



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

ORDER P-416

Appeal P-9200379

Ministry of the Attorney General



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ORDER

BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records relating to him in the possession of the Office of the Police Complaints Commissioner (the PCC). The Ministry granted full access to fifty responsive records, and denied access to two other records, pursuant to sections 13(1), 14(1)(a) and (b), 14(2)(c) and 49(a) of the Act. The requester appealed the Ministry's decision.

Mediation was not successful, 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 both parties. In its representations, the Ministry raised section 14(2)(a) of the Act as an additional exemption claim for both records.

Before discussing the actual records and the application of the Act, I thought it would be helpful to provide some background information about the PCC and the circumstances of the complaint filed by the appellant with that organization.

Under the Police Services Act (the PSA), an individual may submit a complaint about police misconduct to the relevant police chief. The legislation provides that the complaint must be filed within six months of the alleged wrongdoing. Following an investigation, the police chief must issue a decision, which may be reviewed by the PCC. A request for review by the PCC must be made within thirty days of the police chief's decision. The PCC has discretion to consider complaints/requests for review filed after the prescribed six month/thirty day time periods.

The appellant filed a complaint with a police chief under the PSA, alleging improper conduct on the part of a police officer. The police chief looked into the matter and issued a decision, and the appellant requested a review of this decision by the PCC. The appellant's initial complaint and request for review were both made after the time periods allowed by the legislation.

Record 1 is a handwritten memorandum to file by a PCC employee, dated July 5, 1991. It outlines a discussion between the employee and the appellant regarding the appellant's delay in submitting his original complaint, and contains the employee's comments respecting the granting of a time extension. The record also includes a handwritten statement by another PCC employee pertaining to the contents of the memorandum.

Record 2 is another memorandum to file by the same PCC employee, dated December 20, 1991. It contains an outline of the employee's conversation with the appellant regarding his request for a time extension, the employee's response to the request, and her views as to whether an extension should be granted.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by sections 14 and 49(a) of the Act applies to the records.
- C. If the answer to Issue A is yes, whether the discretionary exemption provided by sections 13(1) and 49(a) of the Act applies to the records.

SUBMISSIONS/CONCLUSIONS:

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

Personal information is defined in section 2(1) of the Act, in part, as follows:

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

...

- (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 examined the two records at issue in this appeal and, in my view, all of the information contained in the records qualifies as personal information of the appellant only.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of institutions covered by the Act. However, this right of access is not absolute. Section 49 provides a number of exceptions to this general right of access, including section 49(a), which reads as follows:

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; [emphasis added]

I will now consider whether the records satisfy the requirements of sections 13(1) and/or 14 of the Act, and thereby qualify for exemption under section 49(a).

ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by sections 14 and 49(a) of the Act applies to the records.

The Ministry claims sections 14(1)(a) and (b), and 14(2)(a) and (c) as the basis for denying access to both records.

Sections 14(1)(a) and (b) of the Act state:

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;

Sections 14(2)(a) and (c) state:

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;
- (c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability;

These and other provisions of sections 14(1) and (2) provide the Ministry with discretion to exempt certain records which relate to law enforcement activities. Section 2(1) of the Act provides assistance in determining what constitutes a law enforcement activity, by defining "law enforcement" as follows:

"law enforcement" 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);

The Ministry claims that all activities of the PCC fall within the scope of law enforcement. In its representations, the Ministry makes the following statements with respect to its claim under section 14(2)(c) which, in my view, have general application to sections 14(1) and (2) of the Act:

First, because of the Institution's mandate, as set out in Part VI of the Police Services Act, 1990, the Office of the Police Complaints Commissioner falls within the definition of "law enforcement" as provided in subsection 2(1) of the FOI Act. Thus, any records it creates, pursuant to its mandate, can be characterized as a law enforcement record.

Second, the documents at issue were created by staff while carrying out the mandate of the Institution and thus can be characterized as a "law enforcement record".

I do not agree with the Ministry's position. To place such a broad interpretation on the term "law enforcement records", in my view, would be inconsistent with the legislative intent of the law enforcement exemption. Even if I were prepared to accept that Part VI of the PSA establishes a law enforcement mandate for the PCC, this would not automatically make any record created by the PCC a "law enforcement record". In my view, in order for a record created by the PCC to qualify for consideration under either sections 14(1) or (2) of the Act, the PCC must establish that it has a law enforcement mandate, and that the record is directly related to this mandate. The records at issue in this appeal relate to matters of process and procedure, not to the substance of the appellant's complaint or the investigatory functions of the PCC, and I find that the Ministry has not provided me with sufficient evidence to establish that these records relate to a law enforcement matter or proceeding, or are law enforcement records, as those terms are used in various parts of sections 14(1) and (2) of the Act relied on in this appeal.

Subject to my discussion of Issue C, because the records do not satisfy the requirements of section 14 of the Act, the exemption provided by section 49(a) does not apply.

ISSUE C: If the answer to Issue A is yes, whether the discretionary exemption provided by sections 13 and 49(a) applies to the records.

The Ministry claims section 13(1) of the Act as the basis for exempting both records. This section reads as follows:

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.

In its representations, the Ministry presents the following submissions with respect to its section 13(1) claim:

The Institution ... is involved on a daily basis pursuant to the Police Services Act, 1990, in decision making which directly impacts on the lives of police officers, complainants, their respective families and friends and on the community-at-large. Thus, public servants and consultants retained by the Institution must feel free to provide full, complete and frank information when laying the foundation of any advice or recommendation they may provide without fear of unwarranted disclosure. To do otherwise, would create a reluctance on advisors to provide candid and confidential opinions.

It has been established in a number of previous orders that "advice" for the purposes of section 13(1) 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 in the deliberative process [Orders 118, P-304, P-348, P-356 and P-402]. "Recommendations" should be viewed in the same vein [Orders 161, P-402, P-428, P-348 and P-356].

Having reviewed the records, in my view, both contain recommendations regarding a suggested course of action in relation to the appellant's request for a time extension for filing his complaint under the PSA. Therefore, I find that the records satisfy the requirements of section 13(1) of the Act.

I must now consider whether any of the mandatory exceptions to the section 13(1) exemption outlined in section 13(2) of the Act apply in the circumstances of this appeal. Section 13(2)(a) reads as follows:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

factual material;

The Ministry acknowledges in its representations that the records contain factual material, but contends that it is so inextricably interwoven with the advice and recommendations that it cannot reasonably be severed. I do not agree. Having reviewed the records, in my view, they consist primarily of factual material. Two sentences in Record 1 and one sentence in Record 2 contain "recommendations", and these sentences can be severed from the rest of the records prior to release. I have enclosed a highlighted version of the records with the copy of my order sent to the Ministry, which identifies the parts of each record which should be severed prior to release.

Therefore, I find that two sentences in Record 1 and one sentence in Record 2 satisfy the requirements of section 13(1) of the Act, and these parts of the records are, therefore, properly exempt under section 49(a).

Section 49(a) is a discretionary exemption, giving the Ministry discretion to refuse to disclose personal information to the appellant if section 13(1) of the Act would apply to exempt any part

of the records. I have reviewed the Ministry's representations regarding its decision to exercise discretion in favour of denying access, and find nothing improper in the circumstances of this appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to two sentences in Record 1 and one sentence in Record 2. I have enclosed a highlighted version of the records with the copy of this order provided to the Ministry which identifies the sentences which must be severed prior to release.
2. I order the Ministry to disclose the remainder of the records to the appellant within 15 days of the date of this order.
3. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant in accordance with Provision 2, **only** upon my request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ February 23, 1993