



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2001

Appeal PA-010192-1

Ministry of Natural Resources



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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for access to Ministry records relating to a land development in the City of Kawartha Lakes, formerly the County of Victoria. Upon receipt of the request, the Ministry confirmed with the requester that he was seeking access to records compiled in the Ministry's file between July 1, 1999 and March 20, 2001, the date of the request.

The Ministry located records responsive to the request and granted access to them, in whole or in part, in accordance with an index accompanying the decision letter. Access to some of the responsive records, or portions of them, was denied pursuant to the following exemptions contained in the Act:

- advice or recommendations – section 13(1)
- solicitor-client privilege – section 19
- invasion of privacy – section 21(1)

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

During the mediation stage of the appeal, the parties agreed to significantly narrow the scope of the appeal and the application of section 21(1) to the information remaining at issue was resolved. In addition, the Ministry clarified that it applied the section 13(1) exemption only to Records 5, 22 and 179 and section 19 to all of the remaining records except Records 22 and 179. An Appendix was provided to the appellant with a copy of the Mediator's Report, describing the records and the exemptions claimed for each. As further mediation was not possible, the appeal was moved into the Adjudication stage of the process.

I decided to seek the representations of the Ministry initially and sent it a Notice of Inquiry setting out the facts and issues remaining to be adjudicated. I received submissions in return from the Ministry and provided the appellant with the majority of them, along with a Notice of Inquiry. Only a small portion of the Ministry's representations were withheld from the appellant due to concerns which I had about confidentiality. The appellant did not submit any representations in response to the Notice.

The records at issue in this appeal consist of various e-mail messages, memoranda, correspondence, FAX cover pages and briefing notes, as described in Appendix B to the Notice of Inquiry. I note that the Ministry has claimed the application of section 19 to Records 170 and 171, which are identical to Records 7 and 3 respectively. As Records 7 and 3 have already been released to the appellant, I will order that Records 170 and 171 be disclosed as well as to do otherwise would lead to an absurd result.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry has claimed the application of the section 19 solicitor-client privilege for all of the records at issue in this appeal with the exception of a portion of Record 5. Section 19 provides:

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.

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).

The Supreme Court of Canada has described this privilege 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].

Solicitor-client communication privilege has also been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Litigation Privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The "dominant purpose" test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.

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[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

In Order MO-1337-I, Assistant Commissioner Tom Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief [see *General Accident; Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.); *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.)]. The court in *Nickmar* stated the following with respect to this aspect of litigation privilege:

. . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

In Order MO-1337-I, the Assistant Commissioner elaborated on the potential application of the *Nickmar* test:

The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as

“public” documents. *Nickmar* characterizes them as “documents which can be obtained elsewhere”, and [*Hodgkinson*] calls them “documents collected by the ... solicitor from third parties and now included in his brief”. Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation [privilege] under the *Nickmar* test and should be tested under “dominant purpose”.

Submissions of the Ministry on the Application of Section 19 to the Records

The Ministry submits that the records to which it has applied section 19 are exempt from disclosure as they fall “within the ambit of the common law definition of solicitor client privilege.” The Ministry’s submissions differentiate between three classes or categories of records, depending on their origin and purpose.

The first group of records, which include Records 11, 24-27, 139, 141-142, 156-157, 162, 164 and 165 are “e-mails or communications from [a named Ministry solicitor], to Ministry staff in which she sets out on-going advice with respect to [a particular issue].” The Ministry indicates that these documents are subject to exemption under the solicitor-client communication component of section 19.

The Ministry submits that the second group of records, comprised of Records 5, 6, 8, 10, 12, 19, 23, 137, 138, 158, 159 and 168-171:

contain either instructions or requests for legal advice with respect to [a particular issue] and/or ongoing issues associated with the file to [the named Ministry solicitor] or updates on the status of [her] work on the file. As such, based on the above, they fall within the continuum referred to in *Balabel, op cit*, and are thus subject to solicitor client privilege.

The Ministry also states that a third group of records, composed of Records 1, 16, 19, 28, 43-53, 158, 160, 161, 163, 166, 167, 168-171, 172 and 173:

identify or are material which has been sent to [the Ministry’s solicitor] in order for her to provide legal advice; thus, upon applying the above, are exempt as subject to solicitor client privilege. Mindful of its obligations to sever [sic] under [the] Act where possible, only those records which have been sent to [the Ministry’s solicitor] alone, have been severed. Where records were sent to others for their purposes and to [the Ministry’s solicitor] for her use in the provision of legal advice, the Ministry has severed out the reference to [its solicitor]. This allows the requester access to the records, but does not reveal the basis for [the solicitor’s] legal advice on the issue or the confidential communication between her and the Ministry in the course of providing that advice; thus preserving

privilege while discharging the Ministry's obligation under the Act to sever [sic] wherever possible without compromising privilege.

Findings

Solicitor-Client Communication Privilege

I have reviewed the records to which the Ministry has applied the solicitor-client communication privilege under section 19 and find that Records 24-27, 137, 139-140, 141-142, 156-157, 158, 159, 162, 164, 165, 168-169 and 172 represent direct communications of a confidential nature between a Ministry counsel and her clients, various Ministry employees, which were made for the purpose of giving, seeking or obtaining professional legal advice. I find that these communications, comprising e-mail messages, memoranda and FAX cover sheets are exempt from disclosure under the solicitor-client communications component of section 19.

Each of these documents contain either a request for legal advice or the advice which was provided by counsel to Ministry employees in response.

In addition, I agree with the Ministry's submission that records reflecting other contact which do not specifically contain a request for or the provision of legal advice between the Ministry's counsel and various employees of the Ministry represent part of the "continuum of communications" referred to in *Balabel*. In the present case, there were on-going discussions between counsel and Ministry staff with regard to the situation under review. I find that the information reflected in Records 11, 19, 160, 161, 163, 167 and the undisclosed portion of Record 173 falls within the ambit of the "continuum of communications" between counsel and Ministry staff. As a result, I find that these records are exempt under the solicitor-client communication component of section 19.

In the case of the undisclosed information in Records 1, 5, 6, 8, 10, 12, 16, 23 and 166 I find that they do not contain any request for legal advice or the actual advice provided. Nor do the undisclosed portions of these documents form part of the "continuum of communications" between solicitor and client. Rather, I find that the undisclosed portions of Records 1, 5, 6, 8, 10, 12, 16, 23 and 166 are simply communications between Ministry staff which refer to the fact that a Ministry solicitor is involved in resolving the matter. They cannot, accordingly, fall within the ambit of the solicitor-client communication privilege component of section 19.

Litigation Privilege

As noted above, the Ministry has argued that a number of records are exempt from disclosure under the litigation privilege component of section 19. In my view, Records 143-153, a covering memorandum and a number of attachments which were provided by Ministry staff to its solicitor to assist her in the provision of the legal advice sought, fall within the ambit of information which is litigation privileged. At the time the information was provided to counsel, the appellant had indicated his intention to pursue a claim against the Ministry and that litigation was reasonably contemplated.

In my view, Records 143-153, which “found their way” into the solicitor’s brief prior to the commencement of litigation, fall within the class of records described by Assistant Commissioner Mitchinson in MO-1337-I and in *Nickmar* as litigation privileged despite not having been created with the “dominant purpose” of litigation. Accordingly, Records 143-153 are exempt from disclosure under section 19.

Record 138 is a list of Ministry staff who have had some involvement in the matter which is the subject of the request. I have not been provided with any evidence as to the source of this list or the reason for its creation. As such, I cannot find that it falls within the ambit of documents to be considered “litigation privileged”.

By way of summary, I find that the undisclosed portions of Records 11 and 19 and Records 24-27, 137, 139-140, 141-142, 143-153, 156-157, 158, 159, 160, 161, 162, 163, 164, 165, 167, 168-169, 172 and 173 in their entirety are exempt from disclosure under section 19.

ADVICE OR RECOMMENDATIONS

The Ministry has claimed the application of the advice or recommendations exemption in section 13(1) of the *Act* to portions of Records 5, 22 and 179. This section states:

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, P-1690 and PO-1995].

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.)].

The Ministry makes reference to a number of principles established in the jurisprudence of the Commissioner's office with respect to section 13(1) and submits that:

. . . Records 5 and 22 are portions of briefing notes, which are to be for discussions with senior Ministry officials in order to obtain directions relating to the [appellant's] matter and contain recommendations on courses of action. Record 179 is an email from one member of staff to another, which recommends a course of action with respect to the application [by the appellant]. Accordingly, it is the position of the Ministry that section 13 applies to these records and that they are exempt from disclosure.

I have reviewed the undisclosed portions of Records 5, 22 and 179 and agree that they contain the advice or recommendations of a public servant relating to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. The matter under consideration in each of these documents required that the recipient of the record make a decision on a specific course of action. In each case, the record serves to provide the recipient with a suggested way of addressing the identified problem. In my view, this is precisely the type of information which falls within the ambit of the section 13(1) exemption.

Finally, I note that none of the circumstances described in sections 13(2) and (3) are applicable to the contents of the information contained in the Options section of Records 5, and undisclosed information in Records 22 and 179. As a result, the undisclosed portions of each of these records are exempt under the advice or recommendations exemption in section 13(1).

ORDER:

1. I order the Ministry to disclose to the appellant Records 1, 5 (with the exception of the information under the heading "Options" which is exempt under section 13(1)), 6, 8, 10, 12, 16, 23, 138 and 166 by providing him with unsevered copies by **April 24, 2002** but not before **April 19, 2002**.
2. I uphold the Ministry's decision to deny access to the other records, and parts of records, at issue in this appeal.
3. In order to verify compliance with the Provision 1, I reserve the right to require the Ministry to provide me with copies of the records which are disclosed to the appellant in accordance with the terms of this order.

Original signed by: _____
Donald Hale
Adjudicator

March 18, 2002