



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

ORDER 191

Appeal 890212

Ministry of the Attorney General



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O R D E R

INTRODUCTION:

On April 25, 1989, a request was received by the Ministry of the Attorney General (the "institution") under the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act"). The requester sought access to:

Copy of any and all files, correspondence, documentation, reports etc. including memoranda, notes, notes of telephone conversations with or about [the requester], records of meetings, investigations, hearings, etc. regarding [the requester] at which she was or was not present, transcripts, electromagnetic recordings, photostatic recordings, facsimile transmissions, performance appraisals, position descriptions, grievances, medical records, etc. held in any location pertaining to [the requester].

On June 20, 1989, the institution provided access to part of the requested records and responded to the balance of the request in the following manner:

Access to part of the record is denied under subsection 22(a) of the Act as these documents are a matter of public record. The documents in question were documents submitted in the course of your hearing such as factums submitted by your counsel, exhibit book, motion record, transcripts of hearing, etc. Either you or your counsel have been served with a copy of these documents.

The Ministry also has in its custody additional documents (approximately 45) that originated with the Ministry of Labour. Since that Ministry has a greater interest in these records a decision on these

documents will be made when they respond to the request you made with that Ministry.

On July 12, 1989, the requester appealed the decision of the institution pursuant to subsection 50(1) of the Act. This subsection gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head of an institution under the Act to the Commissioner. In her letter of appeal the appellant stated:

I appeal the denial, under subsection 22(a) of the Act, of access to important documents which are part of the record... What are the particulars with respect to names, dates, times and places of all documents relied upon to support Mrs. Maillard's [the institution's Freedom of Information Co-ordinator] contention that either I or my counsel have been served with 'factums submitted by your counsel, exhibit book, motion record, transcript of hearing etc.'? I request that you cause the Ministry of the Attorney General to produce and to forward these documents to me.

... I request that these 'additional documents (approximately 45) that originated with the Ministry of Labour' be released and forwarded to me from the custody of the Ministry of the Attorney General.

On July 20, 1989, notice of the appeal was given to the institution and the appellant.

As soon as the appeal was received, an Appeals Officer was assigned to investigate the circumstances of the appeal and to attempt to mediate a settlement. To that end, the Appeals Officer obtained and reviewed the records. Along with the

records, the institution provided an index which listed the exemptions claimed for each record. Following the Appeals Officer's review of the index and the records, it became apparent to the Appeals Officer that the institution had not indicated to the appellant that it was also relying on the section 19 exemption to withhold some of the records. The Appeals Officer advised the appellant accordingly.

As mediation of the appeal was unsuccessful, notice that an inquiry to review the decision of the head was being conducted was sent to the appellant and the institution on February 13, 1990. 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.

Written representations were received from the appellant and the institution. I have considered all representations in making this Order.

Since this is a request for information relating to the appellant, section 49 should have been referred to by the institution along with section 19 and subsection 22(a) of the Act as the basis for denying access to the requested records. Accordingly, I will also consider section 49 as it relates to this appeal.

The issues arising in this appeal are as follows:

- A. Whether the information contained in the requested records qualifies as "personal information" as defined by subsection 2(1) of the Act.

- B. Whether the requested records would qualify for exemption under section 19 of the Act.
- C. Whether the requested records would qualify for exemption under subsection 22(a) of the Act.
- D. If the answer to either Issue B or C is in the affirmative, whether the exemption provided by subsection 49(a) of the Act applies in the circumstances of this appeal.
- E. Whether the requested records could reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

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.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

BACKGROUND :

The appellant is a former employee of the Ministry of Labour. During her employment with that Ministry, she filed several grievances concerning the "working conditions" at her place of employment. Subsequent to the commencement of arbitration hearings before the Public Service Grievance Settlement Board, the Deputy Minister of Labour advised the appellant that a hearing was scheduled to determine whether there was cause for her dismissal from employment. The appellant then initiated judicial review proceedings to prohibit the dismissal hearing until the final disposition of her grievances.

During the mediation of the appeal, the institution provided the appellant with a list of eight records for which it had claimed that subsection 22(a) of the Act applied. The list indicated the dates on which the records were prepared and the location to which the records were sent. The Appeals Officer was advised that all of these records were available to the public in the Supreme Court of Ontario (Divisional Court) File No. [a cited case]. The institution also provided the appellant with copies of 42 records which originated with the Ministry of Labour.

Following the provision to the appellant of the list of the records which the institution claimed were publicly available, the appellant advised the Appeals Officer by letter that "[f]or your information, the denial by Mrs. Maillard of documents of my personal information withheld under subsection 22(a) of the Act is not settled." The balance of the appellant's letter with

respect to this issue consisted of questions relating to a transcript of a grievance hearing.

The institution then provided the appellant with a copy of the 110_page transcript of the grievance hearing mentioned above. It also provided copies of court decisions which had not been identified to the appellant. Although the Ministry had claimed that these records were exempt pursuant to subsection 22(a), they were provided to the appellant in an effort to mediate the appeal. This left seven records in dispute for which subsection 22(a) has been claimed.

Finally, since the institution had not indicated to the appellant that it was relying on section 19 to prevent the disclosure of some of the records, the Appeals Officer provided the appellant with a description of the types of records which were being withheld pursuant to section 19.

The institution also disclosed to the appellant two records in their entirety and one severed record, all of which had been withheld from disclosure pursuant to section 19. This left seven records in dispute for which section 19 has been claimed.

DISCUSSION:

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

In all cases where the request involves access to personal information it is my responsibility, before deciding whether the

exemptions claimed by the institution apply, to ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act. This definition reads, in part, 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, (emphasis added)

...

In my view, the information contained in the records at issue in this appeal falls within the definition of personal information under subsection 2(1). I find that the information contained in the record is properly considered personal information about the appellant.

Subsection 47(1) of the Act gives individuals a general right of access to any personal information about the individual in the custody or under the control of an institution. However, this right of access under subsection 47(1) is not absolute. Section 49 provides a number of exceptions to this general right of access to personal information by the person to whom it relates.

Subsection 49 (a) of the Act provides that:

A head may refuse to disclose to the individual to whom the information relates personal information,

- (a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; (emphasis added)

...

I will now consider whether section 19 and subsections 22(a) and 49(a) of the Act have been properly applied to exempt the requested records from disclosure.

ISSUE B: Whether the requested records would qualify for exemption under section 19 of the Act.

The institution relied upon section 19 to exempt seven records from disclosure. These records are listed below, using the numbers assigned to them by the institution, for ease of reference. They have been withheld in their entirety, except where noted otherwise.

- Record 3. Crown counsel's notes of a hearing. (57 pages)
- Record 10. Crown counsel's notes regarding the preparation of the employer's factum. (17 pages)
- Record 15. Correspondence between Crown counsel with respect to litigation. (one page)
- Record 42. Crown counsel's notes of a hearing. (12 pages)
- Record 52. Crown counsel's notes of an interview with a
53. witness. (2 pages)
- Record 94. Crown counsel's memorandum to file regarding litigation. This one page memorandum was disclosed to the appellant with the last paragraph severed.

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.

The institution's representations indicate that:

The correspondence between counsel in the Crown Law Office, Civil, was prepared at a time when the Deputy Minister of Labour had served [the appellant] with notice of his intention to hold a hearing into whether there was just cause for her dismissal from employment. [The appellant] then brought judicial review proceedings to prohibit the hearing from being held. The notes between the lawyers deal with various options for responding to those proceedings. It is submitted that they meet the criteria for the second branch of the section 19 exemption.

It is submitted that the other category of records, that is, counsel's own notes, are also covered by the second branch of the solicitor_client privilege. There are approximately 75 pages of notes. These notes relate to the judicial review proceedings and to the ongoing dismissal proceedings with respect to [the appellant] and represent the preparation for or the product of litigation.

In her representations, the appellant addressed the different types of records withheld by the institution under section 19 of the Act. The appellant submitted that:

1. Counsel's notes of hearing
"At the hearings, part of the record of my personal information held by the Ministries of the Attorney General and Labour was discussed and I am entitled under the Act to receive a copy of these notes."

2. Counsel's notes re factum
"A factum is a public record. Since notes about a factum pertain to me, they are part of the record of my personal information held by the Ministry of the Attorney General and I am entitled under the Act to receive a copy of these notes."

3. Solicitor correspondence with solicitor
"Since such correspondence pertains to me and the hearings I was undergoing, I am entitled under the Act to receive a copy of this record of my personal information held by the Ministry of the Attorney General."

Since these solicitors are fellow government employees of the Appellant, under section 2 of the Act, the appellant is entitled to have this record of her personal information, in order to defend her professional and personal reputation at her ongoing appeal hearing at the Public Service Grievance Board.

4. Solicitor's notes of witnesses interview
"Since interviews of witnesses involved discussions about me, I am entitled under the Act to receive a copy of this record of my personal information held by the Ministry of the Attorney General."

5. Solicitor's notes to file
"Since many such notes pertain to me, I am entitled under the Act to receive a copy of these notes since they are part of the record of my personal information held by the Ministry of the Attorney General." [sic]

Commissioner Sidney B. Linden considered the proper interpretation of section 19 of the Act in a number of his Orders. In Order 49 (Appeals Nos. 880017 and 880048), dated April 10, 1989 he indicated that section 19 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. He further indicated that 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. I agree with and for purposes of this Order I adopt Commissioner Linden's interpretation of this exemption.

Following my review of the records in question, I am satisfied that the second branch of the section 19 exemption has been satisfied. Accordingly, Records 3, 10, 15, 42, 52 and 53 in their entirety and the severed paragraph in Record 94, qualify for exemption under section 19 of the Act.

ISSUE C: Whether the requested records would qualify for exemption under subsection 22(a) of the Act.

Subsection 22(a) of the Act has been raised as the basis for refusing to disclose records which the institution submits are available to the public in the Supreme Court of Ontario (Divisional Court) File No. [a cited case].

Subsection 22(a) reads as follows:

A head may refuse to disclose a record where,

- (a) the record or the information contained in the record has been published or is currently available to the public;

...

The records at issue with respect to the appellant's Supreme Court of Ontario (Divisional Court) File No. [a cited case] consist of: an Exhibit Book, two Facta, a Motion Record and a Supplementary Motion Record submitted by the appellant's legal counsel (Records 1, 4, 5, 7 and 6 respectively); and a Factum and Motion record submitted by legal counsel to the institution (Records 9 and 8 respectively).

At the request of the Appeals Officer, the appellant was provided with a list of the records at issue indicating who had prepared each record and the date that the record was submitted to the Court.

I agree with Commissioner Linden that subsection 22(a) gives the head of an institution the discretion to refuse to disclose the requested information, if it has been published or is currently available in another form. [See Order 42 (Appeal Number 880052) dated March 2, 1989.] I also share Commissioner Linden's belief that when an institution relies on subsection 22(a), the head has a duty to inform the requester of the specific location of the records or information in question. [See Order 124 (Appeal Number 880124) dated November 24, 1989.] I further believe that the head has a duty to identify or provide the requester with a description of the records or information in question.

Subsection 147(1) of the Courts of Justice Act, 1984 (the "CJA") provides that "on payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides

otherwise." According to subsection 147(2) of the CJA, "on payment of the

prescribed fee, a person is entitled to a copy of any document he or she is entitled to see."

I am satisfied that the records withheld under subsection 22(a) of the Act are documents which are available to the public for inspection through the Supreme Court of Ontario (Divisional Court) and that copies of these records can be obtained upon payment of the prescribed fees. Further, the institution has fulfilled its duty to provide sufficient information to the appellant to enable the records in question to be identified.

As a result, Records 1, 4, 5, 6, 7, 8 and 9 qualify for exemption under subsection 22(a) of the Act.

ISSUE D: If the answer to either Issue B or C is in the affirmative, whether the exemption provided by subsection 49(a) of the Act applies in the circumstances of this appeal.

Subsection 49 (a) of the Act provides that:

A head may refuse to disclose to the individual to whom the information relates personal information,

(a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; (emphasis added)

...

I have found that the contents of the requested records qualify as "personal information" about the appellant. I have also

found that the records at issue qualify for exemption under section 19 or 22(a) of the Act. Therefore, the exemption provided by subsection 49(a) applies and consequently the head has the discretion to refuse disclosure of the requested records.

In the circumstances of this appeal, the head has exercised his discretion and decided not to disclose the records. I uphold the

head's exercise of discretion in this regard and would not disturb it on appeal.

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

I must now determine whether the severability requirements of subsection 10(2) apply to the requested records.

Subsection 10(2) reads as follows:

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 have reviewed the requested records and I find that no parts of these records could reasonably be severed without disclosing the exempt information.

ORDER:

1. I uphold the head's decision to withhold Records 3, 10, 15, 42, 52 and 53 in their entirety and the severed paragraph in Record 94, pursuant to section 19 and subsection 49(a) of the Act.

2. I uphold the head's decision to withhold Records 1, 4, 5, 6, 7, 8 and 9 from disclosure pursuant to subsection 22(a) and 49(a) of the Act.

Original signed by:
Tom A. Wright
Assistant Commissioner

August 16, 1990
Date