



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

# ORDER P-398

Appeal P-9200528

Ministry of Health



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# ORDER

## BACKGROUND:

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to eleven specific records.

The Ministry released some records, and denied access to the rest, either in whole or in part, claiming sections 13(1), 18(1)(c) and (e), 19 and 21(1) of the Act. The requester appealed the Ministry's decision.

During mediation, the appellant narrowed the scope of his request to five records, which are described in Appendix A. He also confirmed that he was not interested in receiving the parts of Record A which contain personal information of other individuals. The records which remain at issue in this appeal relate to a 1989 labour dispute between the Ontario Public Service Employees Union (the Union) and various Ontario Government Ministries.

Further mediation 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 both parties.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the discretionary exemption provided by section 13(1) of the Act applies to Records B and/or J.
- B. Whether the discretionary exemption provided by in section 18(1)(c) of the Act applies to Records C and/or K.
- C. Whether the discretionary exemption provided by section 18(1)(e) of the Act applies to Record C.
- D. Whether the discretionary exemption provided by section 19 of the Act applies to Record A.

## SUBMISSIONS/CONCLUSIONS:

**ISSUE A: Whether the discretionary exemption provided by section 13(1) of the Act applies to the remaining parts of Records B and/or J.**

Section 13(1) of the Act 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.

Record B is a two-page draft affidavit prepared by the Assistant Director of the Ministry's Psychiatric Hospitals Branch (the Assistant Director) for the Administrator of the Penetanguishene Mental Health Centre (the Centre). The affidavit was intended to be filed in support of a court proceeding regarding a job action underway at the Centre during 1989. The affidavit was accompanied by a covering memorandum which the Ministry agreed to release during the course of the appeal.

The Ministry agrees that Record B does not contain recommendations, but submits that it contains "advice as to the content that should be included in the affidavit and the wording it is proposed be used".

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 and P-348].

In my view, Record B was not prepared for the purpose of giving advice or suggesting a course of action which would be accepted or rejected in the deliberative process. Rather, it can more accurately be described as an outline of certain facts that the person who drafted the affidavit felt the signatory should include in the affidavit for submission in the context of the court proceeding. I find that Record B does not contain "advice" for the purposes of section 13(1), and that this record should be released to the appellant in its entirety.

Record J is a single sentence severed from a memorandum from the Assistant Director to the Assistant Deputy Minister of the Ministry's Institutional Division. It describes the letter of agreement which resolved the labour relations dispute. The Ministry submits that the severed sentence contains an implicit recommendation regarding future dealings with employees involved in the job action.

Again, I do not accept the Ministry's position. The sentence identifies an option available to the Ministry in implementing the agreement, but does not contain any wording which would indicate whether this option is recommended or not. In my view, the Ministry has failed to establish the requirements for exemption under section 13(1) of the Act, and the remaining sentence in Record J should be released to the appellant.

**ISSUE B: Whether the discretionary exemption provided by section 18(1)(c) of the Act applies to Records C and/or K.**

Section 18(1)(c) of the Act reads as follows:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

To establish a valid exemption claim under section 18(1)(c), the Ministry must demonstrate a reasonable expectation of prejudice to the economic interests or competitive position of a government institution arising from disclosure of the information. It is not necessary to prove that the actual harm enumerated in the section will result from disclosure, only that the expectation of harm is based on reason and is not fanciful, imaginary or contrived [Order P-263].

Record C is a letter dated October 25, 1989 from the Deputy Minister of Correctional Services to the President of the Union, which sets out the terms of the agreement which resolved the labour dispute.

The Ministry submits that:

... disclosure of the information contained in the record would effectively disclose the specific financial and negotiated settlements with respect to ending the 1989 job action.

...

It is submitted that disclosure of this information would permit the use of this information to counteract any actions taken by any of the affected institutions should similar job actions be taken in the future.

I do not accept these submissions. Because the letter was sent to the President of the Union, I fail to see how its release could prejudice the economic interests of the Ministry in future collective bargaining with its employees. In my view, the Ministry has failed to provide the "detailed and convincing" evidence required to establish the requirements for this exemption, and I find that Record C does not qualify for exemption under section 18(1)(c) of the Act.

Record K is a memorandum from the Assistant Deputy Minister of the Operations Division of the Ministry of Correctional Services to other management personnel within that Ministry. It clarifies some of the terms contained in the agreement which ended the labour dispute, and describes management's responsibilities in implementing them.

The Ministry's representations regarding Record K are the same as those for Record C, as set out above. These representations are, at best, generalized references to possible harm and, in my view, the Ministry has failed to provide the "detailed and convincing" evidence necessary to establish the requirements for exemption under this section. Therefore, I find that Record K does not qualify for exemption under section 18(1)(c) of the Act and should be released to the appellant in its entirety.

**ISSUE C: Whether the discretionary exemption provided by section 18(1)(e) of the Act applies to Record C.**

Section 18(1)(e) of the Act reads as follows:

A head may refuse to disclose a record that contains,

positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

In order for records to qualify for exemption under section 18(1)(e), the Ministry must establish the following criteria:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; **and**
3. the negotiations must be carried on currently, or will be carried on in the future; **and**
4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

[Orders 219, P-346]

The only representation made by the Ministry with respect to section 18(1)(e) is: "It is submitted that the negotiations with respect to the issues in the documents continue at this time".

In my view, this statement alone is not sufficient to establish the requirements of the section 18(1)(e) test, and I find that Record C does not qualify for exemption under this section and should be released to the appellant in its entirety.

**ISSUE D: Whether the discretionary exemption provided by section 19 of the Act applies to Record A.**

Section 19 of the Act 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, which provide a head with the 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).

The Ministry claims that the record qualifies for exemption under the first branch of the section 19 exemption.

In order to qualify for exemption under the common law solicitor-client privilege, the Ministry must provide evidence that the record satisfies either of the following tests:

1. a) there is 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 advisor, **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]

Record A is letter from a Legal Counsel at the Ministry of the Attorney General to the Director of Legal Services at the Ministry of Correctional Services. The Ministry makes no submissions with respect to the second part of the privilege, and I find that Record A does not qualify under that part of the privilege. The Ministry submits that Record A does qualify for exemption under the first part of the privilege because it is a confidential, written communication between a legal counsel and her client which provides legal advice.

I disagree. The letter is clearly a written communication between a solicitor and client and, although there is no specific indication that the communication was made in confidence, I am prepared to accept that an expectation of confidentiality did exist in both parties' minds. However, there is nothing in the letter which can accurately be described as "directly relating to seeking, formulating or giving legal advice". In my view, the letter simply outlines administrative arrangements put in place by the Legal Counsel to deal with the transfer of responsibility for a particular file to a different lawyer, and I find the record does not qualify for

exemption under the first part of the Branch 1 test for exemption under section 19 of the Act. Therefore, Record A should be released to the appellant, subject to the agreed-upon severance of personal information.

**ORDER:**

1. I order the Ministry to disclose Records B, C, J and K to the appellant within 15 days of the date of this Order.
2. I order the Ministry to disclose Record A to the appellant, subject to the severance of personal information of individuals other than the appellant, within 15 days of the date of this Order.
3. In order to verify compliance with the provisions of this Order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provisions 1 and 2, only upon my request.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_  
January 12, 1993

## APPENDIX A

- Record A: A letter dated October 16, 1989 from Legal Counsel at the Ministry of the Attorney General to the Director of Legal Services for the Ministry of Correctional Services [section 19].
- Record B: Pages 2 and 3 of a memorandum dated October 23, 1989 from the Assistant Director of the Psychiatric Hospitals Branch to the Administrator of the Penetanguishene Mental Health Centre [section 13(1)].
- Record C: A two-page letter dated October 25, 1989 from the Deputy Minister of Correctional Services to the President of the Ontario Public Service Employees Union [sections 18(1)(c) and (e)].
- Record J: A one-sentence severance on page 3 of a three-page memorandum dated October 26, 1989 from the Assistant Director of the Psychiatric Hospitals Branch to the Assistant Deputy Minister of the Ministry's Institutional Division [section 13(1)].
- Record K: A three-page memorandum dated October 30, 1989 from the Assistant Deputy Minister of Correctional Services to various staff of that ministry [section 18(1)(c)].