



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-1996**

## **Appeal PA-010330-1**

### **Ministry of Natural Resources**



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, a company, submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Natural Resources (the Ministry) for access to

. . . full and complete file disclosure from the [Ministry] starting in 1980 with respect to all activities of [the appellant] in [identified property], up to the present time leaving aside the materials which you forwarded to me with your May 7, 2001 letter.

The Ministry identified records responsive to the request. The Ministry then notified an affected person of the request, and sought the individual's representations on the disclosure of a particular record. The affected person did not respond. The Ministry then notified the affected person of its decision to disclose portions of this record, and to withhold portions based on the personal privacy exemption at section 21 of the *Act*.

Later, the Ministry notified the appellant of its decision to grant full access to some of the records, partial access to others, and no access to the remaining records. The Ministry advised the appellant that records or portions of records were being withheld on the basis of the exemptions at sections 13 (advice to government), 17 (third party commercial information), 19 (solicitor-client privilege) and 21 of the *Act*.

The appellant then appealed the Ministry's decision to this office.

During the mediation stage of the appeal, the scope of the request and appeal was narrowed. As a result, certain records and exemptions are no longer at issue.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry, which provided representations in response. I then sent the Notice of Inquiry, together with the non-confidential portions of the representations, to the appellant. The appellant did not provide representations in response.

## **RECORDS:**

The records remaining at issue in this appeal and the relevant exemptions are described as follows:

<b>Page Numbers</b>	<b>Record Description</b>	<b>Decision</b>
1-3	"Legal review" dated January 15, 1995	Withheld in full under s. 19
4-5	"Interpretation of Legal", undated	Withheld in full under s. 19
7	Notes dated September 18, 1995	Portions withheld under s. 19
44	Letter dated May 1, 1990	Portions withheld under s. 13
66	Chronology (excerpt; page 4 of 5)	Portions withheld under s. 19
70	Notes dated August 2, 1995	Portions withheld under s. 19
71	Telephone messages dated December 23, 1987	Portions withheld under s. 21
73-76	Series of e-mail messages dated from April 24, 2001 to May 17, 2001	Portions withheld under s. 19

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

#### **Introduction**

The Ministry claims that all of pages 1-3 and 4-5, and the withheld portions of pages 7, 66, 70 and 73-76 are exempt under section 19 of the *Act*, which reads:

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 common law privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The Ministry submits that these records are subject to common law 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 pages 1-3 record a communication from Ministry counsel to Ministry staff regarding the legal issues on the development of the lands in issue. The Ministry further submits that the withheld portions of pages 7 and 66 summarize that lawyer’s advice on the issues. I accept these submissions and find that pages 1-3, and the withheld portions of pages 7 and 66, either consist of, or would reveal, confidential communications between Ministry counsel and staff made for the purpose of giving or receiving legal advice.

The Ministry states that pages 4-5 consist of a note requesting a legal opinion and forwarding material for legal review by Ministry counsel. The Ministry also submits that the withheld portions of pages 70 and 73-76 consist of notes of Ministry employees or e-mails from Ministry counsel that contain either instructions to counsel or requests for advice from counsel on the planning matter. Based on these submissions and my review of these records, I am satisfied that all of pages 4-5 and the withheld portions of pages 70 and 73-76 either consist of, or would reveal, confidential communications between Ministry counsel and staff made for the purpose of giving or receiving legal advice.

Based on the above, I conclude that the section 19 exemption applies to all of pages 1-3 and 4-5, and the withheld portions of pages 7, 66, 70 and 73-76.

## **ADVICE OR RECOMMENDATIONS**

The Ministry submits that the section 13 exemption applies to the withheld portions of page 44. Section 13(1) of the *Act* reads:

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.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it “... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making”. Put another way, the purpose of the exemption is to ensure that:

. . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head’s ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere 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 [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

In Order P-434 Assistant Commissioner Tom Mitchinson made the following comments on the “deliberative process”:

In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial *Act*] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the *Act* would be to extend the exemption beyond its purpose and intent.

The Ministry submits that the withheld portion of page 44 consists of advice or recommendations within the meaning of section 13.

On its face, it is clear that the withheld portion of page 44 consists of a recommended course of action from a Ministry staff member to another Ministry official that could have been accepted or rejected in the deliberative process relating to the development matter in issue. As such, the withheld portion of page 44 qualifies for exemption under section 13.

## **PERSONAL INFORMATION/INVASION OF PRIVACY**

The Ministry claims that the withheld portions of page 71 are exempt under the section 21 personal privacy exemption. This exemption applies only to information that qualifies as “personal information”, as defined in section 2(1) of the *Act*. “Personal information” is defined, in part, to mean recorded information about an identifiable individual.

The Ministry submits:

. . . The exempted portion of page 71 identifies the name, address and phone number of an individual . . . It also identifies [this individual’s] concerns or personal opinions concerning [development issues]. [This individual] is not acting in any professional or official capacity. Clearly the exempted information falls within the definition of personal information.

Based on my review of this record, I accept the Ministry's submissions that it contains personal information of an identifiable individual, including the person's name, address, phone number and personal opinions or views.

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. The only exception that could apply here is section 21(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

In the absence of any submissions from the appellant as to why disclosure of the individual's personal information would *not* constitute an unjustified invasion of privacy, I find that the section 21 exemption applies to the withheld portions of page 71.

**ORDER:**

I uphold the Ministry's decision to withhold all of pages 1-3 and 4-5, and portions of pages 7, 44, 66, 70, 71 and 73-76.

Original signed by:  
David Goodis  
Senior Adjudicator

March 11, 2002