the London office houses all records filed by municipal address such as the named property. The Ministry indicates that pursuant to its policy, any notes of verbal transactions, paper copies of e-mails and faxes that pertain to the Ministry's mandate of protecting the natural environment are sent to the file room for inclusion in the site file.

The District Assistant indicates that she went to the file room and located two file folders for the named property. She copied both files. The District Assistant also contacted the Ministry's Environmental Officer who was responsible for the property at issue. This individual is no longer with the Ministry, however, the Ministry indicates that she forwarded groundwater information (technical reports) to the District Assistant. Further, she confirmed to the District Assistant that she had provided all records relating to this property in her possession.

The Ministry indicates that transfer lists for properties on the street on which the property is situated were also located. These transfer lists indicated that four boxes of records were at the government's Records Centre. These files were retrieved, but as I indicated above, they did not contain files or records relating to the named property.

The Ministry indicates that the District Assistant conducted three separate searches for responsive records throughout the processing of this appeal.

The Ministry advises that the records which were provided to the appellant indicate that the Ministry of the Attorney General started to defend a legal action initiated by the appellant against the Ministry of Environment and others. The Ministry states that it did not conduct a search for records related to this legal action at either the Ministry of the Attorney General or the Ministry's Legal Services Branch as they were not requested. The Ministry indicates that it interpreted "Charges/prosecutions" as pertaining to Ministry initiated charges and prosecutions. The Ministry takes the position that the request was limited to records maintained at its London Office.

The Ministry states that its Freedom of Information and Privacy Co-ordinator also contacted the Investigations and Enforcement Branch to confirm that the London Office found no records of charges or prosecutions. Further, a database search of all such files was conducted, however, the database did not contain reference to any of the parties mentioned in the request in connection with this address.

Finally, according to staff at the London District office, no records were created and subsequently destroyed.

I have considered the Ministry's representations on this issue and agree with its interpretation of the request and the locations for search. I am satisfied that the search was conducted by experienced employees and that all reasonable steps have been taken to locate responsive records. Accordingly, this portion of the appeal is denied.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 consists of two branches, which provide the Ministry 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.

In order for a record to qualify for exemption under Branch 2, two criteria must be satisfied:

1. the record must have been prepared by or for counsel employed or retained by the Ministry; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

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The Ministry claims that both branches of the section 19 exemption apply to the records at issue.

The Ministry indicates that it is the client, as represented by an Environmental Officer, the Regional Director and the Regional Supervisor. The solicitor is a crown counsel employed by the Ministry of the Attorney General. The four pieces of correspondence consist of communications between the solicitor and the Ministry's employees.

Record 1 is a letter from the Environmental Officer to counsel in which she informs counsel of the documents available to the Ministry to defend itself in a court action initiated by the

appellant. The Ministry submits that this letter was created solely for counsel with respect to the court case, which the Ministry indicates is still ongoing.

Record 2 is a memorandum from counsel to the Regional Director in which she outlines her assessment of the claim. The Ministry submits that this record was prepared in connection with the litigation involving the Ministry and the appellant. In addition, the Ministry asserts that it contains legal advice.

Record 3 is a letter from the Regional Supervisor to counsel in which he seeks information pertaining to the litigation involving the Ministry and the appellant. The Ministry submits that this letter is a request for legal advice and was prepared in contemplation of the lawsuit.

Record 4 is a memorandum from counsel to the Regional Supervisor in response to Record 3. The Ministry submits that this record provides advice to the Regional Supervisor and outlines the details of a negotiated settlement.

The appellant's representations do not address the application of section 19 to these four records.

I have reviewed the records in light of the Ministry's representations. I am satisfied that Record 2 contains counsel's confidential legal advice to the Regional Director concerning the implications of the claim initiated by the appellant. Accordingly, I find that this record qualifies for exemption under both branches of section 19.

Record 1 contains a direct communication of a confidential nature between the Ministry (through its representative) and counsel for the purpose of furthering counsel's ability to defend the Ministry's interest in the litigation. Accordingly, I find that it is properly exempt under Branch 1 of the section 19 exemption.

In my view, neither of the remaining two records contain or relate to the seeking of legal advice. Rather, they are communications in which information is shared and they pertain primarily to the status of the claim in respect of the Ministry's involvement. In my view, the content of these two records is informational only and does not relate to the defense or preparation for the defense of the contemplated litigation. Accordingly, I find that Records 3 and 4 were neither created or obtained especially for the counsel's brief for existing or contemplated litigation (Branch 1) nor were they prepared in contemplation of, or for use in, litigation (Branch 2). As no other exemptions apply to these two records, they should be disclosed to the appellant.

ORDER:

1. I order the Ministry to provide the appellant with copies of Records 3 and 4 by giving him a copy by **August 20, 1998**.
2. I uphold the Ministry's decision to withhold the remaining records.
3. The Ministry's search for responsive records was reasonable and this part of the appeal is dismissed.

4. 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 records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Adjudicator

July 30, 1998