



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2223

Appeal PA-030022-1

Ministry of Public Safety and Security



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NATURE OF THE APPEAL:

The Ministry of Public Safety and Security (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to records relating to the provision of policing services by the Ontario Provincial Police (the OPP) to the County of Norfolk. The request was made by the County of Haldimand, which had recently terminated its agreement with the Ministry for OPP servicing.

The Ministry located a number of responsive records and granted access to several of them. Access to the undisclosed records was denied under the following exemptions contained in the *Act*:

- Advice or recommendations – section 13(1);
- Relations with other governments – section 15(a) and (b);
- Economic and other interests – section 18(1)(a), (c), (d) and (e); and
- Solicitor-client privilege – section 19

The requester, now the appellant, appealed the Ministry's decision. During the mediation stage of the appeal, the appellant advised that she has copies of Records 2 and 6 and these records were, accordingly, removed from the scope of the appeal. In addition, the parties agreed that the pages comprising Record 11 were incorporated as part of Record 8 and need not be separately addressed.

As further mediation was not possible, the appeal was moved into the adjudication stage of the process. I decided to seek the representations of the Ministry, initially. The Ministry made submissions, the non-confidential portions of which were shared with the appellant, along with a copy of the Notice of Inquiry. The appellant provided me with representations and these were shared with the Ministry, which made brief submissions by way of reply.

RECORDS:

The records at issue consist of the following:

- Record 3 (also described as page 7) – correspondence to Norfolk County;
- Record 4 (also described as page 8) – correspondence from Norfolk County;
- Record 7 (also described as pages 11-13) – Issue Note;
- Record 8 (also described as pages 14-29) – email correspondence;
- Record 9 (also described as pages 30-31) – correspondence from Legal Services Branch; and
- Record 10 (also described as page 32) – email correspondence

DISCUSSION:

Relations with other Governments

The Ministry has claimed the application of sections 15(a) and (b) to Records 3 and 4. These sections state:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
- (b) reveal information received in confidence from another government or its agencies by an institution; or

and shall not disclose any such record without the prior approval of the Executive Council.

In Order PO-2088-F, Assistant Commissioner Tom Mitchinson articulated the following tests to assist in the determination of the application of sections 15(a) and (b):

In order for a record to qualify for exemption under section 15(a), the Ministry must establish that:

- 1. the records relate to intergovernmental relations, that is relations between an Ministry and another government or its agencies; and
- 2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

For a record to qualify for exemption under section 15(b), the Ministry must establish that:

- 1. the records reveal information received from another government or its agencies; and
- 2. the information was received by the Ministry; and
- 3. the information was received in confidence.

I adopt these tests for the purposes of the present appeal.

In support of its contention that Records 3 and 4 qualify for exemption under sections 15(a) and (b), the Ministry submits that:

Section 15 recognizes that the Ontario government creates and receives records in the course of its relations with other governments, and that the Ministry should have discretion to disclose records where it is expected that disclosure would prejudice such relations or result in the release of confidential received from other governments.

...

. . . disclosure of the above mentioned records would jeopardize the ongoing negotiations presently being carried out with Norfolk County. The Ministry's relationship with Norfolk County is an ongoing one. It could reasonably be expected that if the records were to be disclosed to a third party Norfolk County would be less willing to disclose such records in the future to the Ministry, which in turn could delay the resolution of contract negotiations. Obviously, this could have a chilling effect on Ontario's relations with other levels of government if it were to become known that its legislation did not enable it to keep its documents confidential.

Previous Orders by the IPC have determined that the substance and nature of the record would infer that they were submitted in confidence. The content of the record speaks to matters, which are directly related to the substance of the ongoing contract negotiations and the release of the record to a third party would harm the negotiations presently underway.

The Ministry also takes the position that the County of Norfolk is a "government" for the purposes of section 15. It relies on the preamble to section 2 of the *Municipal Act* which reads:

Municipal Governments are created by the Province of Ontario to be responsible and accountable Governments with respect to matters within their jurisdiction and each Municipality is given powers and duties under this Act for the purposes, which include,

In Order PO-1915-F, Senior Adjudicator David Goodis declined to make a definitive ruling on whether municipal governments may properly be characterized as "governments" for the purposes of section 15(a) and (b). Rather, he based his decision on the fact that "the City has failed to establish that disclosure could reasonably be expected to prejudice the conduct of relations between it and the province as required under section 15(a), or that disclosure could reasonably be expected to reveal information the Ministry received in confidence from the City." [under section 15(b)]

Similarly, I decline to make a specific finding on whether the relations between the Government of Ontario and the County of Norfolk are "intergovernmental" in nature within the meaning of

section 15(a) or whether the County of Norfolk is a “government” for the purposes of section 15(b). Rather, based on my review of the contents of Records 3 and 4 and the representations of the Ministry, I find that I have not been provided with sufficient evidence to demonstrate that the disclosure of Records 3 or 4 could reasonably be expected to result in prejudice to the conduct of relations between the County of Norfolk and the Government of Ontario as contemplated by section 15(a). I find that the Ministry has not elucidated the nature of the prejudice to the conduct of relations that would flow from the disclosure of Records 3 and 4. Rather, it simply asserts that prejudice to certain ongoing negotiations would occur without describing how or why this could reasonably be expected to happen.

I further find that the Ministry has not provided me with sufficient evidence to substantiate the application of section 15(b) to Records 3 and 4. In my view, the disclosure of the contents of these documents cannot reasonably be expected to reveal information received in confidence by the Ministry from the County of Norfolk. I find that the Ministry has not demonstrated that the information contained in Records 3 and 4 was received from Norfolk County in confidence. In addition, I find that the subject matter of Records 3 and 4 do not lead one to that conclusion.

As a result, I find that the exemptions in sections 15(a) and (b) have no application to Records 3 and 4. As section 15 was the only exemption claimed for Record 3, and no mandatory exemptions apply to it, I will order that it be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims the application of the discretionary exemption in section 19 to Records 8 (comprising 15 pages of email communications), 9 (a two-page memorandum) and 10 (a one-page email message).

General principles

Section 19 of the *Act* reads:

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 contains two branches as described below. The Ministry must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to “solicitor-client privilege” at common law. The term “solicitor-client privilege” encompasses two types of privilege:

- solicitor-client communication privilege

- litigation privilege

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The Ministry’s representations

The Ministry submits that Record 9 is a confidential legal opinion provided by a solicitor with its Legal Services Branch to Ministry staff respecting a legal issue involving the Ministry. As a result, it argues that this record qualifies for exemption under the solicitor-client communication component of Branch 1 of section 19.

The Ministry is of the view that pages 14, 15, 17, 18, 19 and 21 of Record 8 and Record 10 also fall within the ambit of the solicitor-client communication privilege aspect of Branch 1. It relies on the decision in Order PO-2087 in which Adjudicator Laurel Cropley found that records prepared by non-legal staff within an institution which contain legal advice taken from another document may still qualify for exemption under section 19 as the disclosure of the record may reveal the legal advice that was provided. Accordingly, the Ministry submits that the disclosure of the email communications reflected in pages 14, 15, 17, 18, 19 and 21 of Record 8 and Record 10 would reveal the legal advice contained in the memorandum in Record 9.

The Ministry goes on to submit that the email communications between non-legal Ministry staff represent part of the “continuum of communications” as they are directly related to the legal advice provided in Record 9. It suggests that:

Ministry employees from various divisions are engaged in these ongoing contract negotiations, who work in extended areas of the Ministry and who routinely ‘discuss’ issues by way of e-mail communications. Ongoing and extended discussions by a number of these employees have created a string of communications that all ultimately reference the original legal advice. Reference to and reinforcement of the original legal advice occurs throughout the discussion, as legal branch staff is sourced during [the creation] of the records at issue.

Findings

Record 9 clearly represents a confidential communication between a solicitor and his client pertaining directly to the provision of legal advice. I have no difficulty in finding that this record qualifies for exemption under the solicitor-client communication privilege part of Branch 1 of section 19.

Record 10 is an email communication between two non-legal staff of the Ministry. The communication sets out the factual background of the problem addressed in Record 9 by counsel. It also refers to the fact that legal advice has been sought from several Ministry counsel. Record 10 does not, however, contain any reference to the legal advice received nor does it otherwise reveal any privileged communications. As a result, I do not agree that Record 10 forms part of the “continuum of communications” between a solicitor and client. Accordingly, I find that section 19 has no application to Record 10.

Page 21 of Record 8 is an email communication from a Ministry official to counsel with the Ministry’s Legal Services Branch. In my view, this message represents part of the “continuum of communications” between Ministry staff and its legal advisors and that it qualifies, therefore, for exemption under section 19.

The remaining email communications that comprise Record 8 are not, however, communications between a legal advisor and a client. They are not, therefore, exempt under the solicitor-client communication privilege aspect of section 19. However, the emails passing between non-legal Ministry staff which are reflected in all of pages 14 and 15, the first email message on page 16 and all of pages 17, 18 and 19 of Record 8 refer directly to certain legal advice passed along from Ministry counsel to other Ministry staff in the course of his providing legal advice. Accordingly, I find that the disclosure of these portions of Record 8 would reveal privileged communications and that, as was the case in Order PO-2087, this information is exempt from disclosure under section 19.

The remaining portions of Record 8 do not, however, contain references to the legal advice provided by counsel to Ministry staff. Accordingly, I find that they are not exempt under section 19.

ECONOMIC AND OTHER INTERESTS

The Ministry has applied the discretionary exemptions in sections 18(1)(a), (c), (d), and (e) of the *Act to Records* 4, 7, the remaining portions of Record 8 and Record 10. These sections state:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

The Ministry's submissions on this issue were made in confidence and were not shared with the appellant. I will summarize the position taken by the Ministry with respect to the application of the section 18(1) exemptions claimed to the records, however. It submits that the records relate directly to ongoing contract negotiations between it and the County of Norfolk for the provision of policing services to the municipality and that the records contain information relating to key issues to be discussed during these negotiations. It argues that the disclosure of this information would "impact on the form of the final contract".

The appellant provided me with copies of correspondence from the Ministry to both the Counties of Norfolk and Haldimand and an article from the local newspaper describing the issues surrounding policing and the positions taken by the parties to the dispute. This information serves to confirm that a great deal of information about this issue has already been made public.

Record 4

Record 4 is a letter dated May 15, 2002 from the County of Norfolk to the Ministry setting out its position with respect to the cost of the provision of policing services by the Ministry. I find that this statement of the County's perspective on this issue is well-known and has been disclosed in other records which have been made available to the appellant. In my view, none of the harms contemplated by sections 18(1)(a), (c), (d) or (e) could reasonably be expected to occur should

the information in Record 4 be disclosed. I find that I have not been provided with sufficient information to substantiate such a finding.

Because I have found that sections 15 and 18 have no application to Record 4, and no mandatory exemptions apply to it, I will order that it be disclosed to the appellant.

Record 7

Record 7 appears to be an internal Ministry briefing note prepared in November 2002 in response to the appellant's request for access to information under the *Act*. The Note sets out in detail the background information which gave rise to the issues addressed therein, as well as the Ministry's view of the situation and the fact that it is seeking to arrive at a resolution of the dispute.

Much of the information contained in the note is well known to the appellant and has been the subject of much local media coverage. The Note also makes reference to various communications received from the appellant in the course of the discussions around the issues and the fact that a request for information under the *Act* had been received.

However, I find that the disclosure of the information set out under the heading "OPP Position" on page 2 of the Note could reasonably be expected to prejudice the economic interests of the Ministry by revealing its bargaining positions with respect to certain negotiations to be undertaken between it and the County of Norfolk. As a result, I find that this portion of Record 7 qualifies for exemption under section 18(1)(c). I do not agree, however, that the disclosure of any of the remaining portions of this document could reasonably be expected to give rise to any of the harms contemplated by sections 18(1)(a), (c), (d) or (e) of the *Act*. I find that only the section entitled "OPP Position" on page 2 of Record 7 is exempt from disclosure.

Record 8

I have found above that all of page 14 and 15, the first email listed on page 16, and all of pages 17, 18, 19 and 21 of Record 8 are exempt from disclosure under section 19. Remaining at issue, accordingly, are the bottom two-thirds of Record 16 (which is identical to Record 20 and the bottom half of Record 22), Records 23, 24, 25, 26-27 (which is the same as Record 28) and 29.

Based on the representations of the Ministry and my review of these records, I am not satisfied that the harms contemplated by any of the section 18(1) exemptions claimed could reasonably be expected to flow from the disclosure of the information in the bottom two-thirds of page 16 (which is identical to page 20 and the bottom half of page 22), pages 23, 24, 25, 26-27 (which is the same as page 28) and 29 of Record 8. I find that the Ministry has failed to provide me with sufficient evidence to enable me to make such a finding.

Record 10

Record 10 consists of a description of the Haldimand-Norfolk policing problem from the Ministry's perspective. It does not set out the Ministry's negotiating position and its disclosure would not reveal the strategies it intends to employ in addressing this situation. I cannot agree with the Ministry's position that the disclosure of this information would result in the harms contemplated by section 18(1)(a), (c), (d) or (e). As a result, I find that these exemptions do not apply to Record 10.

ADVICE OR RECOMMENDATIONS

The Ministry also takes the position that Records 7 and 8 contain information which qualifies for exemption under section 13(1) of the *Act*. This section states:

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.

The Ministry submits that:

This matter relates to the ongoing contract negotiations with Norfolk County. The records speak to options related to service levels and resulting costs discussed with the Ministry and OPP officials. The issue of options to discuss was raised on page 32 [Record 10] and the succeeding downstream records . . . specifically reiterate those contractual options. The matter is still ongoing and senior Ministry officials ultimately will make the final decision on the position that will be taken, which would ultimately form part of the final contract.

It is clear from reading the records that they clearly contain express and specific advice and recommendations prepared by public servants. In some of the records, there is factual and background information that could allow the drawing of accurate inferences as to the nature of the actual advice or recommendations given to government.

I note that much of the information from Records 7 and 8 and referred to in the Ministry's submissions has been found above to be exempt under sections 18(1) or 19. I will only address the application of section 13(1) to the remaining portions not subject to those exemptions.

I have reviewed the remaining portions of Record 7 and find that it does not contain or reveal any information which qualifies as "advice or recommendations" within the meaning of section 13(1). As no other exemptions have been applied to Record 7 (with the exception of the section entitled OPP Position which I have found to be exempt under section 18(1)), and no mandatory exemptions apply, I will order that it be disclosed to the appellant.

Similarly, I have reviewed the contents of the remaining pages which comprise Record 8 and find that they do not contain or reveal “advice or recommendations” within the meaning of section 13(1). Therefore, I will order the Ministry to disclose to the appellant the bottom two-thirds of page 16 (which is identical to page 20 and the bottom half of page 22), pages 23, 24, 25, 26-27 (which is the same as page 28) and 29 of Record 8.

Similarly, Record 10 does not contain or reveal any information which qualifies as “advice or recommendations” for the purposes of section 13(1). As no mandatory exemptions apply to this document, I will order that it be disclosed to the appellant.

ORDER:

1. I uphold the Ministry’s decision to deny access to:
 - that portion of Record 7 entitled “OPP Position”;
 - pages 14, 15, the first email on page 16, 17, 18, 19 and 21 of Record 8; and
 - Record 9.
2. I order the Ministry to disclose to the appellant copies of Records 3, 4 and 10 in their entirety, Record 7 (with the exception of that portion entitled “OPP Position”) and the bottom two-thirds of page 16 (which is identical to page 20 and the bottom half of page 22), pages 23, 24, 25, 26-27 (which is the same as page 28) and 29 of Record 8 by providing him with copies by **January 30, 2004**.
3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with copies of the records which are disclosed to the appellant pursuant to Order Provision 2.

Original signed by: _____
Donald Hale
Adjudicator

January 9, 2004 _____