ORDER PO-2044

Appeal PA-010442-1

Ministry of Municipal Affairs and Housing

NATURE OF THE APPEAL:

The Ministry of Municipal Affairs and Housing received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the contents of a particular file relating to a property in the City of Kawartha Lakes. The Ministry located the responsive records and granted partial access to them. Access to other records was denied, pursuant to the following exemptions contained in the *Act*:

- Advice or recommendations – section 13(1);
- Solicitor-client privilege – section 19; and
- Invasion of privacy – section 21(1)

The requester, now the appellant, appealed the Ministry's decision.

During the mediation stage of the appeal, the appellant indicated that he was not seeking access to the personal information contained in the records. Accordingly, Record 667 was removed from the scope of the appeal. In addition, the Ministry agreed to disclose certain additional records to which it had originally applied section 13(1). The Ministry also indicated that it wished to claim the discretionary exemption in section 18(1)(d) to the contents of Records 276 and 277 and that it had neglected to do so in its decision letter in error.

As further mediation was not possible, the matter was moved to the adjudication stage of the appeal process. I provided the Ministry with a Notice of Inquiry seeking its representations on the issues in the appeal. The Ministry made submissions which were shared, in their entirety, with the appellant, who indicated that he would not be making representations in response to the Notice.

The records at issue and the exemptions claimed for each consist of the following:

- Record 247 – E-mail dated 06/04/01 from legal counsel for the Ministry to a Ministry employee (section 19);
- Records 276 and 277 – Notes of a meeting held on January 3, 2001 (section 18(1)(d));
- Records 281-283 – E-mail dated 05/15/01 from a Ministry employee to Ministry counsel (section 19); and
- Record 351 – E-mail dated 11/03/00 from a Ministry Advisor/Planner to a representative of the Ministry of Natural Resources re OPA 94 (section 13(1)).

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The Ministry is relying on the discretionary exemption in section 13(1) to exempt Record 351 from disclosure. This section 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 PO-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.

This approach has been applied in several subsequent orders of this office (Orders P-1147 and P-1299).

Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the *Act*. [Orders 94, P-233, M-847, PO-1709]

The Ministry submits that Record 351 is an e-mail from a Ministry planner to a representative of the Ministry of Natural Resources (MNR) and that both of these individuals are employees of the

provincial government. It indicates that the record contains the advice of the Ministry regarding a pending decision on an application for an amendment to an Official Plan. The Ministry argues that the use of the terms "it looks like" and "it sounds like" "substantiate that this is advice". It goes on to add that provincial employees must be free to:

> discuss approaches or alternatives in the formulation of their advise [sic] regarding the approval of applications. The exploration of alternatives allows for a full analysis of the issues and should result in the more appropriate course of action being taken.

In Order PO-2028, Assistant Commissioner Tom Mitchinson reviewed a number of decisions of this office regarding the application of the section 13(1) exemption in circumstances where the record contained information, as opposed to advice or recommendations *per se*. He concluded his discussion of these decisions by summarizing them as follows:

> What is clear from these cases is that the format of a particular record, while frequently helpful in determining whether it contains "advice" for the purposes of section 13(1), is not determinative of the issue. Rather, the content must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving options that do not include specific advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain "mere information" and what, if any, contain information that actually "advises" the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing "mere information", then section 13(1) applies.
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> Applying this approach to the severed portions of pages 9 and 10, I find they do not contain "recommendations" or "advice". The Ministry acknowledges in its representations that the role of Ministry staff in providing support to NOHFC does not extend to "recommending a particular course of action to be followed". In my view, the description of each option itself is "mere information". The description simply states the various factual components of the option broken down into various pre-determined categories. It contains no information that could be said to "advise" the NOHFC in making its decision on funding, nor, in my view, would disclosure allow one to accurately infer any advice given. The "pros and cons" description that accompanies each option also do not contain any explicit advice. There is no statement recommending that NOHFC chose a particular option and no explicit indication as to which option is preferred by the authors of the Evaluation Report.

In the present appeal, I find that the contents of Record 351 relate to the provision of information by one civil servant to another. The information pertains to the approach to be taken by the Ministry in addressing an application for the amendment to an official plan. In my view, the record simply provides the recipient of the e-mail with what the Assistant Commissioner described in Order PO-2028 as "mere information", as opposed to "advice" to a decision maker

on a suggested course of action. I find that this document does not contain the type of information which either recommends or advises a specific course of action, rather it simply alerts the recipient to a legal requirement that must be satisfied in order to accomplish the Ministry's goal in resolving this land use issue. Accordingly, I find that section 13(1) does not apply to exempt Record 351 from disclosure.

SOLICITOR-CLIENT PRIVILEGE

Introduction

The Ministry claims that Records 247, 281, 282 and 283 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 privilege, as derived from the common law:

(i) solicitor-client communication privilege; and
(ii) litigation 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:

> Record 247 is a memorandum from legal counsel to a client planner with the Ministry. This record was prepared by legal counsel to give advice to a client regarding a matter where a claim had been made against the Crown. The record relates directly to discussions arising regarding the legal action and advice to the client. It is submitted that the solicitor-client privilege exemption therefore applies to this record. No waiver of this privilege occurred.
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> Record 281, 282 and 283 is a memorandum from the planner to legal counsel asking for legal advice regarding an attached document. The entirety of these three records were prepared for a crown counsel for use in giving legal advice. Record 281 outlines the advice sought by the client and records 282 and 283 are the documents about which the advice is being sought. It is submitted that the solicitor-client privilege exemption therefore applies to this record. No waiver of the privilege occurred.

Based in part on the representations of the Ministry, as well as on the contents of the records themselves, I am satisfied that each of these three records represents a confidential communication between a lawyer and client made for the purpose of obtaining legal advice about legal issues addressed therein. Therefore, I find that Records 247, 281, 282 and 283 qualify for exemption under the solicitor-client communication privilege aspect of section 19 of the *Act*.

ECONOMIC AND OTHER INTERESTS OF AN INSTITUTION

The Ministry claims that Records 276 and 277 are exempt from disclosure under the discretionary exemption in section 18(1)(d) of the *Act* which reads:

> A head may refuse to disclose a record that contains,
>
> > information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

To establish a valid exemption claim under section 18(1)(d), the Ministry must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario (Orders P-219, P-641 and P-1114).

In Order PO-1747, Senior Adjudicator David Goodis stated:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

The Ministry's Representations on Section 18(1)(d)

The Ministry submits that:

> The record consists of two pages of notes regarding a meeting that was held without prejudice to any position that may be taken later by any of the parties in a proceeding. The appellant was present for the entire meeting and agreed that it would be held on this basis. The notes were prepared after the meeting and represent a record of the items discussed, the contents of the discussions, who participated and what action would be taken on each item. Revealing the notes would put the Ministry's financial interests at risk.
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> In March of 2001, the appellant served the Crown with a formal notice of claim and in July a statement of claim was filed. This action is being defended by the Crown. In August of 2001 the appellant also appealed to the Ontario Municipal Board the decision of the Minister of Municipal Affairs and Housing on his official plan amendment application. The meeting was held to discuss issues that are at the centre of both of these proceedings.
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> It is essential that the Ministry as a participant in civil and administrative matters be able to undertake, without prejudice, discussions with opposing parties. This process allows parties to explore the opportunities to settle either some or all of the issues in dispute. Without the ability to have without prejudice discussions, and keep a record of these discussions, the Ministry's ability to act in a cost effective and efficient way would be seriously impacted.

Records 276 and 277 reflect the discussions which took place at a meeting on January 2, 2001 in which the appellant participated. As a result, the appellant was apprised of the position taken by the Ministry with regards to his official plan amendment application and its reaction to the position which he himself had taken. In my view, the Ministry has not provided me with the kind of "detailed and convincing" evidence required to demonstrate that the disclosure of the information contained in Records 276 and 277 could reasonably be expected to result in the harm contemplated by section 18(1)(d) to its financial interests. I find that the Ministry has not explained how the disclosure of these records could reasonably be expected to result in harm to any financial interests it may have in the dispute with the appellant. As a result, I find that section 18(1)(d) has no application to Records 276 and 277 and they should be disclosed to the appellant.

In its representations, the Ministry also makes reference to the possible application of the litigation privilege aspect of the solicitor-client exemption in section 19 to Records 276 and 277. Without determining whether it is appropriate that the Ministry be entitled to claim a discretionary exemption at that late stage of the appeals process, I find that the Ministry has not satisfied the requirements of this exemption. The records reflect discussions which took place in the presence of the appellant and any privilege which may have existed in their contents was, accordingly, waived.

ORDER:

1. I order the Ministry to disclose to the appellant copies of Records 276, 277 and 351 by **September 27, 2002.**

2. I uphold the Ministry's decision to deny access to Records 247, 281, 282 and 283.

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 referred to in Provision 1.

Original signed by: September 13, 2002
Donald Hale
Adjudicator