



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER P-538

Appeal P-9200445

Ministry of Finance



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ORDER

BACKGROUND:

The Ministry of Financial Institutions (now the Ministry of Finance) (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information relating to the Motor Vehicle Accident Claims Fund Branch, including records relating to a motor vehicle accident which occurred in 1964 in which the requester was an uninsured driver. The Ministry granted full access to some records and denied access to the remainder pursuant to sections 13(1), 14(2)(a), 18(1)(d), 19 and 21 of the Act. The requester appealed the Ministry's decision.

As a result of mediation, the appellant withdrew his appeal with respect to certain records. Further 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. Representations were received from both parties. Following the notice of inquiry, the Ministry agreed to release three additional records to the appellant.

While the representations were being considered, Commissioner Tom Wright issued Order M_170, adopting the Ontario Court (General Division) (Divisional Court) June 30, 1993 decision in the case of John Doe et al. v. Information and Privacy Commissioner et al. (unreported). This decision interpreted several provisions of the Act in a way which differed from the interpretation developed in orders of the Commissioner. Since similar statutory provisions were also at issue in the present appeal, it was determined that copies of Order M-170 should be provided to the parties. The appellant and the Ministry were provided with the opportunity to change or to supplement the representations previously submitted. Additional representations were received from the Ministry. In making this order, I have considered these representations together with those previously submitted.

A list of the records remaining at issue and corresponding exemptions is contained in Appendices A and B to this Order.

Before discussing the applicability of the sections of the Act to the records at issue, I wish to first provide some background respecting the Motor Vehicle Accident Claims Fund (the Fund).

The Fund was created in the 1960s to provide relief for persons injured by uninsured motorists. Where an accident occurs in which a person is injured by an uninsured driver, the injured party has the option of making an application for payment from the Fund or of commencing an action against the uninsured driver.

In cases where the injured party chooses to commence a legal action against the uninsured driver, the uninsured driver often does not file a defence. The injured party (the plaintiff) notifies the Fund that the defendant is in default in defending the claim and the Fund responds to the claim and defends or settles the action. All acts done by the Fund in accordance with the lawsuit are deemed to be the acts of the defendant.

Where the Fund cannot settle the action directly, it often retains counsel to conduct the defence of the action. After settlement or trial, the Fund pays the claim to the plaintiff after a judgment is taken out and assigned to the Minister, to whom the Fund is responsible. The Fund then attempts to recover the money from the defendant.

Turning to the case at hand, the appellant was involved in a motor vehicle accident in 1964. As a result, two separate claims were presented to the Fund. One claim was settled by the Fund on the basis of a simple application. The other claim proceeded by way of statement of claim and was not defended by the appellant. The Fund (acting for the Minister of Transport, the responsible Minister at the time) subsequently settled the lawsuit for \$13,000. The appellant is currently repaying the settlement to the Fund. The records at issue were created in the course of the Minister's conduct of the defence and settlement of the claim against the appellant.

ISSUES:

- A. Whether the discretionary exemption provided by section 19 of the Act applies.
- B. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- C. Whether the mandatory exemption provided by section 21 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

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

The Ministry submits that section 19 of the Act applies to Records E11, E12, E13 and E16 and the last three paragraphs of Record E9. Record E9 is a letter dated March 22, 1967 from the Ministry's counsel to the Ministry in which counsel for the Ministry advises on the results of the examination for discovery which had been conducted with respect to the plaintiff. The last three paragraphs of the letter, for which section 19 has been claimed, relate to counsel's assessment of the plaintiff's damages.

Record E11 is a letter from the Ministry's counsel to the Ministry dated September 7, 1967 in which counsel for the Ministry reviews a medical report and discusses the difficulties in assessing the case.

Record E12, dated September 28, 1967, is titled "Preliminary Synopsis" and was prepared by the Ministry's staff lawyer for the Ministry's counsel. The document contains a brief summary of the lawsuit, a provisional opinion of liability and recommendation as to further investigation, settlement or trial.

Record E13 is a letter dated January 9, 1969 from the Ministry's counsel to the Ministry. It contains an opinion from the Ministry's counsel as to the plaintiff's damages and also a possible settlement range.

Record E16 is a letter prepared by the Ministry's counsel to the Ministry respecting a conversation between the appellant and counsel for the Ministry. The letter also contains a request for instructions respecting a specific settlement amount.

Section 19 of the Act reads:

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.

Section 19 consists of two branches, which provide the Ministry 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).

With respect to Branch 2, in order for a record to qualify for exemption, the following two criteria must be established:

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.

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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 Ministry submits that counsel to the Ministry was acting as "Crown counsel", in that he was acting in the capacity of a legal advisor to an institution under the Act. The Ministry asserts that the dominant purpose in preparing these documents was contemplation of litigation and, as well, that Crown counsel was giving an opinion, including a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.

The appellant argues that section 19 of the Act is intended to apply to those situations where a court action is contemplated or in progress. In the appellant's view, since the lawsuit was settled in 1970, the records cannot be considered to be for use in or in contemplation of litigation.

In my view, the fact that the litigation has been discontinued since the records were prepared is not determinative of the issue of whether the records qualify for exemption under section 19. I am of the view that Records E11, E12, E13, E16 and the last three paragraphs of Record E9 fall under the second branch of section 19. They were prepared by Crown Counsel for the purpose of giving legal advice.

The appellant contends that if section 19 of the Act is deemed to apply to past litigation, he should nevertheless be entitled to the records, as the Ministry acted on his behalf throughout the litigation.

The Motor Vehicle Accident Claims Act (the MVACA) clearly states that the Minister is to defend the claim on behalf and in the name of the defendant. All acts done in accordance therewith are deemed to be the acts of the defendant. These acts expressly include engaging counsel. The records themselves also note that the solicitor is solicitor for the defendant. The appellant clearly had a joint interest with the Ministry in the subject matter of the communication. The subject matter of the communication was the appellant's liability to the plaintiffs and the means by which the claim would be defended or settled. In my opinion, at common law, no solicitor-client privilege would attach to the record, as against the appellant, because the appellant had a joint interest in the subject matter of the communication, or was a joint client. Therefore, the first part of the section 19 exemption does not apply.

However, a record can be exempt under the second part of section 19 regardless of whether the common law criteria relating to the first branch of the exemption are satisfied. The inquiry under the second branch is not whether the record is "subject to solicitor-client privilege", but whether the record was prepared by Crown counsel, in the prescribed circumstances. There is no need to establish a solicitor-client relationship.

In my opinion, the second branch of the section 19 exemption is available to the Ministry, even where the first branch cannot be raised against an appellant who has a joint interest in the subject matter of the communication, or who is a joint client. The second branch of the exemption is not sufficiently related to the common law privilege to encompass this element of the common law doctrine.

Accordingly, I find that Records E11, E12, E13, E16 and the last three paragraphs of Record E9 qualify for exemption under section 19. I have reviewed the factors taken into consideration by the Ministry in exercising its discretion. I have found nothing improper, and would not alter it on appeal.

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

As I have already found that Records E11, E12, E13, E16 and the last three paragraphs of Record E9 qualify for exemption under section 19, it will not be necessary for me to discuss these records in the context of section 2(1) of the Act. My discussion will address Record E4, E5, E6, E7, E8, E10, 22, 67, 131, 132, 134, 181 and 187, as well as the remaining paragraphs in E9.

Section 2(1) of the Act states, in part:

"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,

...

(d) the address, telephone number, fingerprints or blood type of the individual,

...

(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;

Having reviewed the records for which only section 21 has been claimed, I am of the view that these records contain the personal information of identifiable individuals. I am also of the opinion that these records do not contain the personal information of the appellant.

With respect to those records for which the Ministry granted partial access, I am of the opinion that the severed information contained in all these records (ie. Records 22, 67, 131, 132, 134, 181 and 187) constitutes personal information under sections 2(1)(a), (b), (d) or (h) of the Act and relates to individuals other than the appellant.

ISSUE C: Whether the mandatory exemption provided by section 21 of the Act applies.

I found under Issue A that records for which section 21 has been claimed contain personal information that relates to individual(s) other than the appellant.

Section 21(1) of the Act is a mandatory exemption which prohibits the disclosure of personal information to any person other than to the individual to whom the information relates, except in the circumstances listed in sections 21(1)(a) through (f) of the Act. In my view, the only exception to the mandatory exemption contained in section 21(1) of the Act which has potential application is section 21(1)(f). This section 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.

Since section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) 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. In its representations the Ministry specifically relies on sections 21(3)(a), (d), (f) and (h), which read:

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

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (d) relates to employment or education history;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

The Ministry submits that section 21(3)(a) applies to Records E4, E5, E6, E7, E8, E9, E10, E11, E13, 22, 67, 131, 132, 134, 181 and 187; that sections 21(3)(d) and 21(3)(f) apply to Record E8; and that section 21(3)(h) applies to Records E4, E6, 67 and 181. Having reviewed the information contained in these records, I agree that these sections apply. I am also of the view that section 21(3)(h) does not apply to Record E4, 67 or 181. I am, however, of the view that section 21(3)(h), although not cited by the Ministry, does apply to Record E10. In light of the above findings, I conclude that the requirements for a presumed unjustified invasion of personal privacy under sections 21(3)(a), (d), (f) and (h) of the Act have been established, as indicated above.

The appellant offers the following arguments in favour of disclosure:

Releasing the records in question cannot be presumed to constitute an unjustified invasion of personal privacy, since the individual voluntarily disclosed the

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information in a personal injury action where full disclosure of all relevant documents was an obligation of the litigants. The information was provided to the Ministry's legal representative who was acting on my behalf.. The Ministry did not at that time share this information with me and continues to withhold that same information... I was excluded from the litigation process and access to the information exchanged therein even though I had a personal interest in its outcome in that I was to be the one ultimately responsible for reimbursing the Ministry for payment to the plaintiff.

The only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 21 exemption (Order M-170).

I have considered section 21(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision. In addition, the appellant has not argued that the public interest override set out in section 23 of the Act applies. I am of the view that all of the records remaining at issue in this appeal are properly exempt from disclosure under section 21(1) of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

September 21, 1993

APPENDIX A

FULLY EXEMPT RECORDS		
Record	Description	Exemption
E4	65 01 12: Medical report (1 page)	s.21(3)(a) and (h)
E5	65 05 20: Medical report (2 pages)	s.21(3)(a)
E6	65 10 21: Medical report (2 pages)	s.21(3)(a)
E7	66 11 01: Medical report (2 pages)	s.21(3)(a)
E8	66 12 07: Report by Retail Credit Company investigating financial and health background of plaintiff (8 pages)	s.21(3)(a), (d) and (f)
E9	67 03 22: Letter from Ministry's counsel to Ministry reporting on discoveries of plaintiff (3 pages)	s.19, 21(3)(a)
E10	67 08 22: Medical report (5 pages).	s.21(3)(a)
E11	67 09 07: Letter from Ministry's counsel to Ministry (1 page)	s.19, 21(3)(a)
E12	67 09 28: Preliminary synopsis of case (1 page)	s.19
E13	69 01 09: Letter from Ministry's counsel to Ministry (3 pages)	s.19, s.21(3)(a)
E16	69 04 11: Letter from Ministry's counsel to Ministry (1 page)	s.19

APPENDIX B

SEVERED RECORDS		
Record	Description	Exemption
22	64 12 09: Report by insurance adjusters to Ministry (3 pages - Portions severed)	s.21(3)(a)
67	65 11 01: Letter from insurance adjusters to Ministry (2 pages - Two paragraphs on page two severed)	s.21(3)(a)
131	66 11 10: Letter from insurance adjusters to Ministry (1 page - Second paragraph severed)	s.21(3)(a)
132	66 11 18: Letter from Ministry to insurance adjuster (1 Page - Third paragraph severed)	s.21(3)(a)
134	66 12 13: Letter from insurance adjusters to Ministry (1 page - Third paragraph severed)	s.21(3)(a)
181	69 09 17: Letter from Ministry's counsel to Ministry (1 page - Portion of second sentence severed)	s.21(3)(a)
187	70 06 15: Proposal for Consent to Judgment prepared by Ministry's counsel (4 pages - Second and third paragraphs and portion of fourth paragraph on page 3 severed.	s.21(3)(a)