



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

# ORDER P-379

Appeal P-9200527

Ministry of Health



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# ORDER

On October 1, 1992, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to three specified records. The Ministry granted partial access to each record with severances made pursuant to sections 14(1)(b), 19 and 21(1) of the Act. The requester appealed the Ministry's decision through his agent (the appellant).

During mediation of the appeal, the appellant agreed not to pursue access to the record for which the section 21(1) exemption was claimed. Further mediation was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry and the appellant. Written representations were received from both parties. In its representations, the Ministry agreed to grant access to the record for which the section 14(1)(b) exemption was claimed.

The only record remaining at issue is a paragraph of a memorandum dated October 31, 1989, from the Assistant Director of the Ministry's Psychiatric Hospitals Branch to the Administrator and the Assistant Administrator of the Penetanguishene Mental Health Centre. The sole issue in this appeal is whether the exemption provided for in section 19 of the Act applies to this record. Section 19 of the Act states:

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.

This section consists of two branches, which provide the Ministry with the 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 its representations, the Ministry relied solely on the common law solicitor-client privilege of Branch 1 of the test. In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of the following tests:

1. a) there is 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 advisor, **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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While the record is unquestionably a written communication and relates to a confidential matter within the Ministry, in my view, the third part of the first test has not been met. The record is not a communication between a client (or his agent) and a legal advisor: none of the parties to the communication are legal counsel. Therefore, I find that the record does not qualify under the first part of Branch 1 of the exemption.

The record was not created or obtained especially for a lawyer's brief for existing or contemplated litigation, rather to communicate information between Ministry administration staff. Therefore, I find that the record does not qualify under the second part of Branch 1 of the exemption.

Accordingly, the exemption provided for in section 19 of the Act does not apply to the record at issue in this appeal.

**ORDER:**

- 1. I order the Ministry to disclose the record within 15 days of the date of this order.
- 2. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1, only upon my request.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ December 10, 1992