



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2546

Appeal PA-050124-1

Ministry of Northern Development and Mines



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NATURE OF THE APPEAL:

The Ministry of Northern Development and Mines (the Ministry) received a request made by a Municipality under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all files and records associated with a specific construction project. Specifically, the Municipality making the request sought access to the following:

...all correspondence, memos, charts, minutes of meetings, letters, staff reports etc. This also includes, but is not limited to, all correspondence, memos, charts, minutes of meetings, letters, staff reports etc. with regard to the Northern Ontario Heritage Fund Corporation Board [NOHFC]. All files and records referred to above are to include all paper and electronic records.

The Ministry located a number of responsive records and granted partial access to them. Access to the remaining portions of the responsive records, in whole or in part, was denied on the basis that the information fell within the ambit of the exemptions in sections 13(1) (advice or recommendations), 19 (solicitor-client privilege) and 21(1) (invasion of privacy) of the *Act*. The Ministry also indicated that some of the records or portions of records were not disclosed as they contained information that did not relate to the subject matter of the request.

The requester, now the appellant, appealed the Ministry's decision. The Ministry located additional records and disclosed some of these additional records during the mediation stage of the appeal. Also during mediation, the appellant advised the mediator that it did not want access to the portions of records that were withheld pursuant to section 21(1) of the *Act* or to those portions of records that were identified as being non-responsive. Section 21(1) of the *Act* and responsiveness of records therefore were no longer at issue in this appeal. Accordingly, the records or portions of records to which the Ministry applied the discretionary exemptions at sections 13(1) and 19 of the *Act* remain at issue in this appeal.

As further mediation was not possible, this office sent a Notice of Inquiry setting out the facts and issues in this appeal to the Ministry seeking its representations. The Ministry provided its representations, which were sent, in their entirety, to the appellant, along with a Notice of Inquiry seeking its representations. The appellant did not provide representations in response.

RECORDS:

The following records remain at issue in this appeal:

Record #	Description of Record	Details of Severance
26	NOHFC Project Muskoka Wharf Evaluation Report, October 12, 2001 (30 pages)	severance of recommendation at last bullet point on page
86	Internal Ministry/NOHFC e-mail, May 25, 2004 with attached Evaluation report (14 pages)	severance of recommendation on page 1 from Tourism subcommittee to Board
87	Internal Ministry/NOHFC e-mail, June 3, 2004 (2 pages)	severance of recommendation (last para.)

105	Internal Ministry/NOHFC e-mail, August 31, 2004 with attached Evaluation Report #40010 (20 pages)	severance of recommendation from Tourism subcommittee to Board in e-mail
107	NOHFC Tourism Committee minutes, September 22, 2004 (1 page)	severance of recommendation from Tourism subcommittee to Board
110	Internal Ministry/NOHFC e-mail, October 13, 2004 (1 page)	severance of last four paragraphs of e-mail.
123	Internal Ministry/NOHFC e-mail, November 19, 2004 with attached Ministry of Citizenship and Immigration e-mail (1 page)	2nd e-mail in chain
124	NOHFC e-mail to Ministry of Economic Development and Trade (MEDT) without attachments, November 19, 2004 (1 page)	all
132	MEDT/NOHFC e-mail, January 6, 2005	all
133	MEDT/NOHFC e-mail, January 7, 2005 (3 pages)	all

The Ministry claims the application of section 13(1) to Records 26, 86, 87, 105, 107 and 110, and the application of section 19 to Records 123, 124, 132 and 133.

DISCUSSION:

ADVICE TO GOVERNMENT

The Ministry claims that the discretionary exemption in section 13(1) applies to the undisclosed portions of the Records 26, 86, 87, 105, 107 and 110. Section 13(1) of the *Act* states that:

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.), aff’d [2005] O.J. No. 4048 (C.A.); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.)].

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, 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.), aff’d [2005] O.J. No. 4048 (C.A.); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.)]

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

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff’d [2005] O.J. No. 4047 (C.A.); Order PO-2115; Order 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 PO-2028, 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.), aff’d [2005] O.J. No. 4048 (C.A.)]

Representations of the Ministry

In support of its arguments respecting the application of section 13(1) to the records, the Ministry submits that:

The NOHFC is an operational service agency of the Ministry... with an appointed Board of Directors. It is a prescribed institution for the purposes of the *Act*. The Minister ... is the Chair of the Board.

The NOHFC assists northern communities to generate short and long-term employment important to their economic viability and the quality of life...

Applicants submit project applications to the NOHFC following NOHFC guidelines on eligibility and funding criteria of the program for which they are applying. ...

[Ministry] staff (Northern Development Advisers and Northern Development Officers), provide the Evaluations [the assessment of proposals] to the NOHFC so that its Board can determine if the proponent's project will be approved for funding by the NOHFC and the terms of that funding. The Evaluation is the mechanism by which [Ministry] staff assess and evaluate the proposal and provide advice to the Board through the Executive Director of the NOHFC. This advice was considered by the Tourism Committee of the NOHFC and then by the Board in its deliberations to determine potential assistance if any, the amount and the type of assistance, from the NOHFC. The funding decision is made by the NOHFC Board, which might or might not act on the advice given in the Evaluation and by the Tourism Committee in reaching its decision on whether to approve a project for funding...

The Board in making its funding decision would consider both the Evaluation and recommendations of the Tourism Committee...

The recommendations at issue are from [the Ministry] staff in an Evaluation Report (26), from the Tourism Committee to the Board (86, 87, 105 and 107) and from the Executive Director to the Minister, the Chair of the Board (110)...

In order to ensure fairness of NOHFC decisions the free-flow of advice, from [Ministry] staff to the NOHFC board, from the Tourism Committee to the Board and from the Executive Director to the Chair, within the decision-making process must be protected. Recommended options presented to the NOHFC Board with issues identified, deliberations of the Board and its subcommittees on these recommendations and recommendations made by subcommittees of the NOHFC to the Board must be kept confidential so as to not influence, advantage or disadvantage other applications and ensure that the Board and its subcommittees is allowed to deliberate unencumbered by outside influences...

The specific advice and recommendations are:

- Record 26 - recommended option from [Ministry] staff on level and type of funding to NOHFC Board for decision
- Records 86, 87, 105 and 107 - specific recommendations of Tourism Committee on level and type of funding to NOHFC Board for decision
- Record 110 - specific recommendations, rationale and possible outcomes on level and type of funding from the Executive Director of the NOHFC to the Minister (Chair of the Board)...

Analysis/Findings

In order for me to find that the undisclosed information qualifies as “advice or recommendations”, I must determine whether it suggests a recommended course of action that will ultimately be accepted or rejected by the person or decision-maker being advised.

I agree with the following reasoning articulated by adjudicator John Swaigen in Order PO-2400 and adopt it for the purpose of this appeal:

[F]or the purposes of the section 13(1) analysis, what is important is whether the information actually “advises” the decision-maker on a suggested course of action, or allows one to accurately infer such advice, and determining this requires a careful review of the content of the information and an assessment of the content in light of the context.

... a moderate degree of discussion, assessment, comparison or evaluation of options or alternatives does not necessarily constitute “advice”. There is a fine line between description and prescription. Whether discussion of options crosses that line and becomes a blueprint or road map directing the decision-maker to a preferred option may depend to some extent on matters such as whether the number of options identified is large or small, the tone of the language used to describe and discuss each of them, the strength of the views expressed, and whether the discussion is balanced or skewed.

Following my careful review of the records, I find that the undisclosed portions of Records 26, 86, 87, 105 and 107, for which section 13(1) has been claimed, contain information that suggests a recommended course of action to the decision-maker. I agree with the Ministry that Record 26 contains a recommendation from Ministry staff to the NOHFC Board on the level and type of funding for the construction project that is the subject matter of the records. Records 86, 87, 105 and 107 contain specific recommendations of the Tourism Committee to NOHFC Board on the level and type of funding for the project. Accordingly, I find that the undisclosed information in these records is exempt from disclosure, and that none of the exceptions in sections 13(2) or (3) apply.

However, Record 110 does not contain information which suggests a recommended course of action to a decision-maker, nor does it permit accurate inferences to be drawn in that regard. Record 110 discusses the strengths and weaknesses of two of three options being put forward for funding of the project for the Minister's consideration. Record 110 does not contain a "road map directing the decision-maker to a preferred option". Because no preferred option was identified I conclude that this record does not contain "advice or recommendations" for the purposes of section 13(1) [Order P-1037]. I find that the consequences of implementing a particular option in Record 110 cannot be interpreted as revealing a suggested course of action [Order P-1631]. Therefore, given that no other exemptions are claimed for this information, I will order the Ministry to disclose Record 110 to the appellant.

Solicitor-Client Privilege

The Ministry claims that the discretionary exemption in section 19 applies to the undisclosed portions of the Records 123, 124, 132 and 133.

When the request in this matter was filed, section 19 stated as follows:

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 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal.

Section 19 contains two branches as described below. The Ministry must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

This branch applies to a record that is subject to "solicitor-client privilege" at common law. Solicitor-client communication privilege refers to the substantive rule of law that protects the confidentiality of the solicitor-client relationship. Branch 1 also encompasses common law litigation privilege [Order PO-2538-R].

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.)].

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Representations of the Ministry

The Ministry’s representations about section 19 relate to solicitor-client communication privilege rather than litigation privilege. The Ministry submits:

The records contain drafting instructions to and communications between the NOHFC as client and Crown counsel on the drafting of a legal agreement (124, 132, & 133) and communications between client personnel the agent for the client and her supervisor (Executive Director of the NOHFC) on whether to seek legal advice and on what matter (123).

Crown counsel providing the legal advice with respect to the records at issue was from the Ministry of Economic Development and Trade (MEDT) Legal Branch. Owing to the small size the Ministry of Northern Development and Mines’ Legal Branch, it was necessary on occasion due to workload issues, to seek assistance from MEDT’s Legal Branch. Counsel at MEDT had experience with commercial contracts and had worked with NOHFC in the past on request, so they were familiar with its processes. In these situations, the entire file was passed to MEDT Legal Branch and Crown counsel there dealt directly with NOHFC in a solicitor-client relationship.

The Ministry maintains that the records meet the requirements for the common law solicitor-client communication privilege (Branch 1 of s. 19) and for the statutory solicitor-client privilege (Branch 2 of s. 19).

In support of these arguments, the Ministry states with respect to Branch 1 that:

[T]he four records meet all four parts of the first test for exemption under Branch 1:

- they are written communications;
- their contents and the manner in which they were sent (distribution was limited to the client and counsel) raise an expectation that they will be treated in confidence;
- they are communications between a lawyer and a client and among client personnel with respect to legal advice and,
- they are all directly related to the seeking and giving of legal advice.

[C]onfidentiality was not waived by the NOHFC at any time by sharing the content of the request for legal advice with the Executive Director of the NOHFC as the legal advice was neither shared broadly nor shared outside of the organization....

The Ministry states with respect to Branch 2 that:

In this appeal, records 124, 132 and 133 are properly exempt as communications between solicitor and client with respect to a legal agreement. The e-mail chains indicate inquiries and responses back and forth between Crown counsel and the client regarding legal advice and therefore are properly exempt under the statutory privilege in Branch 2 of section 19.

The severed section of record 123 is not a direct communication between solicitor and client but is a communication within the overall framework of the solicitor-client relationship and would reveal matters for which the client was requesting legal advice from the solicitor.

It relates to the ongoing back and forth communication with Crown counsel in records 124, 132, & 133 (...Orders MO-1258, MO-1214, MO-1374). Accordingly, this severed section is also properly exempt under Branch 2 of s. 19.

Analysis/Findings

The undisclosed portion of Record 123 is an email between an employee of NOHFC and her supervisor, the Executive Director of the NOHFC on the seeking legal advice on a specified matter. NOHFC is the agency of the Ministry which determined if the project which is the subject matter of the records will be approved for funding. Based on my review of Record 123, I find that this record contains the details of direct communications of a confidential nature between the MEDT solicitor, who was acting as the solicitor in this case, and the client, an NOHFC employee [Order MO-2124-I]. Accordingly, I find this portion of Record 123 exempt under branch 1 of the solicitor-client communication privilege exemption in section 19.

Records 124, 132 and 133 all contain a series of emails between the MEDT solicitor and NOHFC staff. The Ministry has claimed the section 19 exemption for all of the information in these records. I find that these records qualify as confidential solicitor-client communications as direct communications of a confidential nature between a solicitor and client for the purpose of obtaining professional legal advice. Accordingly, I conclude that these records also qualify for the common law solicitor-client communication privilege (branch 1) and are therefore exempt under section 19.

I have not been provided with any evidence to support a finding that the privilege in these records has been waived.

As I have found that the undisclosed information in Records 123, 124, 132 and 133 is subject to solicitor-client privilege under branch 1, there is no need for me to consider whether this information is also subject to solicitor-client privilege under branch 2 of section 19. Subject to my discussion below of the exercise of the Ministry's discretion, I agree with the Ministry that all of Records 124, 132 and 133 and the undisclosed portion of Record 123 are exempt from disclosure.

Exercise of Discretion

I must now determine whether the Ministry exercised its discretion properly under sections 13(1) with respect to Records 26, 86, 87, 105 and 107 and under section 19 with respect to Records 123, 124, 132 and 133.

The section 13(1) and 19 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations

- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Representations of the Ministry

The Ministry states in its representations that:

[Ministry] staff would not be able to provide full, free, frank advice to the NOHFC if their advice were accessible to the public. Similarly NOHFC staff must be able to freely and frankly advise decision-makers within the NOHFC and [Ministry]. There may be sensitive matters that the NOHFC or [Ministry] need to be made aware of to make informed decisions. If government employees cannot make these matters known to decision-makers because of a "chilling effect" of knowing their advice will be made public, then important decisions about the use of taxpayers money for government funding will be made based on inadequate and insufficient information and advice. Accordingly specific recommendations of the Tourism Committee to the Board based on [Ministry] and NOHFC staff advice and recommendations must be kept confidential...

It is the Ministry's view that it exercised discretion under section 13(1) in disclosing as much information as possible with out compromising the integrity of the application, evaluation, monitoring or approval process.

The severed portions of the records are a very small percentage of the total volume of pages released and as outlined previously in these representations, constitute advice or recommendations, within the meaning of section 13(1). Only those portions, whose disclosure would interfere with the free flow of full, frank advice between those charged with advising and the decision-makers who consider that advice in the course of government decision making have been excluded.

The Ministry exercised its discretion under section 19 in favour of not disclosing solicitor-client information, taking into account that the requester ... had copies of both legal final agreements, which governed the funding of the project.

Analysis/Findings

Based on the Ministry's representations, I find that it exercised its discretion with respect to Records 26, 86, 87, 105, 107, 123, 124, 132 and 133 in a proper manner taking into account

relevant factors and not taking into account irrelevant factors. I conclude that the Ministry disclosed as much of each responsive record as could reasonably be severed without disclosing material which is exempt.

ORDER:

1. I order the Ministry to disclose to the appellant the undisclosed information in Record 110 by **February 21, 2007**.
2. I uphold the Ministry's decision to not disclose undisclosed information from the remaining records.
3. In order to verify compliance with provisions 1, I reserve the right to require the Ministry to provide me with a copy of the record that it discloses to the appellant.

Original signed by: _____
Diane Smith
Adjudicator

January 30, 2007