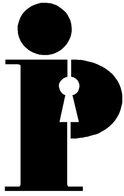

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 136

Appeal 880347

Ministry of Skills Development

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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 under the Act to the Information and Privacy Commissioner.

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

1. On December 2, 1988, a request was made to the Ministry of Skills Development (the "institution") for the following information:

   > Copies of all documents, including inspectors' Reports and any Notices of Violation issued by the Enforcement Services and of your Ministry by Enforcement Officer Arnett at the Polysar site in Sarnia, Ontario, with respect to Commercial and Industrial Limited, on or about September 9, 1988.

2. The institution responded by letter dated December 15, 1989, denying access to the requested records on the basis that they fell within the exemptions provided by subsections 14(1)(a), 14(1)(b) and 14(2)(a) of the Act.

3. On December 22, 1988, the requester wrote to me appealing the head's decision, and I gave notice of the appeal to the institution.

4. The records were obtained and examined by the Appeals Officer assigned to the case, and efforts were made by the Appeals Officer to mediate a settlement.

5. During the course of mediation, the institution wrote to the Appeals Officer on May 2, 1989, raising subsection 14(1)(f) as an additional basis for exempting the records, due to the fact that the institution had decided to prosecute with respect to the incident that was the subject of the requested records. Also during mediation, the appellant agreed that the names of individual workers could be severed from the records. However, mediation efforts with respect to all other issues were not successful.

6. By letter dated October 31, 1989, I notified the institution and the appellant 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 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.

7. I received representations from the institution and the appellant. In its representations, the institution raised section 19 and subsection 21(3)(b) of the Act, as additional grounds for exempting the requested records. Also, at this stage of the appeal the institution agreed to provide the appellant with a copy of Form 1 of the Ministry of Consumer and Commercial Relations, on the basis that it was a public document.

8. I have considered the representations of both parties in reaching my decision in this appeal.

The following is a list of records at issue in this appeal, which I have numbered for convenience in identifying individual records:

#1. memorandum by and to an employee of the Apprenticeship Branch of the institution, dated December 14, 1988, and draft copy of same;

#2. memorandum by and to same people as Record #1, dated January 3, 1989;

#3. memorandum by and to same people as Record #1, dated November 18, 1988;

#4. memorandum by and to same people as Record #1, dated September 15, 1988;

#5. copy of a letter from a solicitor to a client, dated September 4, 1987;

#6. memorandum from by and to the same people as Record #1, dated October 6, 1988;

#7. Notice of Violation regarding a named company under the Apprenticeship and Tradesmen's Qualification Act;

#8. Complaint Information Form regarding a named company under the Apprenticeship and Tradesmen's Qualification Act, dated September 12, 1988;

#9. memorandum by and to same people as Record #1, dated September 15, 1988.

The investigation file containing these nine records also included three other records which do not respond to the appellant's request and are not covered by the scope of this Order.

The issues arising in this appeal are as follows:

A. Whether any of the records are properly exempt from disclosure pursuant to subsections 14(1)(a), 14(1)(b), 14(1)(f) or 14(2)(a) of the Act.

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

C. Whether any of the records are properly exempt from disclosure pursuant to subsection 21(1) of the Act.

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

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 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 personal information.

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

ISSUE A: Whether any of the records are properly exempt from disclosure pursuant to subsections 14(1)(a), 14(1)(b), 14(1)(f) or 14(2)(a) of the Act.

The head has claimed subsections 14(1)(a), 14(1)(b), 14(1)(f) and 14(2)(a) of the Act as the basis for exempting all nine records. These subsections read as follows:

> 14.__(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> ...

(f) deprive a person of the right to a fair trial or impartial adjudication;

...

(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;

...

Representations received from the institution relate only to the claim for exemption under subsections 14(1)(f) and 14(2)(a). I have assumed that any claim for exemption under subsections 14(1)(a) and 14(1)(b) has been abandoned by the institution, and I will restrict my discussion to the two subsections referred to in the head's representations.

"Law enforcement" as defined in subsection 2(1) of the Act means:

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b).

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 order to qualify for exemption under subsection 14(2)(a) the record at issue must first qualify as a "report". If this requirement is satisfied, the institution must then demonstrate that the report was "prepared in the course of law enforcement, inspections or investigations" and that the body preparing the report is "an agency which has the function of enforcing and regulating compliance with a law".

I have reviewed all nine records at issue in this appeal and, in my view, only Records #2, #3, #6 and #9 can accurately be described as "reports". The remaining records fail to satisfy this requirement and, therefore, do not qualify for exemption under subsection 14(2)(a).

I must now determine whether Records #2, #3, #6 and #9 satisfy the remaining requirements of the subsection 14(2)(a) exemption.

Section 6 of the Apprenticeship and Tradesmen's Qualification Act, R.S.O. 1980, c. 24 gives the Director of Apprenticeship the duty of administering and enforcing this Act. His powers under section 7 of that Act include the right to undertake inspections with a view to ensuring compliance with the Act. Violation of the Act can lead to prosecution and the imposition of sanctions or penalties by a court. In my view, the powers and duties enumerated in this Act demonstrate that the Director of Apprenticeship is an "agency which has the function of enforcing

and regulating compliance with a law", the Apprenticeship and Tradesmen's Qualification Act. Further, I find that Records #2, #3, #6 and #9 were prepared "in the course of law enforcement, inspections or investigations" by staff of the institution, and that these four records satisfy the requirements for exemption under subsection 14(2)(a).

In his representations the appellant submitted that the exception provided by subsection 14(4) of the Act should apply in the circumstances of this case.

Subsection 14(4) reads as follows:

> (4) Despite clause (2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

The investigation which is the subject of Records #2, #3, #6 and #9 was undertaken as a result of a complaint filed by the appellant, a lawyer representing a union. The appellant argues that this investigation was simply a "routine inspection" made under the Apprenticeship and Tradesmen's Qualification Act, and therefore meets the requirements of subsection 14(4). In his representations the appellant submitted:

> Where violations of the [Apprenticeship and Tradesmen's Qualification] Act are discovered in the course of these inspections by the Enforcement Officer, the Officer will issue a Notice of Violation and make a report to the Ministry.

> The Ministry is completely understaffed to deal with the enforcement of the Act. Consequently, all its inspections arise from information given to the Enforcement Officers by one source or another. Accordingly, to attempt to distinguish a "routine inspection" from a "complaint driven" inspection is to make a distinction without a difference. There is simply no such distinction recognized within the Ministry. It is the Appellant's submission that this distinction was developed solely to defeat our request for information.
>
> Regardless of the source of the information, the nature of the inspection carried out by the Officer does not vary. The Officer enters the work site under the same authority whether the inspection is of a routine nature or instigated as a result of a complaint to the Enforcement Division... The manner of inspection, the questions asked on inspection, or the objectives of the inspection do not differ regardless of the manner in which the inspection originates.

The Freedom of Information and Protection of Privacy Act, 1987 does not define the phrase "routine inspection" used in subsection 14(4). The word "routine" is defined in the Concise Oxford Dictionary as a "regular course of procedure, unvarying performance of certain acts."

In an effort to determine the practice and procedures of the institution in conducting inspections and investigations, the Appeals Officer spoke to a Standards and Enforcement Advisor at the institution's Apprenticeship Branch. According to this official, there are two distinct types of procedures used by staff of the institution in the course of enforcing the Apprenticeship and Tradesmen's Qualification Act: "geographic area" inspections; and "complaint driven" inspections.

According to the Standards and Enforcement Advisor, during a "geographic area" inspection, an Enforcement Officer will randomly select a job site and check for proper certification of employees, but will not conduct a detailed inspection of the actual work being done on the site. In the Advisor's view, this kind of inspection is more of an information session than an investigation. "Geographic area" inspections take place on a daily basis throughout the province.

On the other hand, when a complaint is filed, the Enforcement Officer enters a specific job site for a predetermined purpose; often to ascertain whether or not the work at the site is being done by workers qualified to perform specific functions.

In my view, a clear distinction can be drawn between "geographic area" inspections and "complaint driven" inspections. Further, I feel that only "geographic area" inspections might qualify as "routine inspections", as the phrase is used in subsection 14(4). Whether or not a violation of the Apprenticeship and Tradesmen's Qualification Act is discovered during a "geographic area" inspection is not, in my view, determinative of whether the inspection was "routine"; it is the nature of the inspection itself which should be considered in deciding whether it falls within the scope of subsection 14(4). As far as "complaint driven" inspections (such as the one that generated the records at issue in this appeal) are concerned, the components of these types of inspections would necessarily vary depending on the nature of the information supplied by the complainant, and, in my view, they could not be said to be "routine".

Therefore, I find that Records #2, #3, #6 and #9 do not meet the requirements of the subsection 14(4) exception, and I uphold the decision of the head to exempt these records under subsection 14(2)(a).

I will now discuss the possible application of the subsection 14(1)(f) exemption to the remaining records, not found to be exempt under subsection 14(2)(a): Records #1, #4, #5, #7 and #8.

Subsection 14(1)(f) reads as follows:

> 14.__(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> ...
>
> (f) deprive a person of the right to a fair trial or impartial adjudication.
>
> ...

The institution has provided evidence that a prosecution has resulted from the inspection which is the subject of these records, and that a trial is expected to take place some time in April, 1990. However, the institution has failed to demonstrate how disclosure of the records could reasonably be expected to deprive the accused of the right to a fair trial, or impair his ability to make a full answer and defence. I have reviewed the contents of these records and, in the absence of any evidence provided by the institution, I find that the requirements for exemption under subsection 14(1)(f) have not been satisfied with respect to Records #1, #4, #5, #7 and #8.

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

The institution has claimed section 19 as one of the grounds for refusing to release all nine records.

Under my discussion of Issue A, I found that Records #2, #3, #6 and #9 are exempt under subsection 14(2)(a). Therefore, I will restrict my discussion of Issue B to Records #1, #4, #5, #7 and #8.

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.

I considered the proper interpretation of section 19 of the Act in my Order 49 (Appeal Numbers 880017 and 880048), dated April 10, 1989. At page 12 of that Order I 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 common law solicitor_client privilege, the four criteria outlined at page 14 of my Order 49 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 advisor;

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

Failure to meet any one of these criteria means that a particular record will not qualify for the common law solicitor_client privilege.

I have examined the contents of Records #1, #4, #5, #7 and #8, and, in my view, only Record #5 satisfies the third criteria of the above test; i.e. it is the only record that is a communication between a client and a legal advisor. Therefore, I find that Records #1, #4, #7 and #8 fail to qualify for the common law solicitor_client privilege.

Applying the other criteria of the test to Record #5, in my view, all three are satisfied: it is a written communication; the contents make it clear that it must have been intended by the parties to be confidential; and it relates directly to the giving of legal advice.

The only remaining issue is whether or not the privilege has been waived. Record #5 was written to and for persons outside the institution, and was given to an institution official by someone other than the addressee. Although these two facts could support an argument that the privilege has been waived, in my view, they are not in themselves sufficient to establish waiver. Only the client can waive solicitor_client privilege, and, although it is clear that persons other than the solicitor and the client have access to the letter, no evidence has been presented during this appeal to indicate that the client has

waived the privilege available to him at common law. Accordingly, I find that the common law solicitor_client privilege attaches to Record #5, and I uphold the decision of the head not to release Record #5 pursuant to section 19.

Turning now to the second branch of the section 19 exemption as it relates to the remaining four 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.

Having examined Records #1, #4, #7 and #8, it is clear that none were prepared by or for an employee of the institution who could qualify as a Crown counsel, nor do the records contain or request legal advice.

As to whether or not any of these records was prepared in "contemplation of litigation", it is important to bear in mind that the following two_fold test must be satisfied in order to fall within the scope of this phrase:

1. the <u>dominant</u> purpose for the preparation of the document must be contemplation of litigation; and

2. there must be a reasonable prospect of such litigation at the time of the preparation of the document.

The institution has provided evidence that it is prosecuting the company which is the subject of some of the requested records. However, it is clear from an examination of the records that the dominant purpose in the preparation of Records #1, #4 and #8 was to request or provide information, and in Record #7 was to notify a company of a violation under the Apprenticeship and Tradesmen's Qualification Act. The dominant purpose for the preparation of any of Records #1, #4, #7 and #8 was not the contemplation of litigation, and therefore, I find that none qualify for exemption.

In summary, I find that Record #5 satisfies the test for exemption under section 19 of the Act, and I uphold the decision of the head not to release it. I find that Records #1, #4, #7 and #8 do not qualify for exemption under this section and, subject to my discussion of Issue C, should be released to the appellant.

ISSUE C: Whether any of the records are properly exempt from disclosure pursuant to subsection 21(1) of the Act.

Because I have found Records #2, #3, #5, #6 and #9 to be exempt under either subsection 14(2)(a) or section 19 of the Act, I will restrict my discussion of Issue C to Records #1, #4, #7 and #8.

In all cases where a request may involve access to access to personal information, it is my responsibility, before deciding whether the exemption provided by section 21 applies, to ensure that the information contained in the records falls within the

definition of "personal information" in subsection 2(1) of the Act.

I have examined Records #1, #4, #7 and #8, and, in my view, only Record #7, the Notice of Violation, which contains the names of individual employees, includes information which qualifies as "personal information" under the Act. The remaining three records fail to satisfy the requirements of the definition and, therefore, are not eligible for consideration under section 21, and should be released to the appellant. Record #1 contains the names of companies other than the one which is the subject of the records at issue in this appeal and, because these companies are not the subject of the appellant's request, their names should be severed from Record #1 prior to release.
As far as Record #7 is concerned, the appellant has indicated that he is not interested in receiving the names of individual employees, and these names, therefore, are not the subject of this appeal.

Therefore, as far as Issue C is concerned, I find that Records #1, #4, #7 and #8 are not eligible for consideration under subsection 21(1) of the Act, and should be released to the appellant, with appropriate severances to Record #1. Record #7 should also be released to the appellant with the names of individual employees severed.

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

In my discussion of Issue B I found that Record #5 qualifies for exemption. I must now determine whether the severability requirements of subsection 10(2) apply to this record.

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 addressed the issue of severance in my Order 24 (Appeal Number 880006), dated October 21, 1988. At page 13 of that Order I stated:

> The inclusion of subsection 10(2) reinforces one of the fundamental principles of the Act, that "necessary exemptions from the right of access should be limited and specific." (subsection 1(a)(ii)). An institution cannot rely on an exemption covered by sections 12 to 22 of the Act without first considering whether or not
>
> parts of the record, when considered on their own, could be disclosed without revealing the nature of the information legitimately withheld from release.

The key question raised by subsection 10(2) is one of reasonableness. As I found in Order 24:

> ...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 Record #5 and, in my view, no information that is in any way responsive to the request could be severed from this record and provided to the appellant without disclosing information that legitimately falls within the section 19 exemption.

In summary, my order in this appeal is as follows:

1. I find that Records #2, #3, #6 and #9 qualify for exemption under subsection 14(2)(a) of the Act, and I uphold the head's decision not to release them;

2. I find that Record #5 qualifies for exemption under section 19 of the Act, and I uphold the head's decision not to release it.

3. I find that Records #1, #4, #7 and #8 do not qualify for exemption under any of sections 14, 19 or 21 of the Act, and I order the head to disclose them to the appellant, with appropriate severances to Records #1 and #7. I further order that this disclosure be made within 20 days of the date of this Order, and that the head notify me within five (5) days of the disclosure, of the date on which disclosure was made.

4. I order the head to disclose to the appellant all records which it has characterized as "public documents", within 20 days of the date of this Order, and to notify me within five (5) days of the disclosure, of the date on which disclosure was made.

Original signed by:	December 28,1989
Sidney B. Linden	Date
Commissioner	