



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

ORDER 49

Appeals 880017 and 880048

Ministry of Community and Social Services



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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) or a person who was given notice of a request under subsection 28(1) the right to appeal any decision of a head under the Act to the Commissioner.

1. On January 8, 1988, the requester wrote to the Ministry of Community and Social Services (the "institution") to request:

- (a) correspondence between the Ministry of Community and Social Services, a named construction company, and a named Home for Aged Persons (the "Home"), regarding a \$10.5 million reconstruction project at the Home, and
- (b) a list of dangerous occurrences and any warnings that may have been issued by the province or the Home to the named construction company.

On January 12, 1988, this request was defined more broadly to include as well:

- (c) any reports or evaluations about the construction project,

- (d) any status reports on the progress of the project, especially documents relating to the more than 6_{month} delay,
 - (e) any documents revealing ongoing or past problems on a project.
2. On February 11, 1988, the institution wrote to the requester and advised that access to certain requested records was being granted. Other records were either severed or withheld from disclosure pursuant to sections 17 and 19 of the Act.
 3. In the same February 11, 1988 letter, the head confirmed the existence of a record regarding "the list of 40 occurrences on the construction site". The requester was advised that an affected third party (the "third party") would be given the opportunity to make representations concerning disclosure of this information.
 4. The requester wrote to me on February 12, 1988 appealing the decision of the institution, and I gave notice of the appeal to the institution (Appeal Number 880017).
 5. On February 11, 1988, the institution wrote to the third party to advise of its intention to release the requested information subject to receiving representations from the third party pursuant to subsection 28(1) of the Act.
 6. On March 4, 1988, the institution advised both the requester and the third party of its intention to release the third party information.

7. On March 10, 1988, the third party wrote to me appealing the Ministry's intention to release this information. Notices of appeal were sent to the requester and to the institution (Appeal Number 880048).
8. The records in dispute were obtained and reviewed by the Appeals Officer from my office. Attempts were made by the Appeals Officer and the parties to clarify the records in dispute and to settle the appeals. These attempts resulted in a final statement of the Ministry's position vis_a_vis the records, and this statement was provided to the parties in an Appeals Officer's Report.
9. On July 20, 1988, I sent notice to the appellant, the institution and the third party that I was conducting an inquiry to review the decisions of the head. Accompanying this notice was an Appeals Officer's Report. At the same time, three other affected persons were identified, provided with copies of the Appeals Officer's Report, and given an opportunity to make representations.
10. By letter dated August 4, 1988, I invited the parties and all affected persons to make written representations on the issues arising in the appeals.
11. Written representations were received from the appellant, the institution and the third party, and from two of the three affected persons.

12. On October 14, 1988, following a review of its representations, the institution was requested to clarify its position with respect to several of the records under appeal. Additional written representations were received from the institution on October 27, 1988.
13. So that I might better understand the nature of the relationships between the various parties and affected persons, the institution was asked to provide me with copies of public records relating to legal actions which had been commenced. These records were received on December 23, 1988 and subsequently reviewed.
14. I have considered all representations received in making my Order.

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

- A. Whether the decision of the head to release Record #1 should be upheld.
- B. Whether any of the requested records are exempt from release pursuant to subsection 17(1)(b) of the Act.
- C. If the answer to Issue B is in the negative, whether any of the requested records are subject to the discretionary exemption provided by section 19 of the Act.
- D. If the answer to Issue B and/or Issue C 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 an exemption.

E. Whether the public interest override provided by section 23 of the Act applies to any records found eligible for exemption under the Act.

At the outset, the purposes of the Act should be noted. 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 counterbalancing 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.

For the purpose of clarity, I have identified the records at issue in these appeals individually. They are listed in the same order as outlined in the Appeals Officer's Report, and I will refer to them by number throughout my Order.

#1 Inspection Tour Notes prepared by Home dated August 13, 1987

This record contains the list of alleged safety violations at the Home and represents the third party information referred to in paragraphs 3, 5, 6 and 7, above.

- #2 Memo to the institution's Solicitor from the institution's Program Supervisor, dated August 26, 1987

This record is a memo from a Ministry official to a Ministry solicitor requesting legal advice. It is marked "PRIVATE & CONFIDENTIAL".

- #3 Letter to Home's Solicitor from Solicitor for Third Party, dated August 12, 1987

This record is the third party's response to Home's allegations of the third party's failure to perform its contractual obligations.

- #4 Memo to institution's Program Manager from institution's solicitor, dated August 28, 1987

This record is the solicitor's response to record #2.

- #5 Minutes of confidential, in camera, special meeting of Home's Committee of Management, dated August 13, 1987

This record contains minutes of a special meeting of Home's Committee of Management, and is marked "CONFIDENTIAL IN CAMERA". It also identifies the members of the committee who were present at the meeting, as well as Home's solicitor, architect and two officials of the institution.

- #6 Memo from Home's Technical Advisory Committee to Home's Committee of Management, dated August 12, 1987

This record is marked "CONFIDENTIAL", and contains opinions regarding the degree to which the third party performed its contractual obligations, and includes allegations of safety violations.

- #7 Letter from Home's Construction Manager to Home's solicitor, dated July 28, 1987

This record contains the construction manager's opinion respecting the performance of the third party's contractual obligations. The letter is produced on Home's letterhead.

- #8 Notes from a former Solicitor for the institution to the Manager of the Capital Projects Branch of the institution, dated May 8, 1987

This record is a handwritten note containing legal advice.

- #9 Letter from Home's Solicitor to Home's Administrator

This record is a report from Home's solicitor advising Home's Administrator of developments in the dispute between Home and the third party. It also contains advice in the form of legal alternatives available to Home.

- #10 Letter from Home's Solicitor to Third Party's solicitor, dated August 10, 1987

This record is the letter which generated Record #3. It contains allegations of the third party's failure to perform its contractual obligations. Copies of the letter were provided to Home's Administrator, construction manager

and architect. Home also provided a copy of the letter to the institution.

#11 Letter from Third Party's Solicitor to Home's Administrator, dated July 30, 1987

This record contains a summary of the third party's understanding of the Home's outstanding concerns as of July 30, 1987.

ISSUE A: Whether the decision of the head to release Record #1 should be upheld.

As noted, the institution gave notice to the third party (the appellant in Appeal Number 880048) under subsection 28(1) of the Act that it intended to release Record #1 to the appellant in Appeal Number 880017.

Subsection 28(1) provides that:

Before a head grants a request for access to a record,

- (a) that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information; or
- (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

Although not specifically stated by the institution, I have reviewed the record and concluded that the head felt section 17 of the Act might apply to exempt the record from disclosure. Section 17 reads as follows:

- (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
 - (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
 - (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; or
 - (c) result in undue loss or gain to any person, group, committee or financial institution or agency.
- (2) A head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure.

Upon receiving notice from the institution, the third party responded on March 10, 1988 and advised the institution that it objected strenuously to the release of the record. Nevertheless, the institution decided to grant access to the record to the appellant in Appeal Number 880017, subject to the third party's right of appeal.

Section 53 of the Act stipulates that, where a head of an institution refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one

of the specified exemptions in the Act, lies upon the head. However, where a third party appeals the head's decision to release any such record, the onus of proving that the record should be withheld from disclosure falls to the third party. This shift in onus has taken place with respect to Record #1, and it is up to the third party to demonstrate why the record should not be released.

The third party takes the position in its letter of appeal that disclosure of the record "...will only confuse and mislead anyone who is not privy to or prepared to consider all facets of the problem". Despite receiving a copy of the Appeals Officer's Report outlining the relevant issues, the third party declined to provide any submissions as to why the section 17 exemption should apply to Record #1.

I have reviewed Record #1, and, in the absence of submissions to the contrary, in my view the requirements for exemption under section 17 are not present. Accordingly, my Order in Appeal Number 880048 is to uphold the decision of the institution and to order the release of Record #1 to appellant in Appeal Number 880017.

ISSUE B: Whether any of the requested records are exempt from release pursuant to subsection 17(1)(b) of the Act.

Subsection 17(1)(b) has been claimed by the institution as one of the bases for refusing to release Records #3, #5, #6, #7, #9, #10 and #11.

The subsection reads as follows:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

...

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

...

In my Order 36 (Appeal Number 880030), released on December 28, 1988, I outlined the three_part test which must be met in order for a record to be exempt pursuant to section 17. The test, as outlined on page 4 of that Order, is as follows:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of harm specified in (a), (b) or (c) of subsection 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the subsection 17(1) exemption claim invalid.

After reviewing all of the records for which the subsection 17(1) (b) exemption has been claimed, and considering the submissions of all parties and affected persons, in my view,

none of these records satisfy the requirements for exemption. Specifically, I find that Part 3 of the test for exemption under subsection 17(1) has not been met.

As I outlined at page 7 of my Order 36:

...in order to satisfy the Part 3 test, the institution and/or the third party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harm described in subsections 17(1)(a)-(c) would occur if the information was disclosed.

In the present appeal, the institution submits that disclosure of the records could reasonably be expected to "...result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied". It goes on to state that "...if the correspondence in question is disclosed, the Ministry will not receive similar kinds of correspondence in the future... (and)... because of the size of the Ministry's financial investment, it is in the 'public interest' that this kind of sensitive information regarding the project continue to be supplied to the Ministry".

In my view, the submissions of the institution are neither detailed nor convincing, and do not contain evidence sufficient to establish a reasonable expectation of harm resulting from the release of the records in question. It could reasonably be argued that it is precisely because of the institution's significant financial investment in projects such as the one being undertaken by Home in this case, that the types of information contained in these records is provided to the

institution. It is possible that, as a major financial contributor to these kinds of projects, the institution could, in some instances, go so far as requiring access to correspondence or information relating to the project as a condition of funding.

Therefore, I am not convinced that the release of Records #3, #5, #6, #7, #9, #10 and #11 could reasonably be expected to result in the harm contemplated by subsection 17(1)(b) of the Act, and, unless these records are otherwise eligible for exemption under the Act, they should be released by the institution to the appellant.

ISSUE C: If the answer to Issue B is in the negative, whether any of the requested records are subject to the discretionary exemption provided by section 19 of the Act.

The institution has claimed section 19 as one of the grounds for refusing to release Records #2, #3, #4, #7, #8, #9, #10 and #11.

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.

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.

Looking first at the common law solicitor_client privilege, Mr. Justice Jackett, at page 33 in the case of Susan Hosiery Limited v. Minister of National Revenue [1969] 2 Ex. C.R. 27, outlines what appears 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 especially for the lawyer's brief for litigation, whether existing or contemplated are privileged. ("litigation privilege")

[See also McDougall, "Privilege in Civil Cases", Law in Transition: Evidence, (1984) Special Lectures of the Law Society of Upper Canada, Richard De Boo Publishers, 131, at 132; File No. 452, Case Summaries, Annual Report Information Commissioner (Federal) 1985_1986 172, at 173; Sopinka and Lederman, The Law of Evidence in Civil Cases, Canadian Legal Text Series, 1974, Butterworths, at 169;]

While both of the above branches are usually referred to as "solicitor_client privilege", it is important to distinguish between the two. There are at least three important differences.

- (1) The first branch applies only to confidential communications between the client and his or her solicitor; litigation privilege, on the other hand, applies to communications of a non_confidential nature between the solicitor and third parties, and even includes material of a non_communicative nature.

- (2) The first branch exists any time a client seeks legal advice from his or her solicitor, whether or not litigation is involved; litigation privilege, on the other hand, applies only in the context of litigation itself.

- (3) The rationale for the first branch is very different from that which underlies litigation privilege. The interest which underlies the protection accorded communications between a client and his/her solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for the individual to obtain proper candid legal advice; litigation privilege, on the other hand, is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.

(Sharpe, "Claiming Privilege in the Discovery Process", Law in Transition (1984), Special Lectures of the Law Society of Upper Canada, Richard De Boo Publishers, 163, at 164_5).

In the present appeal, it is not necessary for me to consider the application of "litigation privilege", because the arguments in favour of the common law solicitor_client privilege all relate to the first branch of the privilege.

Four criteria must be satisfied in order for a record to be covered by the first branch of solicitor_client privilege. 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.

[Solosky v. The Queen, [1980] 1 S.C.R. 821; Susan Hosiery Limited v. Minister of National Revenue, [1969] 2 Ex. C.R. 27 at 33; Report of the Special Committee of the Canadian Bar Association Ontario Regarding Solicitor Client Privilege, March 1989, at 4; McDougall, "Privilege in Civil Cases", at 132; Manes, "Solicitor/Client Privilege", Advocates Society Journal (1988) 20, at 22; Lederman, "Claim of Privilege to Prevent Disclosure", Canadian Bar Review (1976) Volume LIV 422, at 426.]

As far as Record #9 is concerned, it consists of a letter from Home's solicitor to Home's Administrator, advising of developments in the dispute between Home and the third party and providing advice in the form of legal alternatives available to the Home. In my view, the criteria for the first branch of

solicitor_client privilege have been met with respect to this record. The institution, as funder of the Home's construction project, cannot, in my view be considered sufficiently separate in interest from Home to suggest that the institution's possession of the record constitutes waiver of solicitor_client privilege by Home. Therefore, Record #9 is eligible for exemption by the head under section 19.

Turning to Records #3 and #10, both involve correspondence between the solicitor for Home and the solicitor for the third party. In my view, in the circumstances of this appeal, neither branch of the common law solicitor_client privilege attaches to these records, and the exemption provided by section 19 does not apply. Although it is possible for letters or communications passing between opposing lawyers to obtain the status of a privileged communication if they are made "without prejudice" and in pursuance of settlement, I find nothing in the records to indicate that these circumstances exist.

As far as Record #11 is concerned, it can accurately be described as correspondence between a solicitor and a party having a divergent interest from those of the solicitor's client. In my view, this renders the record outside the scope of the section 19 exemption.

Record #7 is a letter from Home's construction manager to Home's solicitor. Like many of the other records at issue in this appeal, it contains the author's opinion respecting the performance of the third party's contractual obligations. A notation appears on the bottom of the record indicating that it was carbon copied to the Home's administrator and to the architect working on the project. In my view, by providing the architect with a copy of the record, the construction manager

has given a clear indication that he did not intend the correspondence to be treated confidentially. Further, the communication between Home's construction manager and its solicitor was not made in connection with services given or rendered in pending or contemplated litigation. Consequently, in my view, the section 19 exemption does not apply to Record #7.

The institution has not claimed an exemption under section 19 of the Act with respect to Record #5. However, in some instances I feel that I have a duty to consider unclaimed exemptions provided by the Act in order to prevent possible unfairness to third parties who have not been given a chance to make representations and who might be adversely affected by the release of information. After reviewing the contents of Record #5, it became apparent that the section 19 exemption might apply to exempt the record from disclosure, because it contains legal advice given by Home's solicitor. However, this advice was provided in the presence of Home's architect, among others, and, in my view, the presence of third parties at the meeting takes the record outside the scope of the second criteria for establishing the common law solicitor_client privilege, in the circumstances of this appeal. Consequently, the section 19 exemption does not apply to Record #5.

Records #2, #4 and #8 all involve correspondence between legal staff of the institution and their clients, various staff of the institution. In each case legal advice is either being sought or given. In my view, these records meet the requirements of the second test for privilege outlined in section 19 of the Act. Each record was "...prepared by or for Crown counsel for use in giving legal advice..." and therefore qualify for exemption.

In summary, I find that Records #2, #4, #8 and #9 meet the requirements for exemption under section 19, and Records #3, #5, #7, #10 and #11 do not.

The section 19 exemption is discretionary, and it is up to the head to exercise this discretion in claiming exemption for eligible records. In this case the head has exercised his discretion in favour of not releasing Records #2, #4, #8 and #9. I find nothing improper or unreasonable in the head's refusal to disclose these records, and would not alter his decision on appeal.

ISSUE D: If the answer to Issue B and/or Issue C 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 an 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 my Order 24 (Appeal Number 880006), released on October 21, 1988. At page 13 of my Order I point out that:

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.

In the present case, I have reviewed the contents of Records #2, #4, #8 and #9 and have concluded that no information that is in any way responsive to the request could be severed from the documents without disclosing information that legitimately falls within the solicitor_client exemption provided by section 19 of the Act.

ISSUE E: Whether the public interest override provided by section 23 of the Act applies to any records found eligible for exemption under the Act.

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.

I have found under Issue B that none of the records at issue in this appeal qualify for exemption under subsection 17(1)(b) of the Act. The only records eligible for exemption are those found under Issue C to meet the requirements for the section 19 solicitor_client privilege exemption.

Because section 23 does not apply to exempt records under section 19, it is not necessary for me to consider the application of section 23 in this appeal.

Before summarizing my Order, I wish to note that the Appeals Officer's Report which was provided to the parties in accordance with my usual practice indicates that the institution previously agreed to release certain records. Accordingly, no submissions were requested in respect of those records, and my Order does not speak to them. It is unclear whether these records have already been released to the appellant. If not, I trust that the institution will forward copies of these records to the appellant together with the records being released pursuant to this Order.

In summary, I uphold the head's decision in Appeal Number 880048 and Order the release of Record #1 to the appellant in Appeal Number 880017; I uphold the head's decision with respect to Records #2, #4, #8 and #9; and I Order the release of Records #3, #5, #7, #10 and #11 to the appellant in Appeal Number 880017.

With respect to the records that I have ordered be released, I Order that that the institution not do so until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give the third party sufficient opportunity to apply for judicial review of my decision before the records are actually released. Provided notice of an application for judicial review has not been served on the

institution within this 30_day period, I Order that the records be released within thirty_five (35) 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 on which disclosure was made.

Original signed by: _____
Sidney B. Linden
Commissioner

April 10, 1989
Date