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

ORDER P-236

Appeal 900200

Ministry of the Attorney General

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O R D E R

INTRODUCTION:

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 of an institution to the Information and Privacy Commissioner.

On February 7, 1990, the Ministry of the Attorney General (the "institution") received a request for information from the appellant as follows:

> Please provide me with a copy of all information contained in your file #s 117181, 117181B, SCO DO 1332-84, and all other information relating to me, particularly all correspondence between your department and the British Lord Chancellor's Office.

On April 6, 1990, the institution responded that "partial access has been granted to your request." It added the following:

> Access to part of the record (approximately 20 pages) is denied pursuant to subsection 15(a) of the Act as disclosure would prejudice the conduct of intergovernmental relations by the Government of Ontario or an Institution; pursuant to subsection 15(b) as disclosure would reveal information received in confidence from another government or its agencies; and pursuant to section 19 (approximately 11 pages) as the record is subject to solicitor/client privilege or the record was prepared by or for Crown counsel for use in giving legal advice in contemplation of or for use in litigation.

> Access to other portions of the record (approximately 28 pages) is also denied pursuant to subsection 22(a) of the Act as these documents (court records) are already publicly available.

The requester appealed the decision of the institution and notice of the appeal was given to the institution and the appellant.

The records at issue in the appeal were reviewed by the Appeals Officer. The records, numbered consecutively by the institution, consist of letters, solicitor's notes and memoranda.

The Appeals Officer contacted the appellant and the institution in an effort to mediate a settlement. The appellant advised the Appeals Officer that he was no longer interested in pursuing his appeal with respect to the records refused under subsection 22(a) as the institution had written to him identifying the information exempted under this subsection.

On July 17, 1990, the institution wrote to the Appeals Officer stating that it was prepared to release two further records to the appellant: pages 101 to 104 (solicitor's notes) and page 140 (a memorandum to file). Settlement was not achieved with regard to the other records and the parties indicated that they were content to proceed to inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution. Enclosed with each 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.

Representations were received from the institution. In these representations, the institution stated that it had become apparent that the material contained in pages 142 to 159, which had been exempted under section 15, was already in the possession of the

appellant. The material included correspondence written to or by the appellant, as well as material which had previously been released to him through federal legislation. Thus, the claim for exemption for that material was withdrawn. The institution also indicated that pages 200-201 did not meet the criteria of section 19 and the claim for exemption for that material was withdrawn.

There are five remaining records to be considered in this appeal. They are the following:

Record 1 A letter to counsel in the institution from counsel in the British Lord Chancellor's Department, dated October 15, 1987 [page 138]

Record 2 A letter to counsel in the institution from counsel in the British Lord Chancellor's Department, dated November 23, 1987 [page 139]

Record 3 A handwritten notes made by the institution's counsel, undated [pages 1 - 2]

Record 4 A letter from counsel in the institution to the British Lord Chancellor's Department, dated July 21, 1987 [page 97]

Record 5 A memorandum from one of the institution's counsel to another, dated September 14, 1987 [pages 121 - 122]

PURPOSES OF THE ACT/BURDEN OF PROOF:

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 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, or a part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution.

ISSUES/DISCUSSION:

The issues arising in this appeal are as follows:

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

B. Whether any of the records would qualify for exemption under section 15 of the Act.

C. Whether any of the records would qualify for exemption under section 19 of the Act.

D. If the answer to Issue B or C is in the affirmative, whether the exemption provided by subsection 49(a) of the Act applies.

ISSUE A: Whether the information contained in the records at issue 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" as set out 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 information contained in the records in issue in this appeal and I am of the opinion that the information is "personal information" about the appellant.

Subsection 47(1) of the Act gives individuals a general right of access to personal information about themselves 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. One such exception is contained in subsection 49(a) of the Act which reads 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]

In this appeal, the institution has claimed that sections 15 and 19 of the Act would apply to the records.

ISSUE B: Whether any of the records qualify for exemption under section 15 of the Act.

The institution submitted that Records 1 and 2 would fall within the exemption provided in subsections 15(a) and (b) of the Act. These subsections provide 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;
>
> ...
>
> and shall not disclose any such record without the prior approval of the Executive Council.

At page 8 of Order 210, dated December 19, 1990, I set out the test for exemption under subsection 15(a):

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.

The institution stated that both the Ministry of the Attorney General and the British Lord Chancellor's Department are central authorities with regard to the application of the Hague Convention on the Civil Aspects of International Child Abduction. The institution submitted that one of the obligations imposed on the central authorities by the Hague Convention is to: "keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application".

In its submissions the institution expressed the head's concerns about the effect of disclosing the letters received from the British Lord Chancellor's Department. The institution submitted that:

> The head was concerned that if records created and shared with an implicit understanding of confidentiality, and reflecting discussions between central authorities as to the possibility of refusing to process an application or the appropriateness of

> appealing an adverse court decision were to be disclosed, it would have a chilling effect on the open communication between central authorities which is so vital to the Convention's proper functioning.

In the circumstances of this appeal, I am satisfied that the disclosure of the records could give rise to an expectation of prejudice to the conduct of intergovernmental relations. The relations which would be prejudiced are intergovernmental relations between the institution and an agent of another government, the British Lord Chancellor's Department. Further, the expectation that prejudice could arise as a result of disclosure is reasonable. As I am of the view that Records 1 and 2 would qualify for exemption under subsection 15(a) of the Act, it is not necessary to consider the application of subsection 15(b).

ISSUE C: Whether any of the records qualify for exemption under section 19 of the Act.

The institution submitted that Records 3, 4 and 5 would qualify for exemption under section 19. 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.

Records which qualify for exemption under section 19 include:

(1) A record that is subject to the common law solicitor-client privilege; (Branch 1)
(2) A record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. (Branch 2)

The institution has claimed that Records 3, 4 and 5 fall under the second branch of section 19. A record can be exempt under the second branch of section 19 regardless of whether the common law criteria relating to the first branch of the exemption are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under the second branch:

(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. [See Order 210 supra, p. 15].

In Order 52, dated April 12, 1989, former Commissioner Sidney B. Linden stated at page 10, that "the proper interpretation of 'Crown counsel' under section 19 should include any person acting in the capacity of legal advisor to an institution covered by the Act." The records in issue have been prepared by counsel for the institution and so qualify under the first part of this branch.

I discussed the meaning of the term "legal advice" at page 16 of Order 210 supra:

> 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.

I have examined Record 3 and I am satisfied that it fulfils the criteria of the second branch; that is, it was prepared by Crown counsel for use in giving legal advice. Similarly, Record 5 expresses the legal opinion of Crown counsel about a legal issue, and therefore falls within that branch as well.

With regard to Record 4, the institution has submitted the following:

> At the time this document was created, counsel had already been retained in the United Kingdom to commence proceedings on the applicant's behalf. As a result, this record falls under the second branch of the section 19 exemption in that it consists of communication between counsel for the Ministry of the Attorney General and the Lord Chancellor's Department created in contemplation of the litigation to be undertaken in the United Kingdom.

In deciding whether Record 4 was prepared in "contemplation of litigation" the following two-fold test must be satisfied:

> 1. the dominant 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. [See Order 136, dated December 28, 1989, p. 13]

It appears from a review of Record 4 that the dominant purpose for preparing the letter was to state that the institution would

not take part in any proceedings as it was of the opinion, and so informed the appellant, that the application had no merit. In my view, the exemption does not extend to litigation in which there will be no involvement by the institution. Therefore, the section 19 exemption does not apply to this record, and I order its disclosure.

ISSUE D: If the answer to Issue B or C is in the affirmative, whether the exemption provided by subsection 49(a) of the Act applies.

Under Issue B, I found that Records 1 and 2 met the criteria for exemption outlined in subsection 15(a). Under Issue C, I found that Records 3 and 5 met the criteria for exemption under section 19. The exemption provided by subsection 49(a) is therefore applicable to Records 1, 2, 3 and 5, and allows the head the discretion to refuse disclosure.

In all cases where the head has exercised his/her discretion under subsection 49(a), I look very carefully at the manner in which the head has exercised this discretion. Provided that this discretion has been exercised in accordance with established legal principles, in my view, it should not be disturbed on appeal. In the circumstances of this appeal, I find no basis on which to interfere with the head's exercise of discretion in favour of non-disclosure of Records 1, 2, 3 and 5.

ORDER:

1. I order the head to disclose the following records which the head agreed to disclose in his representations:

Solicitor's notes, undated [pages 101 - 104]

Memo to file, January 12, 1988	[page 140]
Covering memo, April 7, 1988	[page 142]
Letter, June 25, 1987	[page 143]
Letter, May 31, 1987	[pages 144 - 146]
Letter, May 20, 1987	[page 147]
"Draft" notes, undated	[page 148]
Letter, June 25, 1987	[page 149]
Letter, undated	[pages 149a - 150]
Letter, June 1, 1987	[page 151]
Letter, May 21, 1987	[page 152]
Letter, July 22, 1987	[pages 153 - 154]
Letter, June 30, 1987	[page 155]
Letter, March 25, 1988	[pages 156 - 157]
Letter, undated (draft)	[pages 158 - 159]
and	
Memorandum, July 13, 1988	[pages 200 - 201].

2. I order the head to disclose Record 4.

3. I uphold the head's decision not to disclose Records 1, 2, 3 and 5.

4. I order the head to disclose the records listed in provisions 1 and 2, within twenty days (20) from the date of this Order and to advise me in writing, within five days (5) from the date of disclosure, of the date on which disclosure was made.

5. The notice 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:
Tom Wright
Commissioner

July 11, 1991
Date