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

ORDER P-326

Appeal P-910788

Ministry of Correctional Services

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

The Ministry of Correctional Services (the institution) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a number of records relating to the requester, including notes of his supervisor taken in the context of an allegation made against him by another employee.

The notes and part of another record were denied by the institution pursuant to section 49(b) of the Act. The requester appealed the head's decision to this office.

During the course of mediation, the appellant narrowed the scope of his request to the notes taken by his supervisor. As a result, a new decision letter was issued by the institution, adding sections 14(1)(f) and 19 of the Act as new exemption claims with respect to the notes.

A copy of the record was obtained and reviewed by the Appeals Officer. It consists of 21 photocopied pages of handwritten notes.

Further attempts to mediate the appeal were not successful, and the matter proceed to inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the institution and to four individuals whose personal information appeared to be contained in the record. Enclosed with each Notice of Inquiry was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal.

After the Notice of Inquiry was issued, the appellant agreed to further narrow his request to exclude the personal information of individuals other than himself which appears in the record. The copy of the record provided to the institution with this order will identify the personal information of other individuals which falls outside the scope of this order and should be severed from the record.

Written representations were received from the institution, the appellant and the appellant's supervisor (the affected person).

ISSUES:

The issues in this appeal are as follows:

A. Whether the record is in the custody or under the control of an institution, as defined by section 10(1) of the Act.

B. Whether any of the information contained in the record qualifies as personal information as defined in section 2(1) of the Act.

C. If the record contains the personal information of individuals other than the appellant, whether the discretionary exemption provided by section 49(b) of the Act applies.

D. Whether the record qualifies for exemption under section 14(1)(f) of the Act.

E. Whether the record qualifies for exemption under section 19 of the Act.

F. If the answer to Issue C and/or D is yes, whether the discretionary exemption provided by section 49(a) applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the record is in the custody or under the control of an institution, as defined by section 10(1) of the Act.

Section 10(1) of the Act states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.

At pages 10-12 of Interim Order 120, dated November 22, 1989, former Commissioner Sidney B. Linden made the following statements regarding section 10(1):

> In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

Commissioner Linden went on to provide the following non-exhaustive list of factors which can be of assistance in determining whether an institution has "custody" and/or "control" of records in particular situations:

1. Was the record created by an officer or employee of the institution?

2. What use did the creator intend to make of the record?

3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?

5. Does the institution have a right to possession of the record?

6. Does the content of the record relate to the institution's mandate and functions?

7. Does the institution have the authority to regulate the record's use?

8. To what extent has the record been relied upon by the institution?

9. How closely is the record integrated with other records held by the institution?

10. Does the institution have the authority to dispose of the record?

In this appeal, the affected person submits that the notes were not intended "to have any involvement in employment history of the Appellant. The notes rather were taken to record chronology and type of contact between the two parties in the event that the Appellant pursued legal action". The affected person feels that the notes are in her custody and control, not the institution's.

The institution agrees with the position taken by the affected person, adding that "[the affected person] is of the view that creation of these records was not mandated by her position as the appellant's supervisor ... [and she] believed that the appellant was contemplating some type of legal action against herself or the Ministry of Correctional Services". However, the institution does acknowledge that "if [the affected person] was not an employee of the Ministry of Correctional Services, she would not have found it necessary to create this record and therefore in a very narrow sense the record was created in the course of her duties". The institution goes on to state that "[w]hile the ministry does not encourage employees to keep personal notes on employment-related matters, this situation undoubtedly does occur in certain situations. The status of such records must be viewed on a case by case basis".

The appellant submits that "I do not believe that this question [custody and control] should be at issue, as all of the documentation that I have requested was prepared by a Ministry of Correctional Services representative [the affected person] for the purpose of investigation, during the course of normal employment ... and was the basis for possible disciplinary action by the MCS".

Having reviewed the contents of the record and considered all representations, in my view, the record is properly considered to be in the custody and/or under the control of the institution pursuant to section 10(1) of the Act. The record was created by the affected person during the course of her employment, and describes events which took pace at the workplace in the context of providing supervision to the appellant. It is also relevant to note that a copy of the record was voluntarily provided by the affected person to the institution for use in a grievance being heard by the Crown Employees Grievance Settlement Board.

ISSUE B: Whether any of the information contained in the record qualifies as personal information as defined in 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,
>
> (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 consists of notes taken by the affected person over a four-month period, and can accurately be described as a chronology of various meetings and other activities relating to an allegation made against the appellant by another employee.

The institution submits that the record contains the personal information of the appellant. It also submits that the record contains the personal information of the affected person, in that it relates specifically to her employment history (subparagraph (b)).

In my view, the record does not contain any personal information of the affected person. It has been established in a number of previous orders that information provided by an individual in a professional capacity or in the execution of employment responsibilities is not "personal information" (Orders 113, 139, 157, P-257). In the circumstances of this appeal, the affected person was acting in her official capacity as an employee of the institution and the appellant's supervisor when the notes were created, and I find that the information about the appellant which was produced in the course of employment cannot properly be categorized as "personal information" of the affected person under section 2(1) of the Act.

Therefore, in my view, the record contains the personal information of the appellant only, and it is not necessary for me to consider Issue C.

ISSUE D: Whether the record qualifies for exemption under section 14(1)(f) of the Act.

The institution claims section 14(1)(f) as one of the bases for exempting the record. This section reads as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> deprive a person of the right to a fair trial or impartial adjudication;

The institution submits that disclosure of the record could reasonably be expected to deprive the affected person of the right to an impartial adjudication in the context of a grievance filed by the appellant against the affected person. The institution states:

> The appellant, as a grievor, has to prove discrimination and harassment by adducing evidence of incidents in which he was unfairly singled out for adverse treatment. [The affected person]'s personal notes documenting her views about incidents involving the appellant could be prejudicial to [the affected person]. If disclosed, these notes, as a candid and personal reflection of [the affected person]'s thoughts and views, may be used by the appellant to strengthen his case against [the affected person]/Ministry of Correctional Services at the grievance proceeding.

In Order 48, dated April 6, 1989, Commissioner Linden considered the proper interpretation of section 14(1)(f) of the Act. At page 6 of that Order he stated:

> The exemption provided by subsection 14(1)(f) should be considered in the context of the governing principles of the Act as outlined in section 1, and, in my view, in order to demonstrate unfairness under [sub]section 14(1)(f), an institution must produce more evidence than mere commencement of a legal action. Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. No such exemption exists, and, in my view, [sub]section 14(1)(f) ... cannot be interpreted so as to exempt records of this type without offending the purposes and principles of the Act.

Commissioner Tom Wright also considered the application of section 14(1)(f) in Order 192, dated August 22, 1990. That case was similar in nature to the present appeal, in that the institution argued that release of a particular record would give an appellant an unfair advantage in grievance proceedings. Commissioner Wright pointed out that it is not sufficient for an institution to simply identify that a grievance is in existence; the institution bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm under section 14(1)(f).

In the circumstances of this appeal, in my view, the institution and the affected person have not provided adequate evidence to establish a reasonable expectation that the affected person's right to a fair trial or impartial adjudication would result from disclosure of the record. Therefore, I find that the record is not exempt under section 14(1)(f) of the Act.

ISSUE E: Whether the record qualifies for exemption under section 19 of the Act.

The institution also claims that the record qualifies for exemption under section 19 of the Act. Section 19 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.

The section 19 exemption consists of two branches, which provide a head 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).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution 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]

Having reviewed the record, I find that it fails to satisfy the requirement for exemption under the first part of Branch 1. First of all, the record is not a communication between a client and a legal advisor; on the contrary, it was prepared by the affected person in her capacity as the appellant's supervisor, and was simply retained by her for possible future use. There is also no evidence to support the fact that the record was directly related to seeking, formulating or giving legal advice. As far as the second part of the Branch 1 test is concerned, the institution and/or affected person have failed to establish that the record was "created or obtained especially for a lawyer's brief", which is a necessary component of the "litigation privilege" part of the exemption. In my view, the record was created in the context of the affected person's supervisory responsibilities. Litigation between the appellant and the affected person has not been commenced, and there has been insufficient evidence to establish that the record was **especially** created for the purpose of a lawyer's brief for contemplated litigation. (Emphasis added)

Turning to Branch 2 of the exemption, 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.

(Order 210)

The record in this appeal was not prepared by Crown counsel. There is also no evidence that Crown counsel requested that the record be prepared, and I am unable to conclude that it was prepared "for" Crown counsel.

Accordingly, I find that the record does not qualify for exemption under either branch of the section 19 exemption.

Because I have found that the record does not qualify for exemption under section 14(1)(f) or section 19 of the Act, it is not necessary for me to consider Issue F.

ORDER:

1. I order the head to disclose the record to the appellant, subject to the severance of personal information of individuals other than the appellant. I have attached a highlighted copy of the record with the copy of this order provided to the institution, which identifies the portions of the record which should be severed.

2. I order that the head not release the record until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the record is actually disclosed. Provided 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 this record be disclosed within thirty_five (35) days of the date of this Order.

3. I order the head to advise me in writing within five (5) days of the date on which disclosure was made. The said notice should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1

4. In order to verify compliance with this order, I order the head to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1, upon my request only.

Original signed by: July 8, 1992
Tom Mitchinson
Assistant Commissioner