



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

# **ORDER P-1229**

**Appeal P-9400386  
(Reconsideration)**

**Ministry of the Attorney General**



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## **BACKGROUND:**

On November 9, 1994, I issued Order P-792 requiring the Ministry of the Attorney General (the Ministry) to disclose to the requester a memorandum from the Regional Counsel for the Family Support Plan to a member of the Family Support Plan. This memorandum constituted pages 43-44 of the record. In that order, I found that section 19 of the Freedom of Information and Protection of Privacy Act (the Act) (solicitor client privilege) did not apply to exempt this memorandum from disclosure. I reached this conclusion on the basis that the document did not contain an element of legal advice.

On November 25, 1994, the Ministry commenced an application to the Ontario Court (General Division) Divisional Court for a judicial review of Order P-792. The application remains before the Court.

In early 1995, the Divisional Court issued two decisions which involved the interpretation and application of section 19 of the Act. These decisions were Attorney General for Ontario v. Donald Hale, Inquiry Officer (1995) O.A.C. 229 (Ont. Div. Ct.) and Minister of Labour v. Donald Hale, Inquiry Officer et al. (22 Feb. 1995), Toronto Doc. 692/94 (Ont. Div. Ct.). Because of the possible impact of these two decisions on the issues before the Court in the judicial review of Order P-792, I decided to seek the views of the appellant and the Ministry on the issue of whether I should reconsider my decision on the application of section 19 to pages 43-44 of the record. This matter was set out in a notice sent to the parties which also included a copy of the two court decisions. I also asked the parties to make representations on the substantive issue of the application of section 19 to these pages. Representations were received from the Ministry only.

## **DISCUSSION:**

### **JURISDICTION TO RECONSIDER**

The Commissioner's office has adopted a policy which sets out the circumstances in which an order should be reconsidered. This policy states that an order should be reconsidered only when there is a fundamental defect in the adjudication process, some other jurisdictional defect in the order or where the order contains a typographical or other clerical error which has a bearing on the decision. In view of the fact that I relied upon an interpretation of section 19 which, in the decisions referred to above, the Divisional Court has held to be patently unreasonable, it is my view that there was a failure of jurisdiction in rendering my original decision in Order P-792.

Accordingly, I find that I have the jurisdiction to reconsider Order P-792.

### **SUBSTANTIVE ISSUE:**

#### **SOLICITOR-CLIENT PRIVILEGE**

In Order P-792, I found that the memorandum at issue was not exempt from disclosure pursuant to section 19 of the Act. This provision 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.

Section 19 consists of two branches, which provide an institution 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 original submissions, the Ministry maintained that the memorandum was exempt under both branches of section 19. In its representations received in the course of the reconsideration of this order, the Ministry relied solely on Branch 2.

In this regard, the Ministry states that in the memorandum, counsel requests that the Ministry staff person take certain action. It is the Ministry's position that the record suggests that the information obtained from the staff person carrying out the requested action would be used by counsel in formulating or giving legal advice. Thus it is the submission of the Ministry that, although the memorandum does not contain legal advice per se, it was "prepared for use" in giving legal advice and is therefore exempt under Branch 2 of section 19 of the Act.

Following my review of the memorandum and the representations of the Ministry, I find that this record is exempt from disclosure under Branch 2 of section 19 of the Act in that it was prepared by Crown counsel for use in giving legal advice.

**ORDER:**

I uphold the decision of the Ministry with respect to pages 43-44 of the record and rescind order provisions 2 and 3 of Order P-792.

Original signed by: \_\_\_\_\_

Anita Fineberg

Inquiry Officer

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July 17, 1996