



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

ORDER P-298

Appeal 900626 and 900628

Ministry of the Attorney General



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ORDER

BACKGROUND:

The Ministry of the Attorney General (the "institution") received two separate requests for information under the Freedom of Information and Protection of Privacy Act (the "Act") for personal information in the custody and control of the Executive Co-ordinator, Legal Services Branch, Civil Law Division (Appeal Number 900626) and the Assistant Deputy Attorney General, Civil Law Division (Appeal Number 900628) for the period of January 1, 1988 to November 30, 1990. A search for records responsive to the requests yielded eight pages in Appeal Number 900626 and twelve pages in Appeal Number 900628. In each case, all but one page was disclosed. The withheld page is identical in each appeal, and was exempted in both cases pursuant to sections 13 and 49(a) of the Act. The requester appealed the institution's decision, claiming that the remaining page should have been disclosed in full, and that the notice of refusal letters sent by the institution did not comply with section 29(1)(b)(ii) of the Act.

A copy of the record was obtained and reviewed by the Appeals Officer. It is a one page internal memorandum dated October 16, 1990.

Attempts to mediate these appeals were not successful. Accordingly, notice that an inquiry was being conducted to review the decision was sent to the appellant and the institution. The notice also contained a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. Representations were received from both the institution and the appellant.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the information contained in the record qualifies as "personal information", as defined by section 2(1) of the Act.
- B. Whether the record satisfies the requirements of the discretionary exemptions provided by sections 13 and 49(a) of the Act.
- C. Whether the institution's notice of refusal letters satisfy the requirements of section 29(1)(b)(ii) of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the record qualifies as "personal information", as defined by section 2(1) of the Act.

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

...

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

...

- (d) the address, telephone number, fingerprints or blood type of the individual,

...

- (g) the view 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;

The record contains the appellant's name, address, information relating to his medical condition, and the views or opinions of another individual about the appellant. In my view, it contains the appellant's personal information.

ISSUE B: Whether the record satisfies the requirements of the discretionary exemptions provided by sections 13(1) and 49(a) of the Act.

The institution claims that the record qualifies for exemption under section 13(1) of the Act.

Section 13(1) of the Act states:

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.

At page 5 of Order 94, former Commissioner Sidney B. Linden outlined the general purpose of the section 13 exemption, as follows:

...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. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, 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.

As has been stated in previous orders, "advice" pursuant to 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. (Order 118)

In its representations the institution states that part of the second paragraph of the record at issue "clearly constitutes advice". Having reviewed the record, I find that the entire second paragraph contains advice and recommendations, and therefore satisfies the requirements of section 13(1).

The institution also states that, although the rest of the record does not explicitly include advice, disclosure could permit the recipient to infer the advice expressly made in the second paragraph. The remainder of the record contains a factual summary of events involving the appellant. I find that these portions of the record do not qualify for exemption under section 13(1). They contain no suggested course of action nor any other type of information which, if disclosed, would reveal advice or recommendations of the author of the record.

Section 13(2) of the Act provides that despite section 13(1), a head may not refuse to disclose a record that contains certain types of information. I am satisfied that the part of the record which I have found to qualify for exemption under section 13(1) does not contain any of the types of information enumerated in section 13(2).

In Issue A, I found that the record contains the appellant's personal information. Section 49(a) of the Act states:

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

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

Because, I have found that the second paragraph of the record qualifies for exemption under section 13(1) of the Act, the discretionary exemption provided by section 49(a) is available to the head to deny access to this part of the record.

The institution has made submissions regarding the exercise of discretion, and I am satisfied that the head has properly exercised his discretion to refuse to disclose the second paragraph of the record.

ISSUE C: Whether the institution's notice of refusal letters satisfy the requirements of section 29(1)(b)(ii) of the Act.

Section 29(1)(b) of the Act reads as follows:

Notice of refusal to give access to a record or a part thereof under section 26 shall set out,

- (b) where there is such a record,
 - (i) the specific provision of this Act under which access is refused,
 - (ii) the reason the provision applies to the record,
 - (iii) the name and position of the person responsible for making the decision, and
 - (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

In his letter of appeal, the appellant states that the head failed to indicate the reason that the exemptions apply to the withheld record. (Section 29(1)(b)(ii)).

Commissioner Linden addressed the requirements of section 29(1)(b)(ii) in Order 158, involving the same institution. He pointed out that specifying which part of a provision applies to a record is not the equivalent of providing the reason a provision applies, as required by section 29(1)(b)(ii). At page 4 of the Order, he went on to state:

In my view, a head is required to provide a requester with information about the circumstances which form the basis for the head's decision to deny access. The degree of particularity used in describing the record at issue will impact on the amount of detail required in giving reasons, and vice versa. For example, if a record is described not in general terms, but rather as a memo to and from particular individuals on a particular date about a particular topic, then the reason the provision applies to the record could be given in less detail than would be required if the record were described only as a

memo. The end result of either approach is that the requester is in a position to make a reasonably informed decision as to whether to seek a review of the head's decision.

The institution's notice of refusal letters in the present appeals simply state the wording of section 13(1), without further description of the withheld record or reasons for applying the exemption.

In my view, this is not sufficient to satisfy the requirements of section 29(1)(b)(ii) of the Act. However, because I have disposed of all issues relating to the record in this order, I do not see any purpose in ordering the head to provide proper notice of refusal letters to the appellant. I would simply remind the institution of the importance of issuing proper and comprehensive notice of refusal letters when responding to requests under the Act.

ORDER:

1. I uphold the head's decision to deny access to the second paragraph of the record in each appeal.
2. I order that the balance of the record in each appeal be disclosed to the appellant in accordance with the severance indicated under provision 1.

3. I order that the institution not make the disclosure described in provision 2, above, until thirty (30) days following the date of the issuance of this Order. This time delay is necessary to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the records are actually disclosed. Provided that notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that the part of the record be disclosed within thirty-five (35) days of the date of this Order.
4. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
5. In order to verify compliance with the provisions of this Order, I order the head to provide me with a copy of the records which are disclosed to the appellant pursuant to provision 2, upon my request.

Original signed by: _____ May 20, 1992
Tom Mitchinson
Assistant Commissioner