



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

ORDER P-227

Appeal 890404

Ministry of Community and Social Services



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>

O R D E R

INTRODUCTION:

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) or to personal information under subsection 48(1), a right to appeal any decision of a head to the Commissioner.

On November 1 and 2 of 1989, the Ministry of Community and Social Services (the "institution") received requests for access to all personal information relating to the appellant, as well as all records relating to a named corporation and a facility operated by the corporation. The appellant requested the information for the time period of September 1973 to October 1989 (inclusive) from three offices within the institution: the Children's Services Division, Kingston Area Office; the Communications Branch; and the Legal Services Branch.

On November 29, 1989, the institution provided the appellant with access to his personal information and responded that certain of the records relating to the corporation and its facility were being withheld as follows:

1. Under the section 19 - Solicitor/Client Privilege exemption, the Ministry is

withholding 57 items. These are records that involve confidential communications to solicitors in the Legal Services Branch, communications from solicitors to the client Ministry and communications between solicitors within the Branch with respect to this file;

2. Under Section 17, 3 items are being withheld at this time and the Ministry is seeking representations from the third parties with respect to whether or not those items should be released. Subsection 28(1) requires that before a Head grant a request for access to a record that the Head has reason to believe might contain information referred to in subsection 17(1) the Head shall give written notice to the person to whom the information relates;
3. Pursuant to Section 21, the Ministry is withholding 7 items in their entirety, and two items are being released to you in their severed form; and
4. One item is being withheld which would record advice of a public servant within the meaning of Section 13 - Advice and Recommendations.

The institution also indicated that a response to the request directed to the Communications Branch could not be made within the thirty day deadline, and extended the time for completion of this request to December 18, 1989. The appellant did not appeal this time extension.

On December 22, 1989, the appellant appealed the institution's decision, and notice of the appeal was given to the institution. The records at issue in the appeal were received and reviewed by the Appeals Officer.

The Appeals Officer contacted the institution and requested that a final decision respecting the records withheld under section 17 be sent to the appellant. On March 7, 1990, the institution wrote to the appellant and provided him with copies of the three letters that were previously withheld under section 17 of the Act. The Appeals Officer also inquired whether the institution had made a decision regarding the request directed to the Communications Branch. The institution wrote to the Appeals Officer on September 18, 1990, stating:

With respect to your query regarding the materials in the Communications Branch, those materials have been included in the response to [the appellant].

The Appeals Officer attempted mediation with regard to the remaining records, but was unable to effect settlement. On October 9, 1990, notice that an inquiry would be conducted was sent to the appellant and the institution. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer or either of the parties to be relevant to the appeal. This report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

Representations were received from the institution and the appellant. I have considered these representations in making this order.

PURPOSES OF THE ACT/BURDEN OF PROOF:

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a 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. This 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 a record, or a part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution.

ISSUES/DISCUSSION:

The issues arising in this appeal are:

- A. Whether the head properly applied the discretionary exemption provided by subsection 13(1) of the Act.
- B. Whether the head properly applied the discretionary exemption provided by section 19 of the Act.
- C. Whether the information contained in the record qualifies as "personal information" as defined in subsection 2(1) of the Act.

- D. If the answer to Issue C is in the affirmative, whether the head properly applied the mandatory exemption provided by section 21 of the Act.
- E. Whether the records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

ISSUE A: Whether the head properly applied the discretionary exemption provided by subsection 13(1) of the Act.

There is one record at issue under this subsection. It is a memorandum, dated May 13, 1987, to the Assistant Deputy Minister, Operations, from an Executive Assistant.

Subsection 13(1) of the Act provides that:

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 general purpose of the section 13 exemption was considered in Order 94 (Appeal Number 890137), dated September 22, 1989. At page 5 of that Order former Commissioner Sidney B. Linden stated:

... in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right

of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.

Commissioner Linden considered the meaning of the word "advice" in Order 118 (Appeal Number 890172), dated November 15, 1989. At page 4 of that Order he stated:

In my view, "advice" pursuant to subsection 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.

In the record at issue, the author relates the comments which he received concerning a draft letter and forwards a copy of the draft letter to the Assistant Deputy Minister for his review and approval. The institution has submitted that the record "refers to advice and recommendations of two public servants ... and contains a notation with the initials of [the Assistant Deputy Minister] indicating that he has accepted the advice and recommendations ..."

From my review of the record, I am of the opinion that there is no advice or discernible recommendation contained within it. The record appears to be a routine piece of internal

correspondence which would be expected to occur as part of the daily activities of

public servants. In my view, not every communication of this nature will qualify for exemption under subsection 13(1) and in this case I find that the record is not exempt from disclosure.

I note that the draft letter which accompanied this record was also not disclosed by the institution and it will be considered in the following section of the Order.

ISSUE B: Whether the head properly applied the discretionary exemption provided by section 19 of the Act.

The institution has claimed that section 19 of the Act applies to 57 records. I have numbered the records following the order used in the Appeals Officer's Report and have included this enumerated list of records as "Appendix A" to this Order.

Section 19 of the Act provides 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.

At page 12 of Order 218 (Appeal Number 890364), dated January 31, 1991, I stated:

This section provides an institution with the discretion to refuse to disclose:

- (1) A record that is subject to the common law solicitor-client privilege; (Branch 1)
- (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)

At page 13 of Order 218 supra, I stated the tests for inclusion under Branch 1 of the section 19 exemption:

In order for a record to be subject to the common law solicitor-client privilege the institution must provide evidence that the record satisfies either of the following 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 adviser, 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.

At page 14 of Order 218 supra, I stated the tests for inclusion under Branch 2 of the section 19 exemption:

To meet the requirements for inclusion under this second branch, the institution must demonstrate that:

- (1) The record was prepared by or for "Crown counsel"; and
- (2) The dominant purpose for the preparation of the record was for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

In his representations, the appellant addressed the litigation aspect of the section 19 exemption. However, as the institution has not claimed that that aspect of the exemption applies to the records, his representations do not assist me in my deliberations.

For ease of reference, I shall consider the 57 records in three categories: draft and final letters, memoranda, and miscellaneous materials.

1. DRAFT AND FINAL LETTERS

The draft letters to be considered are Records 3, 11, 14, 16, 21, 22, 29, 30, 31, 33, 35, 37 and 52. All except Record 29 are addressed to the Office of the Ombudsman from either the Deputy Minister or the Assistant Deputy Minister, Operations. Record 29 is a draft letter addressed to the appellant from the Assistant Deputy Minister.

In Order 163 (Appeal Number 880262), dated April 24, 1990, a decision by an institution to exempt a draft letter prepared by

counsel for the institution under Branch 1 of section 19 of the Act was upheld. At page 59 of Order 170 (Appeal Number 880222), dated May 25, 1990, a decision by an institution to exempt a draft letter prepared by counsel for the Deputy Attorney General setting out certain legal arguments relating to a complaint then under investigation by the Office of the Ombudsman was also upheld under Branch 1 of the exemption.

I have reviewed the records, and I find that all of them meet the four criteria of the common law privilege as outlined above: they are confidential written communications between solicitor and client which are directly related to seeking, formulating or giving legal advice.

The only "final" letter to consider is Record 8. This is an unsigned letter addressed to the Office of the Ombudsman from the Deputy Minister. It is stamped: "Original signed by Peter Barnes, Deputy Minister." This is not a communication between solicitor and client, and therefore does not fall within the scope of Branch 1 of section 19. Nor was it used in giving legal advice, as required by Branch 2. Accordingly, this record does not qualify for exemption under section 19 of the Act.

2. MEMORANDA

There are 34 records in this category. I will consider these records in three subgroups.

The first subgroup includes memoranda communicated within the legal branch from one solicitor to another, or between a solicitor in the legal branch and one formerly employed there: Records 2, 4, 9, 12, 15, 25, 26, 39 and 40. I have reviewed

these records and find that only Records 2, 4, 12 and 15 are exempt, as they were prepared by Crown counsel for use in giving legal advice. I find that Records 9, 25, 26, 39 and 40 do not properly fall within the exemption: as these records do not contain legal opinions based on legal considerations, they cannot be said to have been prepared for use in giving legal advice; and none are communications between solicitor and client.

The second subgroup includes memoranda sent by a solicitor in the legal branch to someone within the institution: Records 1, 5, 6, 10, 17, 18, 19, 23, 24, 27, 28, 32, 34, 38, 43, 48, 55 and 57. On reviewing these records, I find that Records 1, 23, 28, 32, 48, 55 and 57 are exempt as they meet the four criteria of Branch 1 of the exemption: they are written communications between solicitor and client which are of a confidential nature and are directly related to seeking, formulating or giving legal advice. Records 5, 6, 10, 17, 18, 19, 24, 27, 34, 38 and 43 do not meet the criteria of

Branch 1, as they cannot be said to be directly related to seeking, formulating or giving legal advice. I also find that they are not exempt under Branch 2, as the records themselves were not prepared for use in giving legal advice.

The third subgroup includes those memoranda which were sent to a solicitor in the legal branch by someone within the institution: Records 7, 36, 41, 42, 44, 46, 47, 54 and 56. Following an examination of these records, I find that Records 42, 54 and 56 fit the four criteria of the common law privilege: they are written communications of a confidential nature between solicitor and client directly related to seeking, formulating or

giving legal advice. Records 7, 36, 41, 44, 46 and 47 are not directly related to seeking, formulating or giving legal advice: Records 7 and 36 are very brief notes relaying comments, and Records 41, 44, 46 and 47 are covering memoranda concerning attached information. Accordingly, Records 7, 36, 41, 44, 46, and 47 do not fall within Branch 1. Nor were they prepared for use in giving legal advice, as required under Branch 2.

3. MISCELLANEOUS MATERIALS

There are seven records remaining to be considered under section 19.

Record 13 is a page of undated handwritten notes. The institution has stated that these notes were written by a solicitor in the legal branch during a meeting or telephone conversation and concern certain legal advice. I have examined this record and I find that it falls within Branch 2 of the exemption: it was prepared by Crown counsel for use in giving legal advice.

Record 20 contains handwritten notes dated June 3, 1988. The institution has stated that these were written by staff in the legal branch. I find that this record does not fit the four

criteria of the common law privilege, as it is not directly related to seeking, formulating or giving legal advice. Nor was the record prepared by or for Crown counsel for use in giving legal advice. It is therefore not exempt.

Record 45 consists of five pages which form part of an undated report. The institution has submitted that these pages contain

"handwritten addenda reviewed by Legal Services." I have examined this record and, in my view, simply because a lawyer has reviewed it does not bring the record under either part of the exemption: there is no solicitor-client relationship, nor can it be said that the record was prepared by or for Crown counsel for use in giving legal advice.

Records 49 and 50 are a draft and a final form of a letter sent to a person outside of the institution by the Deputy Minister. There is no solicitor-client relationship, and the records were not prepared for use in giving legal advice.

Record 51 is an "Action Request" which was sent to a solicitor in the legal branch from someone in the institution. It is not directly related to seeking, formulating or giving legal advice, and it would not be prepared for use in giving legal advice, and so does not fall under either branch of the section 19 exemption.

Record 53 is a memorandum dated April 23, 1975. It is not directly related to seeking, formulating or giving legal advice, nor was it prepared by Crown counsel for use in giving legal advice, and therefore is not exempt.

ISSUE C: Whether the information contained in the records qualifies as "personal information" as defined in subsection 2(1) of the Act.

The institution claimed that records responsive to the appellant's request for general information contain the personal information of other individuals. The institution claimed that this information was exempt under section 21 of the Act. Before

deciding whether an exemption under section 21 of the Act applies, I must determine whether the information in question falls within the definition of "personal information" contained in subsection 2(1) of the Act.

In part, "personal information" is defined in subsection 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

In its original response to the appellant, the institution stated that there were nine records containing the personal information of an individual other than the appellant. There are, however, only eight such records, as listed in the Appeals Officer's Report. Subsequent to the appeal, the institution disclosed to the appellant one of the records at issue: a letter dated January 28, 1980. In addition, the appellant indicated that he is satisfied with two severed records previously received from the institution, and withdrew his appeal concerning four other records. Therefore, only one

record remains in issue, and it consists of one undated page of handwritten notes.

I have reviewed the record, and I find that it refers to a named person, the length of time during which the person was employed by a named organization, and information concerning that person's work with the organization. I am of the opinion that it contains personal information.

ISSUE D: If the answer to Issue C is in the affirmative, whether the head properly applied the mandatory exemption provided by section 21 of the Act.

Once it has been determined that a record or part of a record contains personal information, subsection 21(1) of the Act prohibits disclosure of this information except in certain circumstances. One such circumstance is contained in subsection 21(1)(f) of the Act, which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Guidance is provided in subsections 21(2) and (3) of the Act with respect to the determination of whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

Subsection 21(3) of the Act sets out a list of the types of personal information the disclosure of which is presumed to

constitute an unjustified invasion of personal privacy. In particular, subsection 21(3)(d) provides:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(d) relates to employment or educational history;

I am of the view that disclosure of the personal information at issue would be presumed to constitute an unjustified invasion of personal privacy under subsection 21(3)(d). Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under subsection 21(3) have been satisfied, I must then consider whether any other provisions of the Act come into play to rebut this presumption.

In Order 20 (Appeal Number 880075), dated October 7, 1988, Commissioner Linden stated that "... a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view such a case would be extremely unusual." The appellant has put forward subsections 21(2)(a) and (d) as factors to consider in my determination. These subsections provide as follows:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

I have considered the appellant's submissions; however, I am of the opinion that the circumstances are such that the presumption that disclosure of the record would be an unjustified invasion of privacy has not been rebutted. Therefore, I uphold the head's decision to exempt this record.

ISSUE E: Whether the records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

Subsection 10(2) of the Act states that:

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.

In Order 24 (Appeal Number 880006), dated October 21, 1988, the Commissioner established the approach which should be taken when

considering the severability provisions of subsection 10(2). At page 13 he 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, at the same time protecting the confidentiality of the record covered by the exemption.

I adopt Commissioner Linden's view of subsection 10(2) of the Act. I have examined each record which I have found falls under the section 19 or section 21 exemption and I do not see how any severances could be made which would provide the requester with information that is responsive to his request.

ORDER:

1. I order the head to disclose to the appellant the record considered under subsection 13(1), that is, the memorandum dated May 13, 1987; and Records 5 to 10, 17 to 20, 24 to 27, 34, 36, 38 to 41, 43 to 47, 49 to 51, and 53 in their entirety within twenty days (20) from the date of this Order. I further order the head to advise me in writing within five (5) days from the date of disclosure, of the date on which disclosure was made.

2. The notice concerning disclosure should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by:
Tom A. Wright
Assistant Commissioner

April 12, 1991
Date

Appendix A

1. memorandum, September 3, 1986
2. memorandum, October 20, 1988
3. letter, undated
4. memorandum, October 14, 1988
5. memorandum, October 14, 1988
6. memorandum, October 20, 1988
7. action memo, October 20, 1988
8. letter, June 20, 1988
9. memorandum, October 12, 1988
10. memorandum, October 14, 1988
11. letter (draft), undated
12. memorandum, June 20, 1988
13. handwritten notes, one page, undated
14. letter, May 22, 1987
15. memorandum, April 5, 1988
16. letter, undated
17. memorandum, April 27, 1988
18. memorandum, April 28, 1988
19. memorandum, June 6, 1988
20. handwritten notes, June 3, 1988
21. letter, undated
22. letter, July 10, 1986
23. memorandum, July 10, 1986
24. memorandum, July 10, 1986
25. handwritten memorandum, August 6
26. memorandum, Aug. 6/86
27. memorandum, January 6, 1987
28. memorandum, April 21, 1987
29. draft letter, undated
30. letter, May 22, 1987
31. draft letter, undated
32. memorandum, July 14, 1987
33. draft letter, undated
34. memorandum, September 28, 1987
35. draft letter, undated
36. memorandum, October 16, 1987
37. letter, October 19, 1987
38. memorandum, October 20, 1987
39. memorandum, March, 1988
40. memorandum, March 29, 1988
41. memorandum, January 19, 1984
42. memorandum, April 29, 1983
43. memorandum, September 27, 1984

44. memorandum, January 23, 1980
45. report with handwritten addenda
46. memorandum, January 29, 1980
47. memorandum, January 23, 1980
48. memorandum, July 4, 1980
49. draft letter, undated
50. letter, February 9, 1989
51. action request, September 23, 1985
52. letter, undated (draft?)
53. letter, April 23, 1975
54. memorandum, May 17, 1977
55. memorandum, June 7, 1977
56. memorandum, February 26, 197?
57. memorandum, April 9, 1975.