Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-310

Appeal P-910938

Ministry of the Environment

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ORDER

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

> Advice given to Mr. Michael Moroney, District Supervisor and Part VII Director for the Sarnia-Clearwater area, by the M.O.E. Legal Department, with respect to the need or obligation for him to take into account the Official Plan for the City in determining whether or not to issue a holding tank/septic tank approval.

The institution informed the requester that access was denied to the one responsive record pursuant to section 19 of the Act. The requester appealed the institution's decision, claiming that (1) the record falls more properly under section 13(2)(l) and as such should be disclosed, and (2) the head has not properly exercised discretion under section 19 in favour of denying access in the circumstances.

The Appeals Officer explained to the appellant that section 13(2)(l) is an exception that is only available when an institution has claimed that a record qualifies for exemption under section 13(1). The institution did not claim section 13(1) in this case.

A copy of the record was obtained and reviewed by the Appeals Officer. It consists of a one page letter, dated June 25, 1990, prepared by the institution's legal counsel.

Attempts to mediate this appeal were not successful. Accordingly, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution. The notice was accompanied by a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal.

Representations were received from the institution. Representations were not received from the appellant, however, prior to the commencement of the inquiry the appellant had sent a letter to the Appeals Officer explaining its position in detail. I have considered the arguments raised in this letter and the representations of the institution in reaching my decision.

The sole issue arising in this appeal is whether the record qualifies for exemption under section 19 of the Act, which reads 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.

The section 19 exemption consists of two branches, which provide a head with discretion to refuse to disclose:

(1) a record that is subject to the common law solicitor-client privilege (Branch 1); and

(2) a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there must be a written or oral communication; and

   (b) the communication must be of a confidential nature; and

   (c) the communication must be between a client (or his agent) and a legal adviser; and

   (d) the communication must be directly related to seeking, formulating or giving legal advice.

   OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

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The institution claims that the first part of the common law solicitor-client privilege applies to the record.

Both parties agree that parts (a), (c) and (d) of the test for the first part of the common law solicitor-client privilege have been satisfied. I have reviewed the record and the representations, and I agree.

As far as part (b) of the test is concerned, the appellant submits that all communications between a client and legal advisor are not necessarily confidential in nature. Because the institution employee who sought the legal advice was prepared to provide it to the appellant until legal counsel intervened, the appellant believes that this individual did not view the advice as confidential and had no concerns about releasing it.

The institution submits that the advice was given in confidence and that the privilege has not been waived. The institution points out that the record has only been shared with two other employees of the institution both of whom required the advice contained in the record in order to properly carry out their job responsibilities. In both instances the confidential nature of the contents of the record was emphasized, and the legal advice has not been released or discussed with anyone outside of the institution.

Based on the representations provided by the institution and my independent review of the contents of the record, I am satisfied that part (b) of the test for the first part of the common law solicitor-client privilege has been satisfied, and that the privilege has not been waived by the institution.

Section 19 of the Act is a discretionary exemption, which provides the head with the discretion to disclose the record even if it qualifies for exemption. The appellant has expressed specific concerns with respect to the institution's exercise of discretion. I have reviewed the representations of the institution which outline the factors considered by the head in exercising discretion, and I find nothing improper.

Although not specifically referred to in the representations, the appellant makes a number of submissions which relate to the subject matter of section 23 of the Act, the so-called "public

interest override". It should be noted that section 23 does not apply to the section 19 exemption.

ORDER:

I uphold the head's decision.

Original signed by: June 8, 1992
Tom Mitchinson
Assistant Commissioner