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

ORDER 134

Appeal 880339

Ministry of Financial Institutions

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I N T E R I M O R D E R

This appeal was 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) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

The facts of this case and the procedures employed in making this Interim Order are as follows:

1. On January 27, 1988, the Ministry of Financial Institutions (the "institution") received a request for the following information:

> pertaining to meetings, letters, recorded conversations, decisions that the Department of Insurance has with Motor Clubs as follows:
>
> Dominion Automobile Association, London, Ontario
> Ontario Automobile Association, London, Ontario
> National Automobile League, London, Ontario
> Trans_Canada Automobile League, Toronto, Ontario
> Ontario Motor League, Toronto, Ontario
>
> All matters concerning the selling of insurance in the PROVINCE of ONTARIO,
>
> all matters concerning the settling of disability claims of the above club's members.
>
> During the years 1980_present (1)
> During the years 1970_1980 (2)
> During the years 1960_1970 (3)
> During the years 1950_1960 (4)

> We would appreciate reviewing the files according to the 3 steps noted above. Should the 1st not be sufficient, then we would request step 2, and then step 3, and finally step 4.

2. On a number of occasions over the next five_month period, representatives of the institution met with the requester in order to attempt to clearly identify the scope of the request.

3. On July 25, 1988, 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 responsive to his request, with the exception of nine records. In her letter the Co_ordinator stated:

> Of the nine exempt records, two would reveal consultation among Crown ministers on a matter of government policy (s. 12(1)(d)), two are reports prepared in the course of investigations by an agency which enforces and regulates compliance with a law (s. 14(2)(a)), and five are subject to solicitor client privilege (s.19).

4. In order to determine if he wanted copies of the records that the institution was prepared to disclose, the requester contacted the institution and made arrangements to attend and view the records. Between July and November of 1988, the requester made a number of visits to various offices of the institution to view these records.

5. On December 6, 1988, the requester wrote to me appealing the head's decision with respect to the exempt records, and I sent notices of appeal to the appellant and the institution.

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

7. During the course of mediation the appellant expressed the view that the institution had not identified all records responsive to his request. Consequently, a Compliance Auditor from my staff attended at the offices of the institution to ascertain the adequacy of the institution's search. The Compliance Auditor completed his investigation and submitted a report, which has been taken into consideration in reaching my decision in this appeal.

8. Despite the efforts of the Appeals Officer, mediation of the issues in this appeal was not successful, and on August 29, 1989, I sent notice to the appellant and the institution that I was conducting an inquiry to review the decision of the head. 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 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 any of the parties, to be relevant to the appeal. The Report also indicates that the parties, in making their representations need not limit themselves to the questions set out in the Report.

9. Representations were received from the appellant and the institution, and I have considered them in making this Order.

The nine records at issue in this appeal can be described as follows.

#1 A letter dated May 15, 1980, from the Minister of Correctional Services to the Minister of Consumer and Commercial Relations.

#2 A letter in reply to Record #1, dated June 12, 1980.

#3 An interim investigation report and covering memorandum dated September 12, 1985, prepared by an employee of the institution.

#4 An undated report of an examination conducted by two employees of the institution.

#5 A memorandum_to_file dated February 16, 1983, prepared by a solicitor for the institution.

#6 A memorandum dated August 2, 1984, from a solicitor for the institution to an employee of the institution.

#7 A memorandum dated November 20, 1984, from a solicitor for the institution to an employee of the institution.

#8 A memorandum dated March 19, 1985, from a solicitor for the institution to an employee of the institution.

#9 A memorandum dated May 10, 1985, from a solicitor for the institution to an employee of the institution.

The issues arising in this appeal are as follows:

A. Whether any of the records are properly exempt from disclosure pursuant to subsection 12(1)(d) of the Act.

B. Whether any of the records are properly exempt from disclosure pursuant to subsection 14(2)(a) of the Act.

C. Whether any of the records are properly exempt from disclosure pursuant to section 19 of the Act.

D. If either Issues A or C are answered in the affirmative, whether the records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

E. Whether the institution has identified all records within its custody or under its control which respond to the appellant's request.

It is important to note at the outset the purposes of the Act as set out in section 1. 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 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 where a head refuses access to a record, 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 are properly exempt from disclosure pursuant to subsection 12(1)(d) of the Act.

The institution claimed subsection 12(1)(d) as the basis for exempting Records #1 and #2, the exchange of correspondence between two ministers of the Ontario Government.

Subsection 12(1)(d) of the Act reads as follows:

> 12.__(1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, including,
>
> ...
>
> (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

In order to qualify for exemption under subsection 12(1)(d), a record must either:

(a) reflect consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; or

(b) be used for the making of government decisions or the formulation of government policy.

Record #1 consists of a letter from the Minister of Correctional Services to the Minister of Consumer and Commercial Relations regarding prepaid legal insurance, and Record #2 is the Minister of Consumer and Commercial Relations' reply. The institution submitted that these two letters fall under the scope of subsection 12(1)(d). I have reviewed the records and I agree with the institution's position. The letters are clearly records "...reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy", and are therefore the type of records to which this exemption applies.

Because I have found that Records #1 and #2 qualify for exemption under subsection 12(1)(d), it is not necessary for me to consider whether they meet the requirements for exemption under the introductory wording of subsection 12(1).

I conclude, therefore, that the head has properly applied the provisions of subsection 12(1)(d) to exempt Records #1 and #2 from disclosure.

ISSUE B: Whether any of the records are properly exempt from disclosure pursuant to subsection 14(2)(a) of the Act.

Subsection 14(2)(a) was claimed by the institution as the basis for exempting Record #3, an interim investigation report and covering memorandum prepared by an employee of the Investigations Branch of the institution, and Record #4, a final

report of a different examination prepared by two employees of the same Branch.

Subsection 14(2)(a) reads as follows:

> 14.__(2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
>
> ...

I considered the proper application of subsection 14(2)(a) of the Act in my Order 38 (Appeal Number 880106), dated February 9, 1989. At page 4 of that Order I stated:

> Subsection 14(2)(a) is unusual in the context of the Freedom of Information and Protection of Privacy Act, 1987, in that it exempts a type of document, a report. The exemption does not require that the report meet additional criteria such as a reasonable expectation of some harm resulting from the disclosure of the report, or specifications about the contents thereof.
>
> Under subsection 14(2)(a) the head may exercise his or her discretion to deny access to an entire report.

In its representations, the institution submitted that Records #3 and #4 consist of interim and final reports prepared following completion of two investigations into possible violation of the Insurance Act. The reports were produced by employees of the institution's Investigations Branch for submission to the Superintendent of Insurance, the entity within the institution having statutory responsibility for regulating the insurance industry.

I have examined the contents of Records #3 and #4 and, in my view, they meet the requirements for exemption under subsection 14(2)(a). They are clearly "reports prepared in the course of an investigation", and this investigation was conducted by "an agency which has the function of enforcing and regulating compliance with a law", i.e. the Insurance Act.

Accordingly, I find that Records #3 and #4 qualify for exemption from disclosure pursuant to subsection 14(2)(a) of the Act.

I have reviewed the institution's representations regarding the exercise of the head's discretion with respect to these two records, and I find nothing to indicate that it was improperly exercised. Accordingly, I find that the head's decision to exercise his discretion in favour of non-disclosure of the records should not be interfered with on appeal.

ISSUE C: Whether any of the records are properly exempt from disclosure pursuant to section 19 of the Act.

The institution claimed section 19 as the basis for exempting Records #5, #6, #7, #8 and #9. These five records all consist of memoranda prepared by solicitors from the Legal Services Branch of the institution.

Section 19 of the Act 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 have dealt with the proper application of section 19 of the Act in a number of my previous Orders. At page 12 of Order 49 (Appeal Numbers 880017 and 880048), I pointed out that section 19 provides 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.

To meet the requirements of the second part of the section 19 exemption, the institution must establish that the record in question:

> (a) was prepared by or for Crown counsel; and
>
> (b) was prepared (i) for use in giving legal advice; or (ii) in contemplation of litigation; or (iii) for use in litigation.

In its representations the institution submitted that all five records meet the requirements for exemption under the second branch of section 19 exemption. In other words, all of the memoranda were prepared by Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. In the alternative, the institution argued that Records #6, #7 and #9 satisfied the requirements of the common law solicitor_client privilege under the first branch of the section 19 exemption.

Having examined these five records and the representations submitted by both parties, in my view, they all satisfy the requirements for the second branch of the section 19 exemption. These documents were all prepared by Crown counsel at a time when litigation was either contemplated or actually in process.

Having reached this conclusion, it is not necessary for me to consider the possible application of the first branch of section 19 exemption.

I have also reviewed the institution's representations regarding the exercise of discretion with respect to these five records, and I find that the head's decision to exercise his discretion in favour of non_disclosure of the records should not be interfered with on appeal.

Accordingly, I find that the decision of the head to withhold Records #5, #6, #7, #8 and #9 from disclosure should be upheld.

ISSUE D: If either Issues A or C are answered in the affirmative, whether the records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

The question of severability is relevant to all records found to be exempt in my discussion of Issues A and C, namely Records #1, #2, #5, #6, #7, #8 and #9.

Subsection 10(2) provides:

> 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 my Order 24 (Appeal Number 880006), dated October 21, 1988, I established the approach which should be taken when considering the severability provisions of subsection 10(2). At page 13 of that Order I state:

> ...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.

I have reviewed the contents of Records #1, #2, #5, #6, #7, #8 and #9 and, in my view, no information that is in any way responsive to the appellant's request could be severed from these records and provided to the appellant without disclosing information properly withheld from disclosure under subsection 12(1)(d) or section 19 of the Act.

ISSUE E: Whether the institution has identified all records within its custody or under its control which respond to the appellant's request.

From the outset of this appeal, the appellant maintained that he was being denied access to more than the nine records referred to in the institution's July 25, 1988 letter.

In light of this claim, a Compliance Auditor from my staff attended at the offices of the institution to review the

procedures followed in responding to the appellant's request. The Compliance Auditor met with various staff of the institution, including the individuals identified by the appellant, and examined the records disclosed to the appellant.

During the course of his investigation, the Compliance Auditor became aware that the records which responded to the appellant's request resided in various offices and departments of the institution, and had been in the hands of a large number of different employees of the institution at various points in time. In addition, he learned that on the occasions when the appellant attended at the institution's offices to view the records that the institution was prepared to disclose, no log was kept by the institution which identified these records. As a result, it was extremely difficult for the Compliance Auditor to determine whether or not full disclosure had in fact been made to the appellant. The Compliance Auditor received assurances from the various employees who had met with the appellant that all records that the institution was prepared to disclose had been shown to the appellant, but, in the absence of a log, a more definitive determination could not be made.

The Compliance Auditor addressed all specific allegations made by the appellant, and was able to confirm that records which the appellant claimed had not been disclosed were among those records the institution maintained had been viewed by the appellant. He also interviewed employees identified by the appellant as having custody of withheld records and was assured that all relevant records had been released to the appellant for viewing.

The Appeals Officer advised the appellant of the Compliance Auditor's findings, but the appellant remained convinced that full access had not been given. He identified three specific records (the "legal files") which he claimed had not been shown to him. These legal files were:

- the file associated with the legal proceedings against the appellant and Trans_Canada Automobile League Limited;

- the file associated with the judicial review proceedings that followed the above_noted proceedings; and

- the file associated with the appeal of the above_noted proceedings.

Representatives of the institution maintained that the appellant had been shown the legal files, and, at the suggestion of the Appeals Officer, arrangements were made for the appellant to return to the institution and view these files again. On September 6, 1989 the Appeals Officer and the appellant met with the Co_ordinator and two other representatives of the institution for the purpose of viewing the legal files. However, these files were not produced at this meeting.

In order to fully understand the parties' positions with respect to the legal files, the appellant and the institution were asked to submit written representations to me.

In its representations, the institution submitted that the files relating to legal cases involving the appellant were files of

Legal Counsel which fell outside the scope of his original request. The institution submitted that the only reason the appellant asked for these files was because he recognized the names of Legal Counsel while viewing certain released records, and specifically asked for access to their files. At that time, the institution suggested that the appellant submit a new access request for these records, and in fact offered the appellant a request form. In addition, the institution argued that files residing with Legal Counsel were under the custody or control of the Ministry of the Attorney General, not the institution.

The appellant submitted that he had been given no assistance by the institution in identifying possible locations of records responsive to his request, and alleged that individuals within the institution had actually attempted to prevent him from locating and obtaining information.

I must now determine whether or not the legal files fall within the scope of the appellant's original request.

Having reviewed the wording of the original request, I find it to be both broad and somewhat vague in its wording. In situations where a request is unclear, the Act requires the institution to assist in clarification. Specifically, subsections 24(1) and (2) of the Act read as follows:

> 24.__(1) A person seeking access to a record shall make a request therefor in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.
>
> (2) If the request does not sufficiently describe the record sought, the institution shall

> inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Due to the way in which the request was worded, I can appreciate the difficulty experienced by the institution in assisting the appellant to clarify the request, as required under subsection 24(2). Nonetheless, the Act imposes an obligation on the institution to offer assistance, and, based on the information supplied to me during the course of this appeal, it is difficult for me to conclude that this obligation has been adequately discharged. An organization associated with the appellant had been prosecuted by the institution in a case which was connected to the subject matter of the appellant's request, and this fact was known to the institution at the time of the request. In my view, given the circumstances that existed at the time the request was made, it was at least possible that the appellant intended his request to include access to the legal files. This possibility was not specifically identified or addressed by the institution at that time. In its representations on this point, the institution points out that the legal files are not routinely kept in the division of the institution which received the request. Since the appellant was not in a position to know this, I do not think this submission advances the institution's argument.

At the September 6, 1989 meeting between the appellant, the Appeals Officer and representatives of the institution, it was clear to all parties that the appellant wanted access to the legal files. However, the appellant and the institution had different interpretations as to what this meant: the institution felt that the files were outside the scope of the original request and should be the subject of a new one; and

the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the Act compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

I find, therefore, that the legal files properly fall within the scope of the original request.

As far as the institution's submission with respect to the Ministry of the Attorney General is concerned, I do not agree with its position. In the circumstances of this appeal, the records residing with lawyers working as Legal Counsel to the institution are clearly in the custody or under the control of the institution, regardless of whether the lawyers are employed by the Ministry of the Attorney General. I might add that had a question arisen as to whether another institution had a greater interest in the record, subsection 25(2) of the Act imposes a specific responsibility on an institution to transfer a request to that institution.

Therefore, by failing to identify the three legal files, I find that the institution has not identified all records within its custody and control which respond to the appellant's request.

Therefore, I order the institution to:

1. within thirty (30) days of the date of this Order, provide the appellant with a written response in respect to the records found in the legal files, in accordance with sections 26 and 29 of the Act. This response should generally identify each relevant record; provide a decision regarding access to each record; and, if access to any record or part of any record is being denied, to identify the subsection of the Act relied upon, the reason the provision applies to the record, the name and position of the person responsible for the decision, and the fact that the appellant may appeal the decision;
2. provide me with a copy of the response made under paragraph 1, above, within five (5) days of delivery of this response to the appellant.

As far as Issues A, B, and C in this appeal are concerned, I uphold the decision of the head.

Original signed by: December 27, 1989
Sidney B. Linden Date
Commissioner