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

ORDER 210

Appeal 890319

Ministry of the Attorney General

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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), or to personal information under subsection 48(1), a right to appeal any decision of a head to the Commissioner.

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.

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

1. By letter dated August 30, 1989, a request was made to the Ministry of the Attorney General (the "institution") for the following information:

> RE: New Brunswick Department of Justice and Lieutenant Governors' warrant of New Brunswick
>
> I would like to receive copies of any letters, memos, reports, notes, etc., between the Department of Justice of the Provinces of Ontario and New Brunswick in reference to the transfer of a Lieutenant Governors' warrant in reference to myself.

> Such reports, letters, memos, notes, etc. should be involved with the years 1987, 1988 and 1989.

2. On October 6, 1989, the institution wrote to the requester and granted partial access to the requested records. The head's response stated:

> Access is denied in part pursuant to subsection 15(a) as disclosure would prejudice the conduct of intergovernmental relationships by the Government of Ontario or an institution; subsection 15(b) as disclosure would reveal information received in confidence from another government.
>
> Access is denied in part also under section 19 as the record is subject to solicitor-client privilege, and section 13 as disclosure would reveal advice or recommendations of a public servant.

3. By letter dated October 15, 1989, the requester appealed the head's decision to this office. Notice of the appeal was given to the appellant and the institution.

4. The records at issue in this appeal were obtained and examined by the Appeals Officer assigned to the case.

5. The Appeals Officer attempted to mediate a settlement; however, a settlement was not achieved and the matter proceeded to an inquiry.

6. By letter dated February 20, 1990, the appellant and the institution were notified that an inquiry was being conducted to review the decision of the head. Enclosed

with the 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 any 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.

7. Representations were received from the institution only. I have considered these representations in making my Interim Order.

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 subsection provides that the Act should protect the privacy of individuals with respect to information about themselves held by institutions, and should provide individuals with a right of access to their own information.

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 with the head of the institution (the "head").

The issues arising in this appeal are as follows:

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

B. Whether the requested records would qualify for exemption under subsections 15(a) or (b) of the Act.

C. Whether the requested records would qualify for exemption under subsection 13(1) of the Act.

D. Whether the requested records would qualify for exemption under section 19 of the Act.

E. 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.

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

The records at issue in this appeal are as follows:

Record 1: Letter dated April 7, 1988, from the Deputy Attorney General of New Brunswick to the Deputy Attorney General, Ontario.

Record 2: Letter dated May 13, 1988 from the Deputy Attorney General, Ontario to the Deputy Attorney General of New Brunswick.

Record 3: Letter dated March 28, 1989 from counsel, Lieutenant Governor of Ontario's Board of Review to counsel, Ministry of the Attorney General, Ontario.

Record 4: Letter dated April 20, 1989 from counsel, Ministry of the Attorney General, Ontario to counsel, Lieutenant Governor of Ontario's Board of Review.

Record 5: Memo from counsel, Ministry of the Attorney General, Ontario to the Deputy Attorney General, Ontario dated May 11, 1988.

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

> In this Act,
>
> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

> (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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

I have considered the records at issue in this appeal and, in my view, all of the records contain information that falls within

the definition of personal information under subsection 2(1) of the Act. I find that the information 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 that is 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 the general right of access to personal information by the person to whom the information relates.

Subsection 49(a) of the Act provides as follows:

> 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 sections 15 and 19 and subsection 13(1) of the Act would apply to the requested records.

ISSUE B: Whether the requested records would qualify for exemption under subsections 15(a) or (b) of the Act.

In its response to the appellant, the institution did not provide a description of the records being withheld and did not indicate for which records it was claiming the various exemptions from the disclosure cited. The representations of the institution did not address the application of section 15 to Record 5. However, in the index to the records provided to this office, the institution indicated that it was claiming exemption under section 15 for all of the records at issue in this appeal. Accordingly, I have addressed the application of section 15 to all of the records.

Section 15 of the Act provides 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.

In order to qualify for exemption under subsection 15(a) the records must meet the following test:

1. The institution must demonstrate that disclosure of the records could give rise to an expectation of prejudice to the conduct of intergovernmental relations; and

2. The relations which it is claimed would be prejudiced must be intergovernmental, that is relations between an institution and another government or its agencies; and

3. The expectation that prejudice could arise as a result of disclosure must be reasonable.

I have reviewed the representations of the institution and I have concluded that it has not provided me with sufficient evidence as to the expected harm to intergovernmental relations that would arise from the disclosure of any of the records. Therefore, I find that subsection 15(a) does not apply to the records.

In order to qualify for exemption under subsection 15(b), the records must meet the following test:

1. The records must reveal information received from another government or its agencies; and

2. The information must have been received by an institution; and

3. The information must have been received in confidence.

I will deal with each of the records for which the institution has claimed subsection 15(b) individually.

Record 1:

This record is a letter from the Deputy Attorney General of New Brunswick, addressed to the Deputy Attorney General of Ontario. The letter contains information received from New Brunswick by the Deputy Attorney General of Ontario. Given the subject matter of the letter, it is reasonable to infer that there was an expectation that the information would have been received by the institution in confidence. Therefore, this record satisfies the test for exemption under subsection 15(b), subject to the application of subsection 10(2) as discussed under Issue E.

Record 2:

This record is a letter from the Deputy Attorney General of Ontario addressed to the Deputy Attorney General of New Brunswick. Given the content and context of the letter, disclosure in my view, would reveal information received in confidence from another government. Accordingly, I find that Record 2 satisfies the test for exemption under subsection 15(b), subject to the application of subsection 10(2) as discussed under Issue E.

Record 3:

Record 3 is a letter from counsel for the Lieutenant Governor of Ontario's Board of Review, addressed to counsel for the institution. The institution submits:

> ..the release of the correspondence between counsel for the Lieutenant Governors' Board of Review and counsel for the Ministry would prejudice the conduct of intergovernmental relations between the autonomous and independent exercise of jurisdiction by the Lieutenant Governors' Board and the Ministry.

The Lieutenant Governor's Board of Review is an advisory body which is appointed by the Executive Council of Ontario. The Board of Review is appointed by order-in-council, on the advice of the Lieutenant Governor. Pursuant to Ontario Regulation 532/87 under the Freedom of Information and Protection of Privacy Act, 1987, the Lieutenant Governor's Board of Review is a scheduled institution, and the designated head for the purposes of this Act
is the Minister of Health. I find, therefore, that for the purposes of the Act, the Lieutenant Governor's Board of Review is not another "government", nor an agency of another government. Further, a review of the record indicates that disclosure would not reveal information received in confidence from another government.
Accordingly, I find that Record 3 does not qualify for exemption under subsection 15(b) of the Act.

Record 4:

Record 4 is a letter from counsel to the institution addressed to counsel for the Lieutenant Governor's Board of Review. This letter is in response to Record 3. As I have stated above, the Lieutenant Governors' Board of Review is not a "government", or an agency of another government for the purposes of the Act. Further, a review of this record indicates that disclosure would not reveal information received in confidence from another

government. Accordingly, I find that Record 4 does not qualify for exemption under subsection 15(b) of the Act.

Record 5:

Record 5 is a memorandum from counsel to the institution addressed to the Deputy Attorney General. A review of the record indicates that disclosure would not reveal information received in confidence from another government. I find, therefore, that no part of Record 5 satisfies the test for exemption under subsection 15(b).

ISSUE C: Whether the requested records would qualify for exemption under subsection 13(1) of the Act.

The institution has claimed that subsection 13(1) of the Act applies to Record 5. Subsection 13(1) provides 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.

In developing the parameters of the section 13 exemption, Commissioner Sidney B. Linden enunciated the following principles:

> ...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.

> ...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. [Order 94 (Appeal Number 880137), dated September 22, 1989].

Commissioner Linden examined the kind of information which would qualify as advice in Order 118 (Appeal Number 890172), dated November 15, 1989 where he stated that:

> In my view "advice", for the purposes of 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.

I concur with and adopt Commissioner Linden's view of what constitutes "advice" for the purposes of subsection 13(1). I have examined the record at issue and, in my view, the information contained in the record does not qualify as advice, but rather is factual background information about the transfer of the appellant's Lieutenant Governor's warrant. In its representations, the institution used the term "advice" in its broad sense of providing information as to a set of facts and circumstances but, in my view, the record does not contain a recommendation as to a
suggested course of action.

I find, therefore, that Record 5 does not qualify for exemption under subsection 13(1) of the Act.

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

The institution has claimed that section 19 of the Act applies to Records 3, 4 and 5.

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.

Commissioner Linden considered the proper interpretation of section 19 in Order 49 (Appeal Numbers 880017 and 880048), dated April 10, 1989. At page 12 of that Order he stated:

> This section provides an institution with a discretionary exemption covering two possible situations:
>
> (1) a head may refuse to disclose a record that is subject to the common law solicitor-client privilege; or
>
> (2) a head may refuse disclosure if a record was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. A record can be exempt under the second part of section 19 regardless of whether the common law criteria relating to the first part of the exemption are satisfied.

As far as the common law solicitor-client privilege is concerned, the case of Susan Hosiery Limited v. Minister of National Revenue [1969] 2 Ex.C.R. 27, identifies what appear to be two branches of this privilege. They are:

1. all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers directly related thereto) are privileged; and

2. papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated are privileged. ("litigation privilege")

The first branch of the common law solicitor-client privilege applies to confidential communications between the client and his/her solicitor, and exists any time a client seeks advice from
the solicitor, whether or not litigation is involved. The rationale for this first branch is to protect communications between client and solicitor from disclosure in the interest of providing all citizens with full and ready access to legal advice.
In order for a record to be covered by the first branch of the common law solicitor-client privilege, the four criteria outlined at page 14 of Order 49 supra must be satisfied. 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 adviser;

4. the communication must be directly related to seeking, formulating or giving legal advice.

I have examined Records 3 and 4 and find that neither one satisfies the third criterion of the above-noted test - neither record is a communication between a client and his or her solicitor.

In considering the second branch of the common law solicitor-client privilege, I must consider whether the records were created or obtained for the purposes of litigation.

It is not evident from a review of the records that they were created or obtained especially for a lawyer's brief for litigation, either existing or contemplated. I have not received any information from the institution which would indicate that any litigation was contemplated. In my view, the records do not qualify for exemption under the second branch of the common law solicitor-client privilege. Accordingly, I find that Records 3 and 4 do not qualify for exemption under the common law solicitor-client privilege.

Turning now to the second branch of the section 19 exemption as it relates to these records, the institution must satisfy the following two requirements in order for a record to qualify for exemption:

1. the record must have been prepared by or for Crown counsel; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

Both of the records were prepared by employees who qualify as "Crown counsel" in the employ of their respective institutions.

The second branch of the section 19 exemption requires that the record be prepared for use in giving legal advice, or in contemplation of or for use in litigation. This is a narrower wording than if the requirement were that the record be prepared for the purpose of giving legal advice. In my view, it contemplates that the record itself will be used in giving legal advice. However, when I consider the use for which each of the records at issue was prepared, it is clear from a review of each record that neither was prepared "for use" in giving legal advice.

The purpose in preparing Record 3 was to obtain information, and the purpose in preparing Record 4 was to respond to Record 3 and to provide the requested information. As I have stated above, in discussing the second part of the common law solicitor-client privilege, I have been provided with no information to suggest that either record was prepared for use in litigation, or in contemplation of litigation. Accordingly, I find that Records 3 and 4 do not qualify for exemption under section 19, and I order their disclosure to the appellant.

The institution has also claimed that section 19 applies to Record 5 - the memorandum from counsel to the institution to the Deputy
Attorney General. Counsel to the institution is "Crown counsel" for the purposes of section 19.
There is no evidence that the record was prepared for use in or in contemplation of litigation.

I have carefully reviewed this record and I am not convinced that the record was prepared for use in giving, seeking or in formulating legal advice. The term "legal advice" is not defined in the Act. In my view, the term is not so broad as to encompass all information given by counsel to an institution to his or her client. Generally speaking, legal advice will include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. It does not include information given about a matter with legal implications, where there is no recommended course of action, based on legal considerations, and where no legal opinion is expressed.

In Record 5, counsel is providing information to the Deputy Attorney General as to the background to a Federal Court case, and as to the position of the Lieutenant Governor's Board of Review. The memorandum does not offer a recommended course of action, and it does not provide a legal opinion as to the merits of the position of the Lieutenant Governor's Board of Review. If such an opinion was requested, it is not contained in this record. Accordingly, I find that Record 5 does not qualify for exemption under either branch of section 19, and I order its disclosure to the appellant.

ISSUE E: 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) of the Act provides 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.

Subsection 10(2) requires that any part of a record that is not subject to an exemption must be severed and released to the requester. The institution submits as follows:

> It is the position of the Ministry that the disclosure of records must provide the requester with information responsive to the request. It is submitted that the principle of reasonableness is an important criteria [sic] with respect to this question. This "factual information" forms part and parcel of the exemptions previously claimed since the information provides only a background and a context to the advice, recommendations and legal issues falling within the claimed exemptions.... No new information would be provided and, therefore, it is submitted that such a release would not be reasonably responsive to the request.

I agree with the institution that reasonableness is a factor for consideration in applying the provisions of subsection 10(2). However, I note that the institution is of the opinion that the fact that some information contained in a record may already be known to the requester is reason for not severing and disclosing that information to the requester. I find nothing in the Act to support such a reading of the subsection. Subsection 10(2) requires that all information not subject to exemption be disclosed

to the requester, whether or not the information is known to him or her.

I have reviewed Records 1 and 2 with a view to determining whether any parts of these records could be severed and disclosed to the appellant. I find that there are parts of Records 1 and 2 that do not reveal information received in confidence from another government or its agencies, and are therefore not subject to

exemption. Accordingly, I order the head to disclose these portions of the records to the appellant in accordance with the highlighted copies of Records 1 and 2 that I will provide to the head.

ISSUE F: If the answer to Issues A, B, C or D 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;

I have found under Issue A that the records contain personal information about the appellant. In Issue B I found that Records 1 and 2 meet the criteria for exemption under subsection 15(b), subject to the application of subsection 10(2). The exemption provided by subsection 49(a) therefore applies and gives the head discretion to refuse disclosure.

In Order 58, (Appeal Number 880162), Commissioner Sidney B. Linden addressed the issue of a head's exercise of discretion and the responsibility of the Commissioner:

> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon the proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the
>
> head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as administrative decision-maker to ensure that the concepts of fairness and natural justice are followed.

Representations were requested from the institution on the issue of the head's exercise of discretion.

In regard to the exercise of discretion, the head submits:

> It is the position of the Ministry that pursuant to section 49 of the Act, the head has appropriately exercised discretion by refusing to disclose, to the individual to whom the information relates, personal information because of the applicably [sic] of Sections 13, 15 and 19. It is submitted that all the personal information contained in these records is already known to the requester because of the prior release to the requester, of documents outlining this information...

In the institution's representations, I can find no indication that the head considered the option of disclosure prior to deciding to deny the appellant access to Records 1 and 2. While

it is likely that the appellant has knowledge of some of the information contained in the records, it is unlikely that he is in possession of all of the information in Records 1 and 2. The head has clearly not considered why, in this case, the appellant's rights and interests are outweighed by the applicability of section 15 to the records in issue.

Given the above, I find that the head has not properly exercised his discretion, and I order the head to reconsider the exercise of his discretion under subsection 49(a) of the Act with respect to the portions of Records 1 and 2 that I have found to be exempt under subsection 15(b). I further order the head to provide me

with representations outlining his decision on the exercise of discretion and the factors considered by the head when making his decision.

In considering the exercise of discretion, I note that section 15 provides that a head must obtain the consent of the Executive Council before a record which qualifies for exemption under section 15 can be disclosed.

ORDER:

1. I order the head to disclose Records 3, 4 and 5 to the appellant within twenty (20) days of the date of this Interim Order. I further order the head to advise me in writing within five (5) days of the date of disclosure of the date on which disclosure was made.

2. I order the head to sever Records 1 and 2 in accordance with the highlighted copy of the records. The portions which have been highlighted are those parts of the records which I have found would qualify for exemption under subsection 15(b). The balance of Records 1 and 2 are to be disclosed to the appellant within twenty (20) days of the date of this Interim Order. I further order the head to advise me in writing within five (5) days of the date of disclosure of the date on which disclosure was made.

3. I order the head to reconsider the exercise of his discretion under subsection 49(a) with respect to those portions of Records 1 and 2 which I have found qualify for exemption under subsection 15(b) and provide me with representations as to the factors considered in doing so within twenty (20) days of the date of this Interim Order. I remain seized of this matter.

4. The representations concerning the exercise of discretion and notices 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: December 19, 1990
Tom A. Wright Date
Assistant Commissioner