



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

ORDER P-365

Appeal P-9200048

Ministry of Housing



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ORDER

The Ministry of Housing (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the requester. The Ministry responded by providing access to several records and denying access to two others pursuant to section 21 of the Act. The requester appealed the Ministry's decision.

During mediation, the Ministry agreed to release one of the remaining records, and all but nine severed parts of the other record. The Ministry initially exempted the nine parts under sections 18(1)(f), 19 and 21 of the Act, but subsequently withdrew the section 18(1)(f) claim and released the one part of the record which had been exempted under that section.

Further mediation of the appeal was not possible, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Written representations were received from the Ministry, but not from the appellant.

The record consists of a six-page memorandum from a staff member of the Huron County Housing Authority (HCHA) to the Chair and members of the HCHA. For ease of reference, the parts of the record still at issue in this appeal have been numbered from 1 through 8. Access to parts 1, 2, 3, 4, 7 and 8 was denied pursuant to section 19, and parts 5 and 6 were exempted under section 21 of the Act.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the discretionary exemption provided by section 19 of the Act applies.
- B. Whether any of the information contained in the record qualifies as "personal information", as defined by section 2(1) of the Act.
- C. If the answer to Issue B is yes, whether any parts of the record satisfy the requirements of the mandatory exemption provided by section 21 of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 19 of the Act applies.

The Ministry claims that parts 1, 2, 3, 4, 7 and 8 of the record qualify for exemption under section 19 of the Act, which 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.

This section consists of two branches, and provides the Ministry with discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and
- (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).

[Order 49]

In order for a record to qualify under Branch 1, the Ministry must provide evidence that the record satisfies either of the following tests:

1.
 - (a) there must be a written or oral communication; **and**
 - (b) the communication must be of a confidential nature; **and**
 - (c) the communication must be between a client (or his agent) and a legal adviser; **and**
 - (d) the communication must be directly related to seeking, formulating or giving legal advice.

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

The Ministry submits that the first part of Branch 1 applies to parts 1, 2, 3, 4, 7 and 8 of the record; it makes no submissions regarding Branch 2 or the second part of the Branch 1 test.

In its representations, the Ministry states that:

The record was created to advise the HCHA chair and members of certain situations occurring in the housing authority office and her concerns about various

procedures and practices being carried out. Given the legal advice sought and provided, [the author of the memorandum] was concerned about the question of legal liability for herself and her staff involving certain incidents that she feared would lead to legal consequences.

...

In an effort to remedy the problem situation, and at the advice of her solicitor, [the author of the memorandum] wrote to the individuals whom she believed needed to know, namely the HCHA Chair and members with copy to the Housing Administrator.

Having carefully reviewed the Ministry's representations and the relevant parts of the record, I find that the Ministry has failed to establish the requirements for exemption under part 1 of the Branch 1 test. The record is not a communication between a client and a legal advisor, since neither the recipients (the chair and members of the HCHA) nor the author of the record are legal advisers. Further, the record is not "directly related to seeking, formulating or giving legal advice"; it merely contains an account of legal advice previously received by the author from her personal legal counsel. Therefore, I find that section 19 does not apply to parts 1, 2, 3, 4, 7 and 8 of the record.

ISSUE B: Whether any of 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,

...

(e) the personal opinions or views of the individual except where they relate to another individual,

...

(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 Ministry submits that only parts 5 and 6 of the record contain personal information. Because the personal information exemption provided by section 21 of the Act is mandatory, I have reviewed all parts of the record to determine whether any of them contain information which satisfies the definition of personal information. In my view, all parts of the record which remain at issue in this appeal, with the exception of the first two sentences of part 7, contain information which qualifies as the personal information of either the appellant or other individuals. Specifically, I find that parts 1, 2, 3, 4, 5, 6 (with the exception of the sixth sentence), and the third sentence of part 7 contain the personal information of individuals other than the appellant; and part 8 and the sixth sentence of part 6 contain the personal information of the appellant.

Because no other exemptions are claimed with respect to part 8, the sixth sentence of part 6, and the first two sentences of part 7, they should be released to the appellant.

ISSUE C. If the answer to Issue B is yes, whether any parts of the record satisfy the requirements of the mandatory exemption provided by section 21 of the Act.

In my discussion of Issue B, I found that parts 1, 2, 3, 4, 5, 6 (with the exception of the sixth sentence), and the third sentence of part 7 contain the personal information of individuals other than the appellant.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(1)(f) reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and 21(3) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(3) lists the types of information the disclosure of which is presumed to be an unjustified invasion of personal privacy.

Turning first to part 5 and the remainder of part 6, the Ministry submits that section 21(3)(a) applies. This section reads as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

I have carefully reviewed parts 5 and 6, and find that they contain information which relates to the medical condition of several employees of the HCHA which, in my view, falls squarely within the scope of section 21(3)(a). Accordingly, I find that the requirements for a presumed unjustified invasion of personal privacy have been established with respect to parts 5 and 6 (with the exception of the sixth sentence).

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been established, I must then consider whether any other provisions of the Act come into play to rebut this presumption. Section 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). In my view, the records do not contain any information relevant to section 21(4).

I have also carefully considered the provisions of section 21(2) and, in my view, there is no combination of factors listed in section 21(2) which would operate to rebut the presumption of an unjustified invasion of personal privacy. Therefore, the presumption raised by section 21(3)(a) of the Act applies, I find that disclosure of the information contained in parts 5 and 6 (with the exception of the sixth sentence) of the record would constitute an unjustified invasion of the privacy of individuals other than the appellant.

As far as parts 1, 2, 3, 4, and the third sentence of part 7 are concerned, because I have found that they contain the personal information of individuals other than the appellant, the mandatory exemption contained in section 21 of the Act applies. Unless it can be established that one of the exceptions contained in section 21(1) is present, these parts of the record should not be released. The Ministry has not claimed section 21 with respect to these parts. Nevertheless, I have reviewed them and, in my view, none of the exceptions contained in section 21(1) apply. I have given particular attention to section 21(1)(f), but find that none of the factors contained in section 21(2) which favour disclosure are present. Therefore, I find that the mandatory exemption provided by section 21 of the Act applies to prohibit disclosure of parts 1, 2, 3, 4 and the third sentence of part 7.

ORDER:

1. I uphold the Ministry's decision not to disclose parts 5 and 6 (with the exception of the sixth sentence) of the record.
2. I order the Ministry not to disclose parts 1, 2, 3, 4 and the third sentence of part 7 of the record.

3. I order the Ministry to disclose part 8, the sixth sentence of part 6, and the first two sentences of part 7 of the record to the appellant.
4. I order the Ministry to disclose the parts of the record referred to in Provision 3 within thirty five (35) days of the date of this order, and not earlier than the thirtieth (30) day following the date of this order.
5. In order to verify compliance with the order, I order the head to provide me with a copy of the records which were disclosed to the appellant, only upon my request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

November 12, 1992