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

ORDER 150

Appeals 890129 and 890267

Ministry of Housing

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O R D E R

These appeals were received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) the right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

The facts of these cases and the procedures employed in making this Order are as follows:

1. On February 1, 1989, the requester wrote to the Ministry of Housing (the "institution") seeking access to:

> With respect to a decision of the Rent Review Hearings Board dated January 17, 1989 by Mr. Roger Boire, appeal no. C-0504-88, Order No. C-88-0144:
>
> this requests copies of any memos, legal opinions, discussion papers or other documentations with respect to the application of Section 99 or Section 100 of the Rent Regulation Act available to be used by or supplied to the Board member and available to him to be used in making his decision in the above noted appeal and order;
>
> this also requests the record of proceedings compiled by the tribunal pursuant to section 20 of the Statutory Powers Procedure Act.

2. On March 20, 1989, the Freedom of Information and Privacy Co-ordinator for the institution (the "Co-ordinator") wrote to the requester advising that access was granted to all

records, with the exception of one section of one record, and a second one page record, both of which were being withheld from disclosure pursuant to section 19 of the Act.

3. The requester wrote to me on April 26, 1989 appealing the institution's decision, and I gave notice of this appeal (Appeal Number 890129) to the institution.

4. Upon receipt of the appeal, the Appeals Officer assigned to the case obtained and reviewed the two records and attempted to mediate a settlement.

5. During the course of mediation, the Appeals Officer identified one other record which responded to the appellant's request, and on July 11, 1989, the appellant made a separate request to the institution for access to this record. The record is a seven page draft order of the Rent Review Hearings Board, with handwritten notations.

6. On August 11, 1989, the Co-ordinator wrote to the appellant informing him that:

> ...access is denied to the draft decision under section 19 of the Act. This provision applies because it would reveal information which falls under the solicitor-client exemption.

7. The appellant appealed the institution's decision with respect to the other record, and I gave notice of this appeal (Appeal Number 890267) to the institution.

8. The record at issue in Appeal Number 890267 was obtained and reviewed by the Appeals Officer, and further settlement

discussions were undertaken. However, mediation efforts in both appeals were unsuccessful as both parties maintained their respective positions.

9. On September 19, 1989, I sent notice to the appellant and the institution that I was conducting an inquiry to review the decisions in both appeals. In accordance with my usual practice, the Notice of Inquiry was accompanied by a report prepared by the Appeals Officer. This report is intended to assist the parties in making their representations concerning the subject matter of the appeals. The Appeals Officer's Report outlines the facts of the appeals and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeals. The Report also indicates that the parties, in making their representations to the Commissioner, need not limit themselves to the questions set out in the report.

10. Representations were received from the appellant and the institution. The appellant also indicated that he relied on representations made during the course of mediation.

11. On October 16, 1989, following a review of its representations, the institution was asked to provide further information on the role of an Appeal Assistant (now called Appeal Analyst). Additional representations on this point were received from the institution on October 23, 1989.

12. I have considered the representations of both parties in reaching my decision in these appeals.

The records at issue in these appeals can be described as follows:

Appeal Number 890129

Record #1

The one page cover page of a draft order of the Rent Review Hearings Board, including handwritten notes.

Record #2

The Rent Rebate Worksheet, completed by the Appeal Assistant. This is a two page record, and includes one paragraph on the second page which gives an account of a consultation with a legal advisor. This paragraph was severed by the institution.

Appeal Number 890267

Record #3

The seven page draft order of the Rent Review Hearings Board, including handwritten notes.

The issues that arise in the context of these appeals are as follows:

A. Whether any of the records, to which access has been denied, are subject to the discretionary exemption provided by section 19 of the Act.

B. If the answer to issue A is in the affirmative, whether any of the records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under that exemption.

The purposes of the Act should be noted at the outset. Subsection 1(a) provides the right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head.

ISSUE A: Whether any of the records, to which access has been denied, are subject to the discretionary exemption provided by section 19 of the Act.

Section 19 reads as follows:

> 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.

I considered the proper interpretation of section 19 of the Act in Order 49 (Appeal Numbers 880017 and 880048), dated April 10, 1989. At page 12 of that Order I stated:

> This section provides an institution with a discretionary exemption covering two possible situations:
>
> (1) a head may refuse to disclose a record that is subject to the common law solicitor-client privilege; or
>
> (2) a head may refuse disclosure if a record was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. A record can be exempt under the second part of section 19 regardless of whether the common law criteria relating to the first part of the exemption are satisfied.

As far as the common law solicitor-client privilege is concerned, the case of Susan Hosiery Limited v. Minister of National Revenue [1969] 2 Ex. C.R. 27, identifies what appear to be two branches of this privilege. They are:

> 1. all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers directly related thereto) are privileged; and
>
> 2. papers and materials created or obtained specially for the lawyer's brief for litigation, whether existing or contemplated are privileged. ("litigation privilege")

The first branch of the common law solicitor-client privilege applies to confidential communications between the client and his/her solicitor, and exists any time a client seeks advice from the solicitor, whether or not litigation is involved. The rationale for this first branch is to protect communications between client and solicitor from disclosure in the interest of

providing all citizens with full and ready access to legal advice.

In order for a record to be covered by the first branch of common law solicitor-client privilege, the four criteria outlined at page 14 of Order 49 supra must be satisfied. They are:

1. there must be a written or oral communication;
2. the communication must be of a confidential nature;
3. the communication must be between a client (or his agent) and a legal advisor;
4. the communication must be directly related to seeking, formulating or giving legal advice.

As far as Records #1 and #3 are concerned, it is clear that the draft decision and its covering page were submitted to the Rent Review Hearings Board's legal advisor for legal advice.

From a review of the handwritten notes on the bottom half of the cover page and on the draft order and considering the representations of the parties, it is evident to me that these records constitute written communications, of a confidential nature, between a client and a legal advisor, related to the seeking and giving of legal advice. For this reason, Records #1 and #3 meet all four criteria of the test for solicitor-client privilege.

With respect to Record #2, the severed section on page 2 of the Rent Rebate Worksheet was prepared by an Appeal Assistant and it

refers to advice received from a legal advisor. Regarding the severed section, the institution states:

> [This section] clearly indicates legal advice which... a lawyer with the Legal Services Unit... was providing to the Board member...
>
> ...only the staff and Board member assigned to the case would see... the legal comments

After reviewing the severed section of Record #2 and considering the representations of the parties, I am of the view that it meets criteria 1, 2 and 4 of the test for solicitor-client privilege, namely:

1. there has been a written communication;

2. this communication was of a confidential nature; and

4. this communication directly related to seeking, formulating or giving legal advice.

The only remaining question for me to consider is whether or not the communication was "between a client (or his agent) and a legal advisor" (criterion 3).

In its representations, the institution outlined the role of Appeal Assistants [now called Appeal Analysts] as follows:

> [They] review, verify and analyze appeal documentation for use by Board Members... They review the application and other submitted material as to its accuracy and completeness... After the material has been reviewed and analyzed, it is summarized into a report format which identifies problematic or

> controversial areas relating to procedure, supporting documentation or legislative requirements or interpretation for the Member to review at the hearing.

In my view, an Appeal Assistant acts as the agent of the Board member in the review and analysis of a Rent Review Hearings Board file. If legal advice from a legal advisor is required, the Appeal Assistant acts as the agent of the Board member in seeking and receiving this advice, and communications between the Appeals Assistant and a legal advisor constitute communications between a client and his/her solicitor.

Therefore, I find that the third criterion for common law solicitor-client privilege has been satisfied, in the circumstances of these appeals.

In summary, I find that Records #1, #3 and the severed section of Record #2 satisfy the four criteria for the first branch of the common law solicitor-client privilege, and qualify for exemption under section 19 of the Act.

Section 19 of the Act also provides the head with the discretion to release a record even if it meets the test of an exemption. I find nothing improper in the way in which the head has exercised his discretion and I would not alter it on appeal.

Because I have found that these records qualify for exemption under the first branch of the common law solicitor-client privilege, it is not necessary for me to consider whether the records meet the requirements for exemption under either the "litigation privilege" or "Crown Counsel privilege" portions of the section 19 exemption.

In his representations, the appellant has submitted that the "comments" received from Legal Services by the Board Member may have been "submissions made as part of the hearing, although they were received privately by the Rent Review Hearings Board." He further argues that this factual issue can only be resolved fairly if the parties are entitled to examine any legal opinion received by the Board. I do not find the appellant's argument to be relevant to the determination of the issues arising in these appeals. The Freedom of Information and Protection of Privacy Act, 1987, as amended, establishes a right of access to government information subject to certain exemptions. The sole purpose of my inquiry in these appeals was to determine if records, which are in the custody or under the control of an institution governed by the Act, were properly exempt from disclosure in accordance with section 19 of the Act.

Although not specifically referred to in his representations, the appellant made a number of submissions which were of the nature and kind that would be made under section 23 of the Act, the so-called "public interest override". Although, section 23 applies to a number of exemptions under the Act, it does not apply to section 19.

ISSUE B: If the answer to issue A is in the affirmative, whether any of the records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under that exemption.

Subsection 10(2) states:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the

> head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

I considered the proper interpretation of subsection 10(2) in Order 24 (Appeal Number 880006), dated October 21, 1988. At page 13 of that Order I stated:

> The key question raised by subsection 10(2) is one of reasonableness. In my view, it is not reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value. A valid subsection 10(2) severance must provide the requester with information that is in any way responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption.

Having reviewed the records at issue in these appeals, I find that no part of Record #3 or the exempt section of Record #2 can be severed without disclosing information that legitimately falls within the exemption provided by section 19 of the Act. However, I find that if the handwritten notes on Record #1 are severed from the rest of the record, it can be released to the appellant without disclosing information that is legitimately exempt under section 19.

In summary, my Order is as follows:

1. I uphold the decision of the head to exempt Record #3 and the severed section of Record #2, pursuant to section 19 of the Act.

2. I order the head to sever all handwritten notes from Record

#1, and release the remaining portion of the record to the appellant within twenty (20) days of the date of this Order. The institution is further ordered to advise me in writing, within five (5) days of the date of disclosure, of the date upon which disclosure was made.

Original signed by:
Sidney B. Linden
Commissioner

February 22, 1990
Date