

# **ORDER PO-2235**

**Appeal PA-020002-1**

**Ministry of Finance**

## NATURE OF THE APPEAL:

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

1. any and all information, documents, guides, memoranda, bulletins or other internal material dealing with or touching upon the administration, interpretation or enforcement of subsection 2(22) of the *Retail Sales Tax Act* (Ontario) or any other provisions therein dealing with the taxation of promotional distributions; and,
2. any and all rulings, determinations or correspondence sent by or on behalf of the Ministry of Finance (Ontario) to third parties dealing with or touching upon the administration, interpretation or enforcement of subsection 2(22) of the *Retail Sales Tax Act* (Ontario) or any other provisions therein dealing with the taxation of promotional distributions.

The Ministry granted access to some of the records and denied access to the remaining records, in part or in full, on the basis of section 17 (third party information), section 13(1) (advice or recommendations) and section 19 (solicitor-client privilege) of the *Act*.

During mediation, the appellant indicated that they no longer had an interest in those portions of the records denied on the basis of section 17. Therefore, those records were removed from the scope of the appeal. Mediation in every other respect was unsuccessful and the appeal moved to the inquiry stage.

I initially sought representations from the Ministry on the issues raised. In addition to its legal arguments the Ministry made the following representations:

1. It was willing to disclose the following further records
  - portions of Record 19-15
  - Record 13-9 (a) to (g)
  - Record 13-12
  - Record 13-14 (a) and (b)
  - Record 13-18 (a) to (c)

Accordingly, those records are no longer at issue.

2. In addition to the section 13 exemption, the section 19 exemption applies to Records 13-15, 13-19 and 13-21.
3. The section 17 exemption (third party information – tax information) applies to Records 13-19, 13-21 and 13-22 (to which section 13 no longer applies).

I shared all of the Ministry's representations with the appellant.

The appellant then provided representations in response.

I have considered all of the representations before me.

## **RECORDS:**

The records in this appeal, essentially, can be divided into two separate categories.

There are 17 records exempted in their entirety pursuant to section 13(1) of the *Act*. Of these, three records are also exempted pursuant to sections 19 and/or 17. One other record, to which 13(1) was originally applied, is now exempted pursuant to section 17(2) only. These records include memoranda, position papers, project assignment approval forms, a housekeeping paper and one document called "Confidential Advice to the Minister".

There are another 21 records exempted in their entirety pursuant to section 19 of the *Act*. These records are numbered 19-1 to 19-14 and 19-16 to 19-22. Only the first document of Record 19-15 is exempted under section 19 as the Ministry agreed to disclose the remainder. Generally, these records are comprised of memoranda and e-mails.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

To be clear, the Ministry has applied section 19 to

- Records 19-1 to 19-14
- the first of document of Record 19-15
- Records 19-16 to 19-22
- Records 13-15, 13-19 and 13-21

### **General principles**

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 contains two branches. Branch 1 includes two common law privileges:

- solicitor-client communication privilege; and
- litigation privilege.

Branch 2 contains two analogous statutory privileges that apply in the context of institution counsel giving legal advice or conducting litigation.

In this case, the Ministry relies on section 19 to exempt the records. While it does not specify upon which branch of section 19 it relies, it is clear that it is not claiming either form of litigation privilege for any of the records. In general, the Ministry submits that all of these records consist of memoranda, emails and written opinions exchanged between counsel and client for the purpose of seeking or providing legal advice.

The appellant “does not dispute the Ministry’s general reliance on section 19 of FIPPA. Rather, the appellant only seeks such information that does not specifically relate to the provision of legal advice by the Legal Services Branch.” By this, the appellant means

to the extent that any of the disputed material reflect things other than the provision of legal advice, those should be disclosed; and

to the extent that the materials reflect both the provision of legal advice and other advice, that material can and should be severed so as to be disclosed in accordance with subsection 10(2) of the FIPPA.

Here the appellant relies on the case of *Blank v. Canada (Minister of the Environment)*, 2001 FCA 374.

In the circumstances, I will review both branches to determine the extent to which the records are exempt under section 19.

### **Common law solicitor-client communication privilege under Branch 1**

#### ***General principles***

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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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 privilege applies to “a continuum of communications” between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

### *Analysis*

It is evident from the jurisprudence that not every communication between a solicitor and client is privileged. Privilege attaches only to that communication made for the purpose of giving or seeking legal advice. Clearly, the nature of the relationship and the surrounding circumstances will determine whether or not a particular communication is made for the purpose of giving or seeking legal advice.

I have carefully examined all of the records.

Records 19-1, 19-3 to 19-11, 19-13 to 19-20, and 19-22 span the decade between 1991 and 2001. They all consist of correspondence, generally in the form of formal memoranda but also in e-mail format, exchanged between various management personnel of the Retail Sales Tax branch (RSTB) and other branches of the Ministry of Finance, and various counsel in the Legal Services branch. Some of these records are single documents while others have attachments. All of these records form part of the "continuum of communications" between the branches and their solicitors as described in *Balabel*, above. Much of the correspondence is for the purpose of obtaining or providing legal advice and opinions regarding the application of the *Retail Sales Tax Act* in particular circumstances and often related to specific taxpayers. Some of the correspondence is "part of the continuum aimed at keeping both parties informed so that advice may be sought and given as required". Where there are attachments, it is clear that they form the basis for the request or the opinion and therefore are integral to them. In all cases, I am satisfied that the correspondence was to be kept confidential between the branches and their counsel.

Records 19-2 and 19-12 are memoranda exchanged between junior counsel and senior counsel providing legal opinions in response to requests made by the Manager, Interpretations for the RSTB. These memoranda clearly provide legal advice to the client and, as such, the section 19 solicitor-client communication privilege still applies.

Record 19-21 is a memorandum from the Regional Audit Manager for one of the regional tax officers to the Manager, Interpretations – Tax Advisory for the RSTB. It appears to be an opinion (referred to as a "ruling" in the memo itself) on two separate issues. For the most part, this record does not consist of confidential communications between a lawyer and client made for the purpose of giving or receiving legal advice. There is, however, a portion of the document, from pages 5 to 8 and entitled "analysis", that clearly refers to and outlines a legal

opinion that had been provided on these matters earlier. Only this portion of Record 19-21 qualifies for exemption under section 19 since it reveals a privileged communication.

Records 13-19 and 13-21 are both memoranda from the Manager, Interpretations – Tax Advisory from the RSTB to managers in regional offices. They respond to inquiries about the application of certain items. While these records do not consist of confidential communications between a lawyer and client made for the purpose of giving or receiving legal advice, they do contain or reveal the legal advice provided by counsel. Record 13-19 is simply a reiteration of a legal opinion provided earlier. Record 13-21 contains only some limited information that is other than legal advice. In this case, I have considered whether this information is severable. I find that disclosure of those portions of the record that are not privileged communications can be characterised as meaningless to the appellant. Disclosure of these snippets would not result in a reasonable fulfilment of the purposes of the *Act*. Therefore, both of these records are exempt from disclosure on the basis of section 19.

Record 13-15, a memorandum from the Senior Counsel to the ADM, Tax Division, is a clear communication from counsel to client that provides a legal opinion.

On review, I also find that several records for which the Ministry only claimed the section 13 exemption qualify instead for exemption on the basis of section 19. In order to obtain a consistent result, I find that the following records apply for exemption under section 19. They all refer to or reflect the legal advice contained in other records at issue here. Record 13-8 is comprised of four documents, marked (a) to (d). Documents (a), (c) - a Position Paper - and (d), which is a duplicate of (c), refer to or reflect the legal advice. Records 13-10 and 13-11 also comprise multiple documents. Records 13-10(a) and 13-11(c) are duplicates of Record 13-8(c), the Position Paper. As well, Records 13-10(b) and 13-11(a) and (b) make reference to the legal opinions expressed elsewhere in this series of documents. In my view, all of these records qualify for exemption under section 19.

To summarize, then:

- All of Records 19-1 to 19-20, 19-22, 13-11, 13-15, 13-19 and 13-21 qualify for exemption under section 19.
- Only the portion of Record 19-21 from pages 5 to 8 and entitled “analysis” qualifies for exemption under section 19.
- Records 13-8(a), (c) and (d) and 13-10(a) and (b) also qualify for exemption.
- Records 13-8(b), 13-10(c) and (d) do not qualify for exemption under section 19 but may qualify for exemption under section 13, which I will consider below.

## **Statutory privileges under Branch 2**

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Having found that portions of records above do not qualify for either of the two common law privileges, in the absence of representations on this point, I am not persuaded that these records would somehow qualify for the similar statutory privileges under Branch 2.

## **ADVICE TO GOVERNMENT**

The Ministry claims that section 13(1) applies to these records

- 13-1 to 13-8 (a) - (d)
- 13-10 (a) - (d) and 13-11 (a) - (c)
- 13-13 to 13-17
- 13-19 to 13-21

The Ministry submits that Records 13-9 (a) - (g), 13-12, 13-14 (a) - (b) and 13-18 (a) - (c) can be disclosed to the appellant.

I will not consider the application of section 13 to Records 13-8(a), (c) and (d), 13-10(a) and (b), 13-11, 13-15, 13-19 and 13-21 given that I have already determined that section 19 applies to them in their entirety.

## **General principles**

Section 13(1) 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.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the

decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders P-434, PO-1993, PO-2028, PO-2115, 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.)].

Both the Ministry and the appellant make record-by-record representations on the application of section 13. For the most part, their representations are repetitive and can be summarised as follows.

Essentially, the Ministry submits that the records provide advice on various matters, such as, for example, the tax status of certain products and the application of the *Retail Sales Tax Act* in particular circumstances.

The appellant submits that the records appear to contain direction or analysis rather than advice or recommendations. In the appellant's view, advice on the proper interpretation of the *Retail*



*Sales Tax Act* is not “a suggested course of action to be accepted or rejected by the recipient”. It is, rather, a direction to be followed. Furthermore, the application of the legislation in particular circumstances and any direction in that regard is “not part of the deliberative process of government decision-making.” Finally, the appellant asserts that any records that comprise analysis of a matter or issue do not contain advice or recommendations.

## **Findings**

I agree with the Ministry only in part.

In my analysis, I rely on Assistant Commissioner Mitchinson’s Order PO-2028, recently upheld on judicial review (see above). I find that the principles enunciated in that order, and confirmed by the Court, support disclosure of most of the information the Ministry seeks to withhold.

First, I find that Records 13-2, 13-13, 13-16 and 13-17 (which includes 13-16 as an attachment) reveal advice or recommendations. Therefore, these pages are exempt in their entirety on the basis of section 13(1) of the *Act*. In these records one finds advice or recommendations revealed in two ways

- actual advice: a clear general recommendation that decision maker has the option of accepting or rejecting
- information that permits an accurate inference of the advice or recommendations given

Records 13-16 and 13-17, while on their face appearing to provide an evaluation or analysis, in fact clearly reveal the recommended course of action to be pursued.

Records 13-1, 13-3 to 13-7, 13-8(b), 13-10(c) and (d), and 13-20 do not reveal advice. Instead, these records generally provide information or opinions about the manner in which matters can be resolved. Some of them analyse legislation and policy before concluding with an opinion. In none of these records does one find explicit advice to the decision maker on a course of action nor can one accurately infer any advice given. Within Order PO-2028, the Assistant Commissioner quotes liberally from *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen’s Printer, 1980) (the Williams Commission) to support his interpretation of the words “advice and recommendations”. One quotation, in particular, is instructive here:

A second point concerns the status of material that does not offer specific advice or recommendations, but goes beyond mere reportage to engage in analytical discussion of the factual material or assess various options relating to a specific factual situation. In our view, analytical or evaluative materials of this kind do not raise the same kinds of concerns as do recommendations. Such materials are not exempt from access under the U.S. act, and it appears to have been the opinion of the federal Canadian government that the reference to “advice and

recommendations” in Bill C-15 would not apply to material of this kind [16].

Similarly, the U.S. provision and the federal Canadian proposals do not consider professional or technical opinions to be “advice and recommendations” in the requisite sense. Clearly, there may be difficult lines to be drawn between professional opinions and “advice.” Yet, it is relatively easy to distinguish between professional opinions (such as the opinion of a medical researcher that a particular disorder is not caused by contact with certain kinds of environmental pollutants, or the opinion of an engineer that a particular high-level bridge is unsound) and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. *The professional opinions indicate that certain inferences can be drawn from a body of information by applying the expertise of the profession in question. The advice of the public servant recommends that one of a possible range of policy choices be acted on by the government.* (Emphasis added)

In this appeal, disclosure of the professional opinions of civil servants relating to taxation issues does not reveal explicit advice nor does it permit the drawing of an accurate inference about the advice.

While there is some information in these records that is exempt, such as the names of taxpayers mentioned, this information can be severed from the content of each record while at the same time providing the appellant with reasonable information

In conclusion, section 13(1) does apply to exempt Records 13-2, 13-13, 13-16 and 13-17 from disclosure. Section 13(1) does not apply to Records 13-1, 13-3 to 13-7, 13-8(b), 13-10(c) and (d), and 13-20.

## **THIRD PARTY INFORMATION**

### **Section 17(2): tax information**

Section 17(2) states:

A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

The Ministry claims that section 17(2) applies to Records 13-19, 13-21 and 13-22. As I have already determined that Records 13-19 and 13-21 are exempt from disclosure pursuant to section 19, I need not consider whether section 17(2) also applies.

This mandatory exemption was the only one applied to exempt Record 13-22 from disclosure. This record, an undated briefing note to the Minister, clearly contains and describes the

information that was gathered for the purpose of determining the tax liability and collection of taxes from an institution.

Record 13-22, then, is exempt from disclosure on the basis of section 17(2) of the *Act*.

**ORDER:**

1. I order the Ministry to disclose the following records to the appellant no later than **February 20, 2004**: the portion of Record 19-21 up to page 5 but not including the “analysis” section; and Records 13-1, 13-3 to 13-7, 13-8(b), 13-10(c) and (d), and 13-20.
2. I uphold the Ministry’s decision to deny access to the remainder of the records.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Rosemary Muzzi  
Adjudicator

January 30, 2004 \_\_\_\_\_