



Information and Privacy  
Commissioner/Ontario  
Commissaire à l'information  
et à la protection de la vie privée/Ontario

## **ORDER PO-1888**

Appeal PA\_000288\_1

Ministry of Education



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## **NATURE OF THE APPEAL:**

This is an appeal under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a decision of the Ministry of Education (the Ministry). The appellant sought access to “any studies, discussion papers, reports or legal opinions on the constitutionality of implementing a school uniform policy in Ontario schools”.

The Ministry located seven records responsive to the request and granted full access to one record and partial access to six records. The Ministry denied access to portions of Records 1 to 4 relying on the exemption in section 19 [solicitor-client privilege] of the *Act*, and denied access to portions of Records 5 and 6 on the basis of the exemption in section 13 [advice to government].

The appellant appealed the Ministry’s decision.

Prior to the release of the Report of Mediator, the Ministry issued a second decision letter claiming the solicitor-client privilege exemption under section 19 for Records 5 and 6. In response, the appellant requested that the issue of the late raising of a new discretionary exemption be included in the appeal.

At issue are the section 19 exemption [solicitor-client privilege] for Records 1-6, the section 13 exemption [advice to government] for Records 5 and 6, and the late raising of a new discretionary exemption.

I sent a Notice of Inquiry initially to the Ministry and received representations in response. I then sent the Notice, together with the Ministry’s representations in their entirety, to the appellant who also provided representations.

## **RECORDS:**

The Records at issue consist of five internal Ministry memoranda (Records 1 to 5), and one Ministry position paper (Record 6).

## **DISCUSSION:**

### **Background**

According to an affidavit sworn by an individual who was an Education Officer with the Legislation Branch in the Ministry when the six records at issue were prepared, the records were developed in response to an application for judicial review of a local school board’s policy on student attire.

At the time when the records at issue were developed, the Legislation Branch consisted of a Legal Services Unit and a group of Education Officers. The Legal Services Unit, whose members were lawyers, and the Education Officers, who were not lawyers, worked collaboratively as a team preparing policy papers and correspondence. It was the responsibility of the Director of the Legal Services Unit to review and sign off on material prepared by the Branch that involved legal issues.

**PRELIMINARY MATTER:**

**LATE RAISING OF A NEW DISCRETIONARY EXEMPTION**

On September 28, 2000, the Commissioner's office provided the Ministry with a Confirmation of Appeal which indicated that an appeal from the Ministry's decision had been received. This Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Ministry would have 35 days from the date of the confirmation (that is, until November 3, 2000) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

As I indicated above, the Ministry issued a second decision letter to the appellant on November 9, 2000, six days after the November 3<sup>rd</sup> deadline, claiming the solicitor-client privilege exemption under section 19 for Records 5 and 6.

Previous orders issued by the Commissioner's office have held that the Commissioner (or her delegate) has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In Order P-658, Inquiry Officer Anita Fineberg explained that the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal in accordance with section 51 of the *Act*.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions. However, it must not be at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

The Ministry acknowledges that it is raising the application of this exemption to these records late in the process. The Ministry claims that it was only after this Office asked the Ministry to review its position on the section 13 exemptions for Records 5 and 6 that the Ministry recognized that the section 19 exemption should also have been extended to these two records. On the advice of the mediator, the Ministry sent a second decision letter to the appellant setting out its intention to extend its reliance on the section 19 exemption to Records 5 and 6. In its representations, the Ministry states:

...the six-day delay was not extensive. Additionally, it is relevant to note that the additional ground of exemption for records 5 and 6 did not constitute a new ground since the section 19 exemption had already been claimed for records 1-4. This is not a case, therefore, where the appellant was faced with the challenge of having to become familiar with an entirely new ground of exemption.

In the circumstances of this appeal, I am prepared to accept the Ministry's submission on this point. The appellant was given an opportunity to address the exemption claim, no delay resulted from the additional claim, and the delay was relatively brief. It is my view that the appellant was not prejudiced by the late raising of the section 19 exemption to Records 5 and 6.

### **SOLICITOR-CLIENT PRIVILEGE**

The Ministry claims that Records 1 to 6 are exempt from disclosure under section 19 of the *Act*. Section 19 provides that:

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 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the institution must demonstrate that one or the other, or both, of these heads of privilege apply to the records at issue.

The appellant, in his representations, claimed that Records 1-6 were not prepared in contemplation of litigation. In fact, the Ministry has not relied on this part of the section 19 exemption, but submitted that all of the records at issue are covered by solicitor-client communication privilege.

#### **Solicitor-client communication privilege**

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P\_1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

. . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves

protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

The Ministry submits that:

...records 1-6 constituted legal interpretation and advice, prepared for the confidential use of senior ministry official by or with legal counsel in the employ of the Ministry, and are subject as a group to solicitor-client privilege under....section 19 of the Act.

#### Records 1, 2, 4

I have reviewed Records 1, 2, and 4 and also considered the Ministry's submissions. I find that the records were prepared by the Director of the Legal Services Unit and a senior counsel for the purpose of providing legal advice to the Director of the Legislation Branch. Accordingly, I find that these three records qualify for exemption under the section 19 solicitor-client communication exemption.

#### Record 3

The appellant, in his representations, raised the issue of whether solicitor-client privilege can properly attach to this record since it was prepared in part by an Education Officer who is not a lawyer.

In Order PO-1663, Senior Adjudicator David Goodis found that where legal counsel worked with non-legal staff to draft amendments to a regulation, solicitor-client communication privilege applied since it was clear that legal counsel was involved in the course of the drafting process.

I have reviewed Record 3 and I find that it was jointly prepared by the Director of the Legal Services Unit and an Education Officer, at the request of the Management Committee. I am satisfied that legal advice was provided in the course of the development of the record. In the circumstances, I adopt the approach set out in Order PO-1663, and accordingly find that Record 3 qualifies for exemption under section 19.

#### Record 5 and 6

I find that Records 5 and 6 were jointly prepared by two members of the Legal Services Unit and two Education Officers for the purpose of providing legal and policy advice to the Management Committee on policies related to school attire.

The Ministry submits that:

...while there were references in records 3,5, and 6 to the development of “policy” rationale or issues, the essence of the disputed portions of these records was legal interpretation or advice. ...the Ministry submits that the dominant purpose of the dispute portions of these records represented part of the whole continuum of the legal opinion and advice submitted over the period April 18, 1988 to December 9, 1988 around the issues of the Ministry’s position on school uniforms.

I accept the Ministry’s characterization of these records. I am satisfied that these two records contain information that would reveal the confidential legal advice of counsel or are part of the continuum of confidential communications between a client and its legal advisor as contemplated in *Balabel*. Accordingly, I find that Records 5 and 6 also qualify for exemption under the solicitor-client communication privilege segment of section 19.

#### **ADVICE OR RECOMMENDATIONS**

The Ministry claims section 13(1) of the *Act* as a basis for exempting Records 5 and 6 from disclosure. I have found that the Ministry can rely on the discretionary exemption under section 19 of the *Act* for Records 5 and 6. I have also found that Records 5 and 6 to be exempt from disclosure under the solicitor-client communication privilege aspect of section 19. I therefore find that it is not necessary for me to address the section 13(1) claim for exemption in this order.

#### **ORDER:**

I uphold the decision of the Ministry to deny access to the requested records.

Original signed by: \_\_\_\_\_  
Dawn Maruno  
Adjudicator

\_\_\_\_\_ March 28, 2001