



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1571

Appeal P-9800006

Ministry of the Environment



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NATURE OF THE APPEAL:

The Ministry of the Environment, formerly the Ministry of Environment and Energy (the Ministry), received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records relating to the asphalt and cement recycling operations of a named company at a specified location. The Ministry granted partial access to the responsive records. Access to the remaining records was denied pursuant to the exemption under section 19 of the Act (solicitor-client privilege). The requester (now the appellant), who represents the named company, appealed the denial of access.

During mediation, the Ministry located additional records and disclosed some of them to the appellant. The Ministry withheld access to the other records under section 19 of the Act.

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

The records withheld by the Ministry were listed and described on pages 2 and 3 of the Notice of Inquiry. In its representations, the Ministry indicates that it is no longer relying on section 19 to withhold access to Records 1, 5, 6, 8, 10, 11, 14, 15, 17, 19 and 22. No mandatory exemptions apply and no other discretionary exemptions have been claimed by the Ministry. Therefore, these records are no longer at issue and should be disclosed to the appellant. I will include these records in the order provisions below.

The records that remain at issue are Records 2, 3, 4, 7, 9, 12, 13, 16, 18, 20 and 21 as listed and described in the Notice of Inquiry.

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).

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 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 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.

The Ministry submits that the records qualify for exemption under both Branches 1 and 2. I will first consider the application of Branch 2 to the records.

The Ministry states that in 1989, the named company initiated a claim against several parties, including Her Majesty in the Right of Ontario as represented by the Ministry. The Ministry was represented by Crown counsel and a member of a private law firm was retained to assist as the matter proceeded to trial. Several Ministry staff were actively involved with legal counsel in preparing the Ministry's defence.

The Ministry submits that the records were prepared by or for Crown counsel for use in giving legal advice and therefore qualify for exemption under Branch 2.

I have reviewed the records. Record 2 is a memorandum from legal counsel to a colleague; Records 3, 4, 12, 16, 18, 20 and 21 are letters from Crown counsel to staff; Record 7 is a draft letter prepared by staff for review by legal counsel; Record 9 is a list of undertakings and responses compiled by Ministry staff for Crown counsel and Record 13 is a list of undertakings prepared by Crown counsel.

Previous orders of the Commissioner have established that the term "Crown counsel" refers to any legal advisor employed or retained by the Crown (Orders 52 and 170). This interpretation includes both the in-house counsel of the Ministry and the counsel from the private law firm. I agree with this interpretation and adopt it for the purposes of this appeal.

I find that Records 2, 3, 4, 7, 9, 12, 13, 16, 18, 20 and 21 are records prepared by or for Crown counsel for use in giving legal advice and qualify for exemption under Branch 2 of section 19.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 2, 3, 4, 7, 9, 12, 13, 16, 18, 20 and 21.
2. I order the Ministry to disclose Records 1, 5, 6, 8, 10, 11, 14, 15, 17, 19 and 22 by sending the appellant a copy by **June 16, 1998**.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with copies of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Mumtaz Jiwan
Adjudicator
(formerly Inquiry Officer)

_____ May 26, 1998