



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

ORDER 56

Appeal 880157

Ministry of Consumer and Commercial Relations



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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 Commissioner.

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

1. On January 5, 1988, a request was made to the Ministry of Consumer and Commercial Relations (the "institution") for the "...file regarding the Church of Scientology's application for the right to solemnize marriages". By letter dated February 22, 1988, the appellant clarified his request and indicated that he was ". . . not interested in (private personal information) at this time but rather any ministerial or inter_ministerial memoranda, letters or other documents with regard to the Church of Scientology's above_mentioned application".
2. On May 20, 1988, the Freedom of Information and Privacy Co_ordinator for the institution (the "Co_ordinator") wrote to the requester and enclosed copies of those records to which access was granted. However, access to certain records was denied, as follows:

Twenty_two records are denied under section 19 of the FOI Act, as being subject to solicitor client privilege or prepared in contemplation of litigation. One of these records is also denied under section 13, as advice to government, and one is also denied under section 15 (information provided in confidence by another government). These records are ministerial letters, memos and notes.

Two records are denied under section 12 as records prepared for or reflecting consultation among Crown Ministers relating to the formulation of government policy.

One record is denied under section 13, as advice of a public servant.

Access to a file which contains correspondence between the government of Ontario and the governments of other provinces and territories is denied under section 15 of the FOI Act, as disclosure would be prejudicial to the conduct of Ontario's intergovernmental relations, and would reveal information received in confidence from the governments.

3. On May 24, 1988, the requester appealed the institution's decision to provide only partial access to the requested records. Notice of the appeal was given to the institution and the appellant.
4. The Appeals Officer assigned to this case obtained and reviewed the records in question. Efforts to mediate a settlement were unsuccessful, as the parties retained their respective positions.
5. On August 31, 1988, notice that I was conducting an inquiry to review the decision of the head was sent to the institution and the appellant. Enclosed with this letter

was a copy of 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 any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report. The Report is sent to all parties affected by the subject matter of the appeal.

6. By letter dated September 13, 1988, I invited the parties to make written representations on the issues arising in the appeal.
7. The representations received by the institution indicated a partial change in position from the time access was originally denied. In certain instances new exemptions were claimed, and in two cases the institution indicated a willingness to release the records. After receiving the institution's representations, I notified the appellant and invited him to make further representations on the new exemptions raised by the institution.
8. I have considered all representations received from the parties in making my Order.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides the right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the 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.

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

The issues arising in this appeal are as follows:

- A. Whether any of the requested records fall within the scope of the mandatory exemption provided by section 12 of the Act.
- B. Whether any of the requested records fall within the scope of the discretionary exemption provided by section 13 of the Act.
- C. Whether any of the requested records fall within the scope of the discretionary exemption provided by section 15 of the Act.

D. Whether any of the requested records fall within the scope of the discretionary exemption provided by section 19 of the Act.

E. If any of Issues A, B, C and D are decided 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.

The records at issue in this appeal consist of 25 specific documents, together with a series of letters received from various provincial and territorial governments on the subject of the Church of Scientology's right to solemnize marriages in these jurisdictions. The proper treatment of each of the 25 records is discussed under one or more of Issues A through D, and the series of letters is addressed under Issues B and C. I have attached an appendix to my Order which summarizes the disposition of each record at issue in this appeal.

ISSUE A: Whether any of the requested records fall within the scope of the mandatory exemption provided by section 12 of the Act.

Subsection 12(1) reads as follows:

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,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

- (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
- (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;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
- (f) draft legislation or regulations.

The institution has claimed exemption under section 12 with respect to record numbers 8, 18 and 23.

I outlined the proper approach to be followed in dealing with claims for exemption under section 12 in my Order 22 (Appeal Number 880008), issued on October 21, 1988. At page 6 of that Order I state:

...the use of the word 'including' in subsection 12(1) of the Act should be interpreted as providing an expanded definition of the types of records which are deemed to qualify as subject to the Cabinet records exemption, regardless of whether they meet the definition found in the introductory text of subsection 12(1). At the same time, the types of documents listed in subparagraphs (a) through (f) are not the only ones eligible for the exemption; any record where disclosure would reveal the substance of

deliberations of an Executive Council or its committees qualifies for exemption under subsection 12(1).

In this appeal the institution has not argued that disclosure of the information contained in record numbers 8, 18 and 23 would reveal the substance of deliberation of the Executive Council or its committees, and I must therefore look to the expanded definition provided by the subparagraphs of subsection 12(1) to determine whether the requirements for exemption are present.

Record number 18 consists of a letter from the Minister of Consumer and Commercial Relations to the Attorney General regarding the Church of Scientology's application for registration under the Marriage Act. The institution contends that this record falls under the scope of subsection 12(1)(d). I have reviewed the record and am in agreement with the institution. It is clearly a record "...reflecting consultation among ministers of the Crown on matters relating to the making of government decision or the formulation of government policy", and is therefore the type of record to which this exemption applies.

Record number 8 is an "Issues Sheet" prepared to brief the Minister of Consumer and Commercial Relations on matters relating to the Church of Scientology's application for the right to solemnize marriages. As noted above, this application was the subject of consultation among ministers, and I find that this record was "...prepared to brief a minister of the Crown in relation to matters that ... are the subject of consultation among ministers relating to government decisions...", as claimed by the institution under subsection 12(1)(e).

The institution has claimed exemption under both sections 12 and 19 with respect to record number 23. I will discuss the proper disposition of this record under Issue D, below.

I conclude, therefore, that the head has properly applied the provisions of section 12 to exempt record numbers 8 and 18.

ISSUE B: Whether any of the requested records fall within the scope of the discretionary exemption provided by section 13 of the Act.

The institution has cited the exemption provided by section 13 with respect to record numbers 7, 8, 11, 19, 23 and 25, and the file containing correspondence between the government of Ontario and the governments of other provinces and territories.

Section 13(1) reads as follows:

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.

If it is found that a record falls within the provisions of subsection 13(1), a head must then go on to consider the exceptions enumerated under subsection 13(2) before determining whether or not to refuse disclosure.

Record number 7 is a memorandum dated March 30, 1984 to the Deputy Registrar General from an employee of the institution. The first part of the memorandum refers to an accompanying newspaper clipping which is unrelated to the Church of

Scientology's application. However, later in the memo, the Deputy Registrar General asks the author to seek the opinion of an individual referred to in the newspaper article regarding the application. The author's findings are noted at the bottom of this memo.

Having reviewed the record in question, I am unable to discern any "advice or recommendations" given by the memo's author which would be revealed if the record were disclosed. This record identifies the policy of an organization responsible for providing chaplaincy services to correctional inmates. The mere identification of a specific policy, even if it can be attributed to a public servant or any other person employed in the service of an institution does not, in my view, amount to "advice or recommendations" as required to bring the record within the scope of the exemption provided by subsection 13(1) of the Act. Accordingly, I order the institution to disclose record number 7 and the accompanying newspaper articles to the appellant.

The institution has also claimed exemption under subsection 13(1) with respect to five records which have also been exempted by the head under other sections of the Act (record numbers 8, 11, 19, 23 and 25). I have determined the proper treatment of record number 8 in my discussion under Issue A, and I will identify the appropriate disposition of the four other records in the context of my discussion of Issue D, below.

In addition, the institution has used the section 13 exemption to deny access to the file of correspondence received from other provinces and territories. The institution argues that the words "public servant" referred to in section 13 should not be

restricted to public servants employed in Ontario. The institution states that: "(G)rammatically, the words 'employed in the service of an institution' do not apply to 'public servants'. Therefore it is submitted that the intent in section 13 is to include public servants in jurisdictions other than Ontario". The appellant, on the other hand, submits that subsection 13(1) is "...clearly meant to cover advice and recommendations given by all persons employed by or in the service of institutions as designated under the Act... To

suggest that 'public servant' in section 13(1) is to be separated from the qualifier '...any other person employed in the service of an institution' is ridiculous. Moreover, the Act clearly contemplates the exemption of records and information from other governments in section 15 and to add further exempting power for such records under section 13 is a distortion of the Act".

I am in agreement with the interpretation of section 13 outlined by the appellant. The words "public servant" do not connote geographic or territorial limitations per se, but I believe such limitations can be inferred from the context of subsection 13(1). In my view, section 13 was drafted to exempt certain records of an institution containing advice or recommendations authored by their employees or paid consultants, whereas section 15 clearly speaks to records received from other governments. In my view, the file of correspondence from other jurisdictions does not meet the requirements for exemption under section 13, and can only be properly considered in the context of a claim for exemption under section 15 of the Act.

Because I have not upheld the institution's claims for exemption under subsection 13(1) of the Act, it is not necessary for me to consider the application of the exceptions to this exemption enumerated in subsection 13(2).

ISSUE C: Whether any of the requested records fall within the scope of the discretionary exemption provided by section 15 of the Act.

The institution has claimed exemption under section 15 with respect to a portion of record number 1, and the file of correspondence received from various provincial and territorial governments.

Section 15 of the Act reads as follows:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
- (b) reveal information received in confidence from another government or its agencies by an institution; or
- (c) reveal information received in confidence from an international organization of states or a body thereof by an institution,

and shall not disclose any such record without the prior approval of the Executive Council.

Record number 1 is entitled "Personal Notes of R. Drapkin Deputy Registrar General 1983" and is seven pages in length. It appears to be a review of the institution's file relating to the

Church of Scientology's application for the right to solemnize marriages.

The institution has provided me with what it terms a "general submission" applying to all records exempted under section 15, which is said to be "...based on the head's practical experience". According to the institution, there are no specific facts which have prompted the head to conclude that section 15 applies to the records in question, nor, in its view, does the Freedom of Information and Protection of Privacy Act, 1987 require any such facts. Rather, the institution submits that "...the head's decision is a subjective one and must be reasonable in the circumstances".

With respect, I do not agree with the institution's position. Section 15 provides the head with a discretionary exemption, but this discretion is only available with respect to records which fall within the scope of that section. Section 53 of the Act

places the burden of proving that a record falls within one of the exemptions of the Act upon the head, and, in my view, this burden cannot be discharged by a simple subjective exercise of discretion. The exemption under section 15 of the Act is only available to the head if he can first establish that the record in question falls within the parameters of the subsection.

I have reviewed the file containing the correspondence from other jurisdictions and, in my view, some of the documents meet the requirements for exemption under section 15(b) of the Act. On May 15, 1979, the Deputy Registrar General wrote to his counterpart in each of the provinces and territories, with the exception of Quebec, asking whether the Church of Scientology

had been authorized to solemnize marriages in their respective jurisdictions. Each of these letters is marked "Private and Confidential" and contains the sentence: "Any information which you may send will be held in the strictest confidence".

In my view, it can reasonably be inferred that any records which can be regarded as responses to the May 15, 1979 letters were intended to be treated confidentially and therefore fall within the scope of subsection 15(b). Certain other records contained in this file expressly request confidentiality, and they too are properly the subject of an exemption claim under subsection 15(b). The appendix which is attached to this Order identifies those specific records in the file of correspondence which I have found to be exempt from disclosure.

As far as the remaining records in the file and the exempted portion of record number 1 are concerned, in my view, the institution has not satisfactorily demonstrated how and why these records fall within the scope of section 15, and has therefore failed to discharge the burden of proof imposed by section 53 of the Act. Accordingly, I order the institution to

disclose to the appellant record number 1 and all records contained in the file of correspondence which have not been specifically identified in the appendix to this Order.

ISSUE D: Whether any of the requested records fall within the scope of the discretionary exemption provided by section 19 of the Act.

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.

The institution initially exempted 22 records under section 19 (record numbers 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24 and 25). During the course of this appeal, the institution withdrew its claim for exemption under this section with respect to record numbers 1, 10 and 21.

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. 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 discussed the proper application of the common law solicitor_client privilege in my Order 49 (Appeal Numbers 880017 and 880048), released on April 10, 1989. Jackett, P. at page 33 in the case of Susan Hosiery Limited v. Minister of National Revenue [1969] 2 Ex. C.R. 27, identified and outlined the two branches of this privilege:

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").

As I stated at page 14 of Order 49, four criteria must be satisfied in order for a record to be covered by the first branch of common law 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; and
4. The communication must be directly related to seeking, formulating or giving legal advice.

I have reviewed the 19 remaining records which are subject to the section 19 exemption claim, and have concluded that record number 19 meets the requirements of this first branch of common law solicitor_client privilege. It is a note_to_file prepared by the institution's Deputy Registrar General outlining oral legal advice received from the institution's solicitor.

One other record, number 23, meets the requirements for exemption under the second branch of the common law solicitor_client privilege ("litigation privilege"). It is a

memo from the Deputy Registrar General to the Assistant Deputy Minister of the institution, outlining a draft response to the institution's solicitor's request for direction on how to proceed with a legal action involving the Church of Scientology.

The other 17 records, in my view, satisfy the requirements of the second part of the section 19 exemption.

To fall within the scope of the second part of the section 19 exemption, the institution must demonstrate that:

1. the record was prepared by or for Crown counsel; and
2. that the record was prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

With one exception (record number 11) each of these 17 records consists of correspondence between employees of the institution and Crown counsel regarding litigation involving the Church of Scientology. Record number 11 is a memorandum_to_file prepared by the Deputy Registrar General on the instructions of Crown counsel for possible subsequent use in litigation. In my view, all of these records fall within the scope of the second part of section 19.

Therefore, I uphold the institution's decision to deny access to all 19 records which were subject to a claim for exemption under

section 19 of the Act, subject to the proper application of the severance provisions of subsection 10(2) discussed under Issue E, below.

ISSUE E: If any of Issues A, B, C and D are decided 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 section 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 that 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.

The institution has agreed to sever certain information from four records at issue in this appeal (record numbers 6, 12, 13 and 22). I am in agreement with these severances, and order the

institution to release the following information from these records to the appellant:

record #6 _ an attachment being a letter from a solicitor formerly representing the Church of Scientology to the Deputy Registrar General, dated March 12, 1984.

record #12 _ two attachments being a letter from the Deputy Registrar General to a solicitor formerly representing the Church of Scientology, dated August 22, 1984; and a copy of the back page of a "Notice of Motion" and a "Supplementary Notice of Motion".

record #13 _ an undated undertaking given by the Deputy Registrar General by her solicitor to a solicitor formerly representing the Church of Scientology.

record #22 _ an attachment being a 2_page "Declaration in Support of Religious Freedom".

In addition, I find that the court decision which is attached to record number 20 can reasonably be severed without disclosing exempt information, and I Order the institution to do so.

I have reviewed the remaining exempt records, and find that no other information can reasonably be severed under subsection 10(2) without disclosing exempt information.

In summary, I order the head:

1. to disclose to the appellant, within twenty (20) days of the date of this Order, the following records in their entirety: record numbers 1, 7, 10 and 21, and all records contained in the file of intergovernmental correspondence not specifically identified in the appendix to my Order.
2. to disclose to the appellant within twenty (20) days of the date of this Order, the severed portions of record numbers 6, 12, 13, 20 and 22.
3. advise me in writing, within five (5) days of the date of disclosure, of the date on which disclosure was made.
4. upon request, make available to a member of my staff a copy of the records disclosed to the appellant.

Original signed by: _____ May 3, 1989
Sidney B. Linden Date
Commissioner

APPENDIX: APPEAL NO. 880157

<u>Record No.</u>	<u>Exemption(s) Claimed</u>	<u>Disposition</u>
1	s.15 (a)	exemption denied; release notes.
2	s.19	exemption upheld; withhold memo.
3	s.19	exemption upheld; withhold memo and attachment.
4	s.19	exemption upheld: withhold letter.
5	s.19	exemption upheld: withhold letter.
6	s.19	exemption upheld in part: withhold memo; release attachment.
7	s.13	exemption denied, release memo and attachments.
8	s.12 (1) (e) ,13(1)	12 (1) (e) exemption upheld: withhold issue sheet
9	s.19	exemption upheld: withhold memo.
10	s.19	exemption withdrawn by institution; release letter and attachments.
11	s.13 (1) , 19	s.19 exemption upheld; withhold memo and attachment.
12	s.19	exemption upheld in part: withhold letter; release attachments.
13	s.19	exemption upheld in part: withhold memos; release attached undertaking.
14	s.19	exemption upheld; withhold letter.

15	s.19	exemption upheld; withhold letter.
<u>Record No.</u>	<u>Exemption(s) Claimed</u>	<u>Disposition</u>
16	s.19	exemption upheld; withhold letter.
17	s.19	exemption upheld; withhold memo.
18	s.12 (1) (d)	exemption upheld; withhold letter and attachment.
19	s.13 (1), 19	s.19 exemption upheld; withhold notes.
20	s.19	exemption upheld; withhold letter; release attachment.
21	s.19	exemption withdrawn by institution, release notes.
22	s.19	exemption upheld in part; withhold memo; release attachment.
23	s.12 (1) (d), 13 (1), 19	s.12 (1) (d) and s.19 exemptions supported; withhold memo.
24	s.19	exemption upheld; withhold memo.
25	13 (1), 19	s.19 exemption upheld; withhold memo.
<u>Interprovincial communications file</u>	s.13, s.15	s.15 (b) exemption upheld with respect to only:

British Columbia: letter dated May 28, 1979 from Director of Vital Statistics

Alberta: letter dated October 28, 1983 from Director, Alberta Social Services and Community Health, Vital Statistics.

letter dated June 7, 1979 from Director, Alberta Social Services and Community Health, Vital Statistics and enclosures.

Saskatchewan: letter dated June 6, 1979 from Director of Vital Statistics and attachments.

Manitoba: letter dated March 4, 1981 from Director, Office of Vital Statistics.

letter dated June 26, 1979 from Director, Office of Vital Statistics and enclosures.

P.E.I.: letter dated May 22, 1979 from Director, Division of Vital Statistics.

Nova Scotia: letter dated May 18, 1979 from Deputy Registrar General

New Brunswick: letter dated May 28, 1979 from Registrar General.

Yukon: letter dated May 18, 1979 from the Deputy Registrar General, Vital Statistics.