



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2030**

**Appeal PA-010309-2**

**Ministry of Finance**



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## NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

. . . any and all analysis done by or for the Government of Ontario evaluating the long term lease of Bruce Nuclear Generating Station to Bruce Power. Specifically, please release a study done for the government by [a named chartered bank].

The Ministry located a number of responsive records and, after notifying a party whose interests may be affected by their disclosure under section 28 of the *Act*, granted access to some of the responsive records, in whole or in part. Access to other responsive records, or parts of records, was denied pursuant to the following exemptions contained in the *Act*:

- Cabinet records – section 12(1)(introductory wording) and 12(1)(b), (c) and (e);
- Advice or recommendations – section 13(1);
- Relations with other governments – section 15(b);
- Third party information – section 17(1)(a), (b) and (c);
- Valuable government information – section 18(1)(a);
- Economic or other interests – section 18(1)(c), (d) and (e); and
- Solicitor-client privilege – section 19.

The Ministry provided the requester with an Index setting out the exemptions claimed for each of the responsive records. The requester, now the appellant, appealed the Ministry's decision to deny access to the records.

During the mediation of the appeal, the appellant agreed not to pursue access to Records 4, 5, 8, 9, 18, 20, 21, 22, 23, 26 and 56 but wished to pursue his appeal with respect to Records 1, 2, 3, 6, 7, 11, 13, 15, 16, 17, 19, 24, 28 to 41 (inclusive), 43, 45, 47, 48, 49, 51, 52, 54, 55 and 57 to 63 (inclusive), along with the undisclosed portions of Records 10, 12, 14, 25, 27, 42, 44, 46, 50 and 53. As further mediation was not possible, the matter was passed to the adjudication stage of the appeal process.

I decided to seek the representations of the Ministry and two parties whose interests may be affected by the disclosure of the information contained in the records (the affected parties), initially. I received submissions from the Ministry and the affected parties and shared the non-confidential portions of the Ministry's representations and the complete representations of one of the affected parties with the appellant, along with a copy of the Notice of Inquiry. The appellant advised that he would not be making submissions in response to the Notice.

On May 30, 2002, I issued Order PO-2019 in which I addressed the application of the exemptions claimed for records which are identical to Records 1 to 42 in the current appeal, and also numbered as Records 1 to 42. In Order PO-2019, I upheld the Ministry's decision to deny access to all of the documents at issue in that appeal, with the exception of Record 2 and page seven of Record 27. The Ministry's submissions with respect to Records 1 to 42 in the present

appeal are identical to those received in the appeal which gave rise to Order PO-2019. As I have already determined that Record 2 and page seven of Record 27 do not qualify for exemption, I will again order that they be disclosed to the appellant in the present appeal.

As noted above, Records 1, 3 to 26 and 28 to 42 in the present appeal are identical to the records at issue in the appeal which gave rise to Order PO-2019. The appellant has not made any submissions in response to the Notice. Accordingly, since the appellant has provided me with no basis for varying my findings, I will dispose of the common records in this appeal in the same manner in which I addressed them in Order PO-2019. I find, therefore, that Records 1 to 42, with the exceptions of Record 2 and page seven of Record 27, are exempt from disclosure in accordance with my findings in Order PO-2019.

The Ministry has claimed the application of the solicitor-client privilege exemption in section 19 to Records 43 to 63 of the current appeal, which were not at issue in the earlier decision. I will, therefore, address the application of this exemption to Records 43 to 63 in this decision.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

Section 19 of the *Act* 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. In order for section 19 to apply, the Ministry must establish that one or the other, or both, of these heads of privilege apply to the records at issue. The Ministry takes the position that Records 43 to 55 and 57 to 63 fall within the ambit of 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].

Solicitor-client communication privilege has 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].

The Ministry has made specific reference to each of the records to which it has applied the solicitor-client communication privilege exemption. Owing to the nature of the records, these submissions are repetitive and I will not repeat them in this decision. Essentially, the Ministry argues that each of the records represents confidential communications in the context of the seeking, giving and receiving of legal advice between a solicitor and his or her client.

At the time of the creation of Records 43 to 55 and 57 to 63, the Ministry was engaged in the preparation of the legal documents to formalize a proposed lease transaction involving the Bruce nuclear facility. In doing so, it sought legal advice from various counsel within the Ministry, other Crown counsel and from outside legal advisors. The communications between these parties is reflected in these records. In my view, there existed a solicitor-client relationship between the Ministry and its officials on the one hand and legal counsel employed by the Ministry or other agencies of the Government of Ontario, as well as outside legal counsel from the private bar. The correspondence between them, in the form of e-mails, memoranda, letters and notes were intended to document the seeking and giving of legal advice throughout this process.

I find the communications reflected in Records 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 57, 58, 59, 60, 61, 62 and 63 to be of a confidential nature made between a solicitor and client for the purpose of obtaining or giving legal advice relating to the content of the lease agreement under consideration by the Ministry. As such, I find that these records fall within the ambit of the solicitor-client communication privilege component of the section 19 exemption. Record 52 is a set of notes made by counsel in which he identifies several of the issues to be addressed in a legal opinion. I find these notes to be directly related to the formulating or giving of legal advice by counsel. As such, they also qualify for exemption under the “solicitor’s working papers” category of records described in *Susan Hosiery*, above.

In my view, all of the records to which the Ministry has applied section 19 are properly exempt under that section as they represent confidential communications between a solicitor and client pertaining to the seeking, formulating or giving of legal advice.

**ORDER:**

1. I order the Ministry to disclose Record 2 and page seven of Record 27 to the appellant by providing him with a copy by **August 16, 2002**.
2. I uphold the Ministry’s decision to deny access to the remaining records.
3. In order to verify compliance with the terms of Order Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_  
July 25, 2002