



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

ORDER P-1368

Appeal P_9600449

Ontario Native Affairs Secretariat



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant, who represents a “nonprofit conservation organization”, submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ontario Native Affairs Secretariat (ONAS) for specified correspondence relating to a June, 1993 court ruling known as “the Fairgrieve decision”. In this decision, the court dismissed charges which had been brought against two aboriginal men for violation of the terms of a fishing licence issued under the Ontario Fishing Regulations (the Regulations) and fishing without the authority of a licence. The court held that the provisions of the Regulations were in violation of section 35(1) of the Constitution Act, 1982.

ONAS identified a number of records which were responsive to the request, some of which originated from the Ministry of the Attorney General (the MAG) or the Ministry of Natural Resources (the MNR). ONAS determined that these institutions had a greater interest in these records, and transferred parts of the request to them.

ONAS indicated that it had custody and control of three records which were responsive to the request and denied access to them on the basis of section 19 (solicitor-client privilege) of the Act. ONAS also claimed that section 13 (advice or recommendations) applied to exempt Record 2 from disclosure.

The appellant appealed the decision to deny access.

This office sent a Notice of Inquiry to ONAS and the appellant. Representations were received from both parties. The appellant indicated that his representations would be restricted to the facts at issue and the application of section 23 (compelling public interest).

The records at issue consist of the following:

- Record 1 - Memorandum dated January 23, 1992 from an employee of ONAS' Negotiations Support Branch to the Director of ONAS' Legal Services Branch (1 page);
- Record 2 - Memorandum dated May 7, 1993 from counsel employed in ONAS' Legal Services Branch to the Secretary of ONAS (5 pages); and
- Record 3 - Portions of Page 2 of a five-page Briefing Note dated August 17, 1995, prepared by four Crown Counsel from ONAS, MNR and MAG, and submitted to the Attorney General and Minister Responsible for Native Affairs.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 consists of two branches, which provide ONAS 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 order for a record to be subject to the common law solicitor-client privilege (Branch 1), ONAS must provide evidence that the record satisfies either of two 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.

[Order 49]

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

ONAS is relying on both branches of the exemption.

The appellant provided extensive representations regarding the court decision (which the appellant indicates was not appealed by the Attorney General), and its impact on fishing in the Lake Huron and Superior areas. As I noted above, however, the focus of this submission pertains to whether there is a compelling public interest in the disclosure of the records which outweighs the exemptions claimed.

ONAS submits that all three records contain confidential written communications between a client and a legal advisor. Further, ONAS states that all three records were created and communicated for the purposes of formulating or giving legal advice regarding aboriginal and treaty fishing rights generally. In particular, the records were created for the purpose of providing a legal analysis and interpretation of the "Fairgrieve decision", and determining whether an appeal of that decision should be sought.

I have reviewed the submissions of ONAS and the three records at issue and find that they qualify for exemption under section 19 as they represent confidential written communications between a client and a legal advisor which is directly related to the formulating or giving of legal advice.

Because of the decision I have made regarding the application of section 19 to the records, it is not necessary for me to consider section 13(1).

PUBLIC INTEREST IN DISCLOSURE

As I indicated above, the appellant has provided extensive representations on the impact of the court decision and the decision of the Attorney General not to appeal. He enclosed a copy of the court decision (the "Fairgrieve decision"), and an internal government memorandum which was distributed to all Lake Huron/Lake Superior Conservation Officers, and which contained an analysis and findings of the decision, and the conclusions to be drawn from the decision.

Section 23 of the Act provides:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In this order, I have found that all three records are exempt pursuant to section 19 of the Act. Section 23 does not apply to records which are exempt pursuant to section 19. Accordingly, section 23 cannot apply to override this exemption.

ORDER:

I uphold the decision of ONAS.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ March 19, 1997