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

ORDER P-1430

Appeal P_9700067

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to all correspondence between the Ministry and the Ministry of Environment and Energy (MOEE) regarding issues of compliance scheduling, non-compliance or exemption from any of the terms of EA-87-02, the Environmental Assessment by the Ministry for the management of timber on Crown lands in Ontario. The Ministry located six records containing information which was responsive to the request and denied access to them, in their entirety, claiming the application of the following exemptions contained in the Act:

- advice or recommendations - section 13(1)
- proposed plans, projects or policies of the Ministry - section 18(1)(g)
- solicitor-client privilege - section 19

The requester, now the appellant, appealed the Ministry's decision to deny access. Within the time period described in the Confirmation of Appeal sent by the Commissioner's office, the Ministry withdrew its reliance on section 19 with respect to Records 5 and 6 and confirmed that it was relying on sections 13 and 18(1)(g) for Record 2. During the mediation of the appeal, the requester also raised the possible application of the "public interest override" in section 23 of the Act.

A Notice of Inquiry was provided to the Ministry and the appellant. Representations were received from both parties. In the Inquiry stage of the appeal, submissions were also invited from the Ministry on the application of section 23 to the records.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry indicates that it is relying on the section 19 exemption with respect to Record 2. Section 19 of the Act consists of two branches, which provide a head 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), the Ministry 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]

The Ministry argues that Record 2, with the exception of its covering page, is exempt from disclosure under the second part of Branch 1 and Branch 2 of the section 19 test. It submits that Record 2 was prepared especially in order to brief counsel on the Ministry's progress in implementing the terms and conditions set forth by the Environmental Assessment Board (EAB) with respect to timber management. This was necessary as counsel was required to assess the Ministry's legal position with respect to a judicial review application which had been brought by the organization represented by the appellant. Finally, the Ministry argues that the record was used to brief Crown counsel for use in litigation, as contemplated by Branch 2 of the exemption.

I find that, with the exception of the covering page, Record 2 is properly exempt under either the second part of Branch 1 or Branch 2 of the section 19 exemption. The document was prepared specifically to brief Crown counsel with respect to existing litigation, the judicial review application brought by the appellant's organization. I find, therefore, that Record 2, with the exception of the cover page, is exempt under section 19 of the Act.

ADVICE OR RECOMMENDATIONS

The Ministry has claimed the application of section 13(1) to all six of the records at issue in this appeal. The appellant, however, submits that one or more of the mandatory exceptions to the exemption contained in sections 13(2)(a), (b), (d), (g), (i) or (j) apply in the circumstances. These sections state that:

(1) 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.

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material,

(b) a statistical survey;

(d) an environmental impact statement or similar record;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;

(I) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

The Ministry argues that each of the records at issue contain advice or recommendations with respect to its position on how to proceed to adjust the terms and conditions of the EAB decision within the meaning of section 13(1).

I have reviewed the records for which the Ministry has claimed section 13(1) and find that the covering memorandum to Records 1 and 2, as well as Records 5 and 6 do not contain advice or recommendations, as contemplated by section 13(1). The remainder of Record 1 and portions of Records 3 and 4 do contain the advice or recommendations of public servants to government. In my view, the disclosure of this information would inhibit the free flow of advice within the deliberative process of governmental decision and policy making. Accordingly, Record 1 (with the exception of the covering memorandum) and the yellow highlighted portions of Records 3 and 4, as indicated on the copy of these records which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator, are exempt under section 13(1).

I have reviewed each of the exceptions in section 13(2) to the section 13(1) exemption with a view to their possible application to the information which I have found to be exempt under section 13(1) above. I find that none of the exceptions in section 13(2) apply to the exempt information. These records, and parts of records are, therefore, exempt under section 13(1).

PROPOSED PLANS, PROJECTS AND POLICIES OF THE MINISTRY

In order to qualify for exemption under section 18(1)(g) of the Act, the Ministry must establish that a record:

1. contains information including proposed plans, policies or projects; and

2. the disclosure of the information could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or

   (ii) undue financial loss or benefit to a person.

[Order P-229]

The Ministry submits that all of the records contain information which provides details of proposed plans or projects of the Ministry with respect to its approach to the adjustment of the EAB decision. In addition, it submits that it has yet to make a decision as to how to proceed in seeking some adjustment to the EAB decision. The Ministry argues, therefore, that the disclosure of the information contained in the records would result in the premature release of a pending policy decision.

The appellant argues that the forest industry has already been consulted with respect to the proposed plans, policies or projects now being contemplated by the Ministry with respect to the future course of action it may take on the environmental assessment terms and conditions imposed by the EAB decision. She submits, therefore, that as the Ministry has already disclosed at least part of its strategy to the forest industry, its disclosure would no longer be premature and the section 18(1)(g) exemption does not apply.

I have reviewed the remaining information contained in the records which is not exempt under sections 13(1) or 19 and have concluded that portions of the covering memorandum to Record 1 and portions of Records 3 and 4 contain information which includes proposed plans, policies and projects of the Ministry. In my view, the disclosure of this information could reasonably be expected to result in the premature release of a pending policy decision. Records 5 and 6 do not contain information which includes plans, policies or projects, and as such, do not qualify for exemption under section 18(1)(g). I have highlighted in pink those portions of the covering memorandum to Record 1 and Records 3 and 4 which contain information which is exempt under section 18(1)(g) on the copy of these records which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator.

PUBLIC INTEREST IN DISCLOSURE

As noted earlier, the appellant claims that the "public interest override" in section 23 of the Act applies in this case. This section states:

> 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 [emphasis added].

The public interest override contained in section 23 of the Act cannot apply to a record which is found to be exempt under section 19. As I have found that Record 2 (except for the covering memorandum) is exempt under section 19, I will consider the possible application of section 23 only to those portions of Records 1, 3 and 4 which I have found to be exempt under sections 13(1) and 18(1)(g).

In Order P-241, former Commissioner Tom Wright commented on the burden of establishing the application of section 23. He stated as follows:

> The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

I agree with these comments and I have followed the approach advocated by former Commissioner Wright by conducting an independent review of Records 1, 3 and 4. An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to government information. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

The appellant submits that there exists a compelling public interest in the disclosure of the information contained in the records. She argues that changes to the implementation or compliance with the environmental assessment decision by the EAB will affect the management of public lands across the province. Further, the appellant indicates that public access to information about changes to the province's forest management practices is necessary to facilitate the monitoring of management activities on public land.

The appellant represents a long-standing public interest organization which has, in the past, been involved in the development of policies that affect public forests. She submits, therefore, that it should continue to be informed of any processes which will result in changes to Ontario's forest management processes. In addition, the organization is a party to an Application for Judicial Review of the Ministry's approval of six forest management plans. The hearing of the application by the Divisional Court has been completed and a decision is expected soon. The appellant has provided evidence to indicate that the forestry industry has been consulted by the Ministry over the past year with respect to various changes to the forest management practices which she feels are being contemplated. Finally, the appellant argues that the forestry industry has been involved in the development of these new management regimes and it is only fair that other members of the public who have an interest and are concerned with this issue should be granted access to the same information.

The Ministry submits that the public will be given the opportunity to participate in any decision the government may make with respect to its forest management policies through the mechanism of the environmental registry established under Part II of the Environmental Bill of Rights, 1993. Accordingly, it argues that there does not exist a "compelling" public interest in the disclosure of the records at this time. Public input and participation will be invited at the time that a decision is made by the Ministry with respect to changes, if any, to the Environmental Assessment Board's ruling. Because the public interest in the disclosure of this information is premature, the Ministry argues that it is not sufficiently compelling so as to fall within the ambit of section 23. The Ministry also argues that there has not been the kind of intense media coverage or discussion in the Legislature which was present in earlier orders of the Commissioner's office which found the public interest in the disclosure of information to be sufficiently compelling. Similarly, the Ministry argues that the information contained in the records does not relate to public safety or health, or call into question the integrity of the institution's actions. Finally, the Ministry argues that the disclosure of the information is of interest only to a select portion of the public.

I have considered the representations of the appellant and the Ministry, as well as the contents of the undisclosed portions of Records 1, 3 and 4 and find that a public interest in the disclosure of these records has been established. The organization represented by the appellant is long-established and has consistently spoken out on behalf of those who oppose the modification of the Ministry's forestry management policies. In my view, the interest in the disclosure of the information contained in these records is public in the sense contemplated by section 23.

Furthermore, I find that the appellant has established that the public interest in the disclosure of the documents at issue to the organization which she represents is sufficiently compelling in the circumstances. While there has not been a great deal of media coverage of the issue of forest management or discussion of this subject in the Legislature, I find that the public's interest in matters relating to the environment in general, and forest management in particular, is sufficiently widespread to be considered "compelling" within the meaning of section 23.

In Order P-1413, Inquiry Officer John Higgins made the following comments with respect to the second step in the analysis of the application of section 23 to a record. He found that:

> Once a compelling public interest is established, it must be balanced against the purpose of the exemption which has been found to apply. Important

> considerations in this balance are the principle of severability and the extent to which withholding the information is consistent with the purpose of the exemption.

I agree with this approach and adopt it for the purposes of this appeal.

With respect to the second part of the analysis under section 23, the Ministry submits that the purpose behind the exemptions in sections 13(1) and 18(1)(g) outweigh whatever public interest might exist in disclosure of the information. It argues that the disclosure of the information which is subject to section 13(1) would defeat the purpose of the exemption and that the release of the records now would be premature and would adversely affect the decision making process within the Ministry through the exertion of unfair pressure on the Ministry's decision makers. It also argues that the purpose behind section 18(1)(g) is to allow the government to formulate policy in an orderly fashion and to preserve the Ministry's ability to take actions and make decisions without unfair pressure.

In Order P-1413, Inquiry Officer Higgins made the following comments with respect to the purpose behind the section 13(1) exemption:

> Order 24 established that the purpose of section 13(1) was to ensure that:
>
> > ... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure.
>
> I agree with this analysis of the purpose behind the exemption, which is an important public policy consideration.

Similarly, I adopt this statement for the purposes of this appeal.

In my view, the purpose behind the section 18(1)(g) exemption is quite similar. It seeks to protect information where disclosure could reasonably be expected to result in the premature disclosure of a pending policy decision. Again, in my view, the purpose of this exemption is to ensure that government decision-making is carried out with an appropriate degree of confidentiality so that its effectiveness is not compromised.

In my opinion, the fact that the Legislature made sections 13 and 18(1)(g) subject to the public interest override in section 23 is a clear indication that, on specific occasions, these exemptions must give way to the public interest. However, in my view, this is not one of those occasions. I find that the public interest in scrutinizing the Ministry's forestry management practices through the disclosure of the information contained in the records does not **clearly** override the purpose of the exemptions in sections 13(1) and 18(1)(g). On the contrary, I find that purposes of the exemptions in sections 13(1) and 18(1)(g) outweigh any public interest which may exist in the disclosure of the particular information contained in Records 1, 3 and 4.

Accordingly, having balanced the compelling public interest in the disclosure of the information which exists in this appeal and the purpose of the exemptions, I find that the public interest in the disclosure of the remaining portions of Records 1, 3 and 4 does not clearly outweigh the purpose of the exemptions in sections 13(1) and 18(1)(g) and that the "public interest override" does not apply to require the disclosure of this information.

ORDER:

1. I uphold the Ministry's decision not to disclose Records 1, 2 (with the exception of the covering memorandum) and the highlighted portions of the covering memorandum to Record 1 and Records 3 and 4.

2. I order the Ministry to disclose to the appellant the non-highlighted portions of the covering memorandum to Record 1, the entire covering memorandum to Record 2, those portions of Records 3 and 4 which are not highlighted and Records 5 and 6 in their entirety, by sending her a copy by **August 12, 1997**.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: July 22, 1997
Donald Hale
Inquiry Officer