



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

ORDER P-667

Appeal P-9300076

Ministry of the Attorney General



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ORDER

BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request pursuant to the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to three actions filed with the Ontario Court of Justice (General Division). In preparing its initial response to the request, the Ministry located a large number of responsive records and granted access to some of them. Other records were withheld from disclosure, either in whole or in part.

The requester appealed the denial of access. During mediation, the number of records at issue from the group initially discovered by the Ministry was considerably reduced. The appellant continues to seek access to 75 of these records. The Ministry has claimed that five of them are not subject to the Act by virtue of section 65(2)(b). In addition, the Ministry relies on the exemption in section 19 of the Act to deny access to the majority of these records, and on section 21 of the Act to deny access to others. Both sections 19 and 21 have been claimed for several records.

Further mediation was not successful and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the appellant and the Ministry. Representations were received from both parties.

One of the issues identified by the appellant in his letter of appeal, and in his representations, was the adequacy of the Ministry's search for responsive records. Subsequent to the delivery of the first set of representations by the parties, the Ministry discovered another large group of responsive records. This entire group of records related to only one of the three actions, which has now been completed. The Ministry granted access to many of these records. The appellant reviewed the Ministry's index and decided that he was not interested in a number of these records to which access had been denied, and he continues to seek access to 24 of them. The Ministry has claimed the exemption in section 19 for all 24 of these records.

The appellant has advised the Appeals Officer that he is now satisfied with the Ministry's search and, accordingly, that is no longer an issue in this appeal.

While the representations were being considered, the Commissioner's office issued Order M-170 which interpreted section 14 of the Municipal Freedom of Information and Protection of Privacy Act (which is equivalent to section 21 of the provincial Act) in a way which differed from the interpretation developed in previous orders. Since a new approach to the operation of the Act was being adopted and because section 21 is at issue in the present appeal, it was determined that copies of Order M-170 should be provided to all the parties. The parties were then afforded the opportunity to state whether the contents of Order M-170 would cause them to change or supplement the representations which they had previously made. No additional representations were received on this issue.

At the same time, the parties were invited to comment on the application of section 19 to the additional records which had been located. Comments on this issue were received from the Ministry only.

THE RECORDS AT ISSUE:

The records at issue in this appeal consist of a total of 99 documents. The records provided to me include several duplicates, and for greater certainty the totals mentioned here include all copies of these records. Where duplicate records are completely identical to each other, only one copy will be dealt with in this order. The duplicates are identified in the listing of records attached to this order as Appendix A.

The records are taken from files maintained by the Ministry's counsel in their capacity as legal advisors to Her Majesty the Queen in Right of Ontario (the Ministry of Health) and the Administrator of the Mental Health Centre, Penetanguishene, who are the named defendants and/or respondents in the court proceedings. To facilitate the analysis of whether the claimed exemptions and sections apply to the records, Appendix A groups the records according to common characteristics and identifies which sections of the Act have been claimed for each group.

The record numbers used in this order are derived from those applied by the Ministry in its decision letters and indices. However, the Ministry numbered both groups of records (i.e. those found during its initial search and those discovered after the issuance of the Notice of Inquiry) commencing with record "1", causing some overlap in numbering between the two sets of records. Therefore I have added the prefix "A" to record numbers from the first group, and the prefix "B" to the records discovered after the Notice of Inquiry was issued.

ISSUES:

The issues in this appeal are as follows:

- A. Whether the Ministry properly applied section 65(2)(b) of the Act to Record Groups 13 and 14.
- B. Whether the discretionary exemption provided by section 19 of the Act applies to Record Groups 1 through 13.
- C. Whether the records in Record Groups 14, 15 and 16 contain "personal information" as defined in section 2(1) of the Act, and if so, whether the exemptions in sections 21 and 49(b) of the Act apply.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the Ministry properly applied section 65(2)(b) of the Act to Record Groups 13 and 14.

Section 65(2)(b) of the Act reads as follows:

This Act does not apply to a record in respect of a patient in a psychiatric facility as defined by section 1 of the Mental Health Act, where the record,

contains information in respect of the history, assessment, diagnosis, observation, examination, care or treatment of the patient.

Former Assistant Commissioner Tom Mitchinson considered section 65(2)(b) in Order P-374. After reviewing the policy considerations which led to the inclusion of this section in the Act, and observing that a broad interpretation would result in the inability of psychiatric patients to get access to this type of information about themselves (since it is not accessible under the access provisions of the Mental Health Act), Assistant Commissioner Mitchinson stated as follows:

In my view, in order for a record to fall within the scope of section 65(2)(b), it must contain the types of information listed in the section, it must be in respect of a psychiatric patient, and it must have a clinical purpose, nature or value.

I agree with this approach and adopt it for the purposes of this appeal.

Record Group 13

Record A-339 (which is the only item in Record Group 13) is a memorandum, with attachments, prepared by the Director of the Rehabilitation Unit at the Oak Ridge Division, Penetanguishene Mental Health Centre for information purposes, regarding one of the court actions referred to in the request. The memorandum sets out information about four patients, while the attachments consist of general descriptions and analyses of programs in use at the facility. Since the memorandum itself was prepared for information purposes relating to the litigation, it cannot be said to have any "clinical purpose, nature or value". The attachments to the memorandum do not relate to any specific patient and are therefore not "in respect of a psychiatric patient". Accordingly, neither the memorandum nor the attachments meet the criteria set out in Order P-374 for the application of section 65(2)(b).

Record Group 14

Records A-245, A-250 and A-264 are all transcripts or portions of transcripts of examinations for discovery which were conducted as part of the court actions identified in the request.

The bulk of these three records consists of discussions between counsel relating to the relevance or otherwise of the clinical records of a number of psychiatric patients. There are occasional references to the dates upon which various patients resided at different psychiatric facilities, and one of the records contains other comments about a patient's psychiatric history. In my view, these records have no "clinical purpose, nature or value", and therefore they do not meet the criteria established in Order P-374.

For these reasons, I find that section 65(2)(b) does not operate to exclude any of these records from the application of the Act. As the Ministry has made alternative exemption claims for each of these records, I will consider them in the discussion of the relevant exemptions below.

ISSUE B: Whether the discretionary exemption provided by section 19 of the Act applies to Record Groups 1 through 13.

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).

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 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]

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

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 Ministry's representations describe the three Ontario Court (General Division) proceedings to which the records at issue are related, as follows:

In the first matter, which began as an application in 1991 and was converted into an action, the patients allege that their rights under the Charter of Rights and Freedoms and the Mental Health Act have been violated by the facility's Social Behaviour Management Program and other similar programs. This action is ongoing. In the course of this action, a motion was brought to disqualify counsel in the Crown Law Office, Civil. This motion was completed in the summer of 1991. The second case was commenced in 1991 and was an application to strike out the facility's mail-opening policy. This matter was heard in December, 1992 and is now completed. The third case is an action, commenced in 1990, and relates to allegations about the living conditions in the facility. This action is now at the discovery stage.

In all of these cases, counsel at the Crown Law Office, Civil and the Constitutional Law and Policy Division of the Ministry act as counsel to the defendants/respondents in the litigation.

Before turning to the discussion of specific records, there are several aspects of the section 19 exemption which merit a general discussion.

Of the three court actions which were the subject of the request, two are ongoing and one has been completed. Previous orders of the Commissioner's office make it clear that the termination of litigation does not affect the application of Branch 2 of the section 19 exemption (Orders P_538 and P-624).

However, Branch 1 of the section 19 exemption depends on the availability of the common law solicitor-client privilege. That privilege can be lost as a result of the termination of litigation, as noted in the following extract from Solicitor-Client Privilege in Canadian Law by Ronald D. Manes and Michael P. Silver (Butterworths, 1993) at page 210:

- (a) Direct communications between solicitor and client are forever privileged and, accordingly, the general rule that "once privileged, always privileged" applies;
- (b) Derivative communications made in contemplation of litigation cease to be privileged upon completion of the original litigation;
- (c) However, where the privileged communications were originally obtained for both the original litigation and any subsequent

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litigation involving the same subject matter, privilege is maintained in the subsequent litigation.

In the circumstances of this appeal, the ongoing litigation does not involve the same subject matter as the concluded litigation.

The effect of termination of litigation on the common law solicitor-client privilege is further discussed in the following extract from Boulianne v. Flynn (1970), 3 O.R. 84 (H.C.J.), which is also quoted in the Manes and Silver text referred to above:

... the privilege accorded solicitor-and-client communications is to ensure that the client may make full disclosure to the solicitor, secure in the knowledge that such disclosures will not ... be available to others. Otherwise, the client might be tempted to hold back important information that he considers might be damaging if disclosed ... in the future. On the other hand, the privilege accorded to reports prepared for purposes of litigation by experts at the request of a solicitor rests not on the concern that the expert might otherwise fail to make full disclosure (the litigation being of no personal concern to him), but on the desirability of the solicitor being uninhibited in collecting confidential information and opinions for the purpose of preparing his case for trial whether such information and opinions further his case or not. Thus, once the litigation is concluded, the reason for the privilege disappears.

I agree with these interpretations and adopt them for the purposes of this appeal.

There is another matter of general application which I will comment on before turning to specific records. A number of the records do not represent communications between solicitor and client and were not originally prepared for litigation purposes. An example of such a record would be an administrative policy document. Generally speaking, records of this sort would not qualify under Branch 2 because they were not prepared by or for Crown counsel. However, under Branch 1, such records, although not by nature subject to solicitor-client privilege, become privileged as a result of being copied for inclusion in the lawyer's brief for litigation, as long as there was an intention to keep them confidential. In one of the leading cases on this subject, Hodgkinson v. Simms, 55 D.L.R. (4th) 577 (1988), McEachern, C.J.B.C. states as follows at page 589:

It is my conclusion that the law has always been, and in my view it should continue to be, that ... where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection ...

In my view, based on the principles quoted above from Manes and Silver and Boulianne v. Flynn, it is also clear that such collected documents, which are not direct solicitor-client communications, do not maintain their privileged status at common law once the litigation is

completed, and therefore in those circumstances they would no longer qualify for exemption under Branch 1.

Another important factor in determining the applicability of the section 19 exemption is the "dominant purpose" test where records were prepared in contemplation of litigation. This requirement is set out in Order 52, where former Commissioner Sidney B. Linden stated as follows:

... The two current common law requirements for according a record privileged status on the basis of having been prepared in contemplation of litigation ... are:

- (a) the dominant purpose for the preparation of the document must be contemplation of litigation; and
- (b) there must be a reasonable prospect of such litigation at the time of the preparation of the document - litigation must be more than just a vague or theoretical possibility.

[Order 52]

I will now consider the records for which the Ministry has claimed the section 19 exemption. In weighing the application of this exemption, I have borne in mind the principles enumerated above. I have carefully reviewed all of the records and all representations received in connection with them.

Record Group 1

The records in this group consist of correspondence and memoranda from Crown counsel to employees of the Ministry of Health. I accept the Ministry's representations, to the effect that these records were prepared by Crown counsel for use in litigation. Accordingly, each of these records qualifies for exemption under Branch 2 of the section 19 exemption.

Record Group 2

The records in this group consist of correspondence and memoranda from employees of the Ministry of Health to Crown counsel. A number of these records were clearly prepared for Crown counsel for use in, or in contemplation of litigation and therefore qualify for exemption under Branch 2 of section 19. These are Records A-348, A-467, A-491, A-546 (pages 1 and 2), A-547 (pages 1 and 3), A-560, A-612, B-25, B-56 (page 1), B-75, B-95 and B-261.

Some of the records in this group consist of memoranda to Crown counsel enclosing various policy documents. These memoranda consist of the following: Record A-100 (page 1), all of Record B-79, Record B-236 (pages 1 and 2) and Record B-105 (page 1). The enclosures consist of Record A-100 (pages 2 and 3), all of Record B-78, Record B-236 (except pages 1 and 2), Record B-105 (pages 2 through 5), and all of Record B-104.

The memoranda relate to the litigation which has been completed. They are exempt under Branch 2 of section 19, since they were prepared for Crown counsel for use in litigation, or in contemplation of litigation.

The enclosures, however, are records which were not prepared by or for Crown counsel. For that reason they do not qualify under Branch 2. They were obtained for the lawyer's brief for litigation which has now been completed, and because they do not represent solicitor-client communications, their character as privileged documents at common law ended with the litigation. Accordingly, they do not qualify for exemption under Branch 1 either.

As no other exemption has been claimed for the enclosures, they should be disclosed to the appellant.

Record Group 3

Group 3 consists of correspondence and memoranda between two groups of government lawyers employed by the Ministry of the Attorney General. The first group are assigned to the Ministry of the Attorney General, at either the Crown Law Office (Civil) or the Constitutional Law Branch. The second group are assigned to the Ministry of Health. Several of the records contain enclosures.

I am satisfied that, as they were prepared by Crown counsel for use in litigation, the following records are exempt in their entirety under Branch 2: Records A-79, A-117, A-222, A-225, A_230, A-444, A-534, A-536 (page 1), A-544, A-546 (page 9), A-547 (page 2) and B-182.

The portion of Record A-97 (page 2 to the end of the document) which falls into this Record Group consists of a covering memorandum from a lawyer at the Ministry of Health to one at Crown Law Office (Civil), and the memoranda it encloses which were intended to be part of the lawyer's brief for litigation. As the covering memorandum was prepared by and for Crown counsel for use in litigation, and the enclosures form part of the lawyer's brief for litigation which is still ongoing, the covering memorandum qualifies for exemption under Branch 2 and the enclosure qualifies under Branch 1. Therefore, the portion of Record A-97 under discussion here is entirely exempt under section 19.

The same analysis applies to Record A-216, which consists of a one-page covering memorandum from one Crown counsel to another and an enclosure intended to form part of the lawyer's brief for litigation. The memorandum is exempt under Branch 2 and the enclosure under Branch 1.

Record A-511 consists of a memorandum from a lawyer at the Crown Law Office (Civil) to the Director of Legal Services at the Ministry of Health. It relates to an account for services rendered charged by outside counsel with respect to one of the court cases mentioned in the request. In my view, it was not prepared for use in, or in contemplation of litigation, and accordingly it is not exempt under Branch 2. It is not part of the lawyer's brief for litigation, and so it fails to qualify under part 2 (the "litigation" privilege) of Branch 1. While it could be said to be a communication between a solicitor and client, since in a sense the lawyers assigned to the Ministry of Health act on behalf of that Ministry (the "client") in procuring the services of Crown counsel at the Ministry of the Attorney General, it is, in my view, not a communication which is "directly related to seeking, formulating or giving legal advice". As a result, it fails to qualify for exemption under part 1 (the "solicitor-client communication" privilege) of Branch 1. Therefore

it is not exempt under section 19. As no other exemption has been claimed for it, it should be disclosed to the appellant.

Record Group 4

This group consists of memoranda and correspondence between lawyers within the Ministry's Crown Law Office (Civil) and Constitutional Law Branch.

In my view, the following records are exempt under Branch 2 because they were prepared by or for Crown counsel for use in or in contemplation of litigation: A-97 (page 1), A-114, A-132, A-137, A-452, A-455, A-591 (page 1), A-662 (page 1) and B-8.

Record A-545 is a memorandum prepared by Crown counsel which encloses a letter prepared by counsel for another institution relating to proposed changes in legislation. Both records are exempt under Branch 1. The memorandum was prepared especially for the lawyer's brief for litigation, and the enclosed letter was obtained for the brief. The relevant litigation is ongoing.

The Ministry did not make representations regarding Record A-116. On its face, it is not directly related to the giving or seeking of legal advice, and was not prepared for the lawyer's brief for litigation and, accordingly, it is not exempt under Branch 1. Although it is addressed to Crown counsel (and its author also appears to be Crown counsel) no evidence has been provided to me to indicate that it was prepared for use in giving legal advice, or for use in litigation or in contemplation of litigation, and so it is also not exempt under Branch 2. As no other exemption has been claimed for it, Record A-116 should be disclosed to the appellant.

Record Group 5

The Ministry retained outside counsel to assist in its conduct of one of the actions mentioned in the request. The records in this group consist of communications between this outside counsel and lawyers employed by the Ministry. It has been established in previous jurisprudence of the Commissioner's office that "Crown counsel" under section 19 includes any person acting in the capacity of legal advisor to the Ministry (Order 52). This would include an outside lawyer retained by the Ministry.

In my view, Records A-110 and A-122 were prepared by or for Crown counsel for use in litigation, and are exempt under Branch 2.

Record A-457 consists of a memorandum written by Crown counsel regarding payment of the outside counsel's account (page 1), the covering letter which accompanied the account (page 2) and the account itself (pages 3 and 4). Record A-510 is the same as pages 3 and 4 of Record A-457 (the solicitor's account). To avoid duplication I will only consider Record A-457.

During the inquiry stage of this appeal, the appellant indicated that he does not require access to the outside counsel's hourly rate, nor to the total number of hours worked (which, together with the total amount of the bill could reveal the hourly rate). Accordingly that portion of Record A-457 is not at issue.

In my view, Record A-457 was not prepared for use in litigation, or for use in giving legal advice, and therefore the portion of it which is at issue does not qualify for exemption under

Branch 2. It is also my view that no part of this record was prepared for the lawyer's brief for litigation, so it does not qualify for exemption under part 2 (the "litigation privilege") of Branch 1.

It is also clear that pages 1 and 2 were not directly related to the seeking, formulating or provision of legal advice. Accordingly, these two pages of the record also do not qualify under part 1 (the "solicitor-client communication privilege") of Branch 1. Therefore these two pages are not exempt under either branch of section 19.

This leaves the issue of whether the solicitor's account (pages 3 and 4) qualifies for exemption under part 1 (the "solicitor-client communication privilege") of Branch 1. In discussing whether a legal account was exempt under that part of Branch 1, Assistant Commissioner Irwin Glasberg made the following comments in Order M-213:

... the decision maker must determine, based on the contents of each legal account, whether the information contained in the document relates in a tangible and direct way to the seeking, formulating or provision of legal advice.

...

I have carefully reviewed the legal account at issue in the present appeal. While this record sets out, in a summary fashion, the steps which the law firm took to complete its work assignment, the legal account neither contains legal advice, nor reveals any such advice indirectly. ... In short, I find that this record has no direct connection with either "seeking, formulating or giving legal advice". This conclusion has been reached following a careful analysis of section 12 of the Act in relation to this specific legal account.

In my view, the same analysis applies to the account which forms part of Record A-457. Accordingly, the portion of the account which is at issue does not qualify for exemption under Branch 1, and as previously noted it also does not qualify under Branch 2. As no other exemption has been claimed for Record A-457, the portions which are at issue should be disclosed to the appellant. The portions which are **not** at issue (which should not be disclosed) are highlighted on the copy of the record to be sent to the Ministry's Freedom of Information and Protection of Privacy Co_ordinator with this order.

Record Group 6

The two records comprising this group are letters from the Director of the Mental Health Facilities Branch to expert witnesses, written for the purpose of retaining their services for litigation which is still ongoing. They are copied to several lawyers involved in the case, which is why they were in the Ministry's custody. Therefore, in my view, they were prepared with the intention that they form part of the lawyer's brief for litigation, and qualify for exemption under Branch 1.

Record Group 7

These records are correspondence between Crown counsel and expert witnesses. In my view all of these records were created by or for Crown counsel for use in litigation and, accordingly, they are exempt under Branch 2.

Record Group 8

These records consist of notes and research relating to the litigation referred to in the request.

I am satisfied that the following records were prepared by or for Crown counsel for use in litigation and are therefore exempt under Branch 2: A-57, A-93, A-219, A-327, A-448, A-451, B-55, B-65, B-100, B-275 and B-276.

I am also satisfied that the following records were created or obtained especially for the lawyer's brief for litigation which is ongoing and are therefore exempt under Branch 1: A-317, A-318, A-320, A-330 and A-331.

Record A-155 is a letter from a lawyer at the federal Department of Justice inquiring about the status of one of the court actions, and Record A-156 is the response of the Ministry. In my view these letters have no direct relation to the giving or receiving of legal advice, nor were they created or obtained especially for the lawyer's brief for litigation. Therefore they are not exempt under Branch 1. There is no evidence before me to indicate that they were created for use in litigation, or in contemplation of litigation, or for use in giving legal advice. Therefore they are also not exempt under Branch 2. As no other exemption has been claimed for them, they should be disclosed to the appellant.

The first page of Record A-507 consists of handwritten notes made by Crown counsel relating to the preparation of a letter to the Director of Legal Services at the Ministry of Health, concerning the account rendered by outside counsel. The letter itself is Record A-511, which was found not to qualify for exemption under the discussion of Record Group 3, above. In my view, the considerations which led to this finding regarding Record A-511 also apply to these notes, which are not exempt under Branch 1 or 2. The second page of the record is a telephone message slip, which was not specifically referred to in the Ministry's representations. In my view, it does not qualify for exemption under section 19. For these reasons, none of Record A-507 meets the requirements for exemption under section 19. Since no other exemption has been claimed for it, it should be disclosed to the appellant.

Record B-56 (pages 2 through 16) is also included in this group. Pages 2 through 4 were prepared for Crown counsel for use in litigation and are exempt under Branch 2.

Pages 5 through 16 of Record B-56 were not prepared by or for Crown counsel, and therefore they do not qualify for exemption under Branch 2. They were obtained for the lawyer's brief for litigation which has now been completed, and because they do not represent solicitor-client communications, their character as privileged documents ended with the litigation. Accordingly they do not qualify for exemption under Branch 1 either. As no other exemption has been claimed for these pages, they should be disclosed to the appellant.

Record Group 9

These records consist of draft letters, pleadings and affidavits. In my view, with the exception of the attachments to several of the draft affidavits which form part of Record A-279, all of these records are exempt under Branch 2 because they were prepared by or for Crown counsel for use in litigation. The attachments to the draft affidavits in Record A-279 consist of resumés and psychiatric care program information and, in my view, they were obtained especially for the lawyer's brief for litigation which is ongoing. Therefore they qualify for exemption under Branch 1.

Accordingly, all the records in this group are exempt under section 19.

Record Group 10

This group consists of two legal opinions. Both were prepared by or for Crown counsel for use in litigation and accordingly both are exempt from disclosure under Branch 2 of section 19.

Record Group 11

This group consists of two records received from Corrections Canada in connection with litigation which has been completed. In my view, these records were not created by or for Crown counsel and therefore they do not qualify under Branch 2. As the litigation for which they were obtained is completed, this raises the question of whether Branch 1 is available, as previously discussed. Since these documents are not a direct communication between solicitor and client, they are no longer subject to solicitor-client privilege at common law, and accordingly they do not qualify for exemption under Branch 1. Therefore they are not exempt under section 19. As no other exemption has been claimed for them, they should be disclosed to the appellant.

Record Group 12

This group consists of two records which were provided to Crown counsel by counsel for the Ontario Public Service Employees' Union (OPSEU), which was a party to the two actions to which these records relate.

Record A-569 consists of a covering letter to Crown counsel and a draft affidavit which counsel for OPSEU submitted to Crown counsel for comments. It relates to litigation which is ongoing. In my view, both the letter and the affidavit were obtained especially for Crown counsel's brief for litigation and are therefore privileged in the hands of Crown counsel and its client, the Ministry of Health. Accordingly, in my view, all of Record A-569 is exempt under Branch 1.

Record B-111(b) was also provided to Crown counsel by counsel for OPSEU. It is an expert's comments on two draft affidavits. The appellant has indicated that he is not interested in the portion of this record consisting of the professional qualifications of the author and, therefore, that portion is not at issue.

The action to which Record B-111(b) relates has been completed. This record was not created by or for Crown counsel and therefore does not qualify for exemption under Branch 2. It is also

not a communication between a solicitor and client. For that reason, since the litigation has been completed, this record no longer qualifies for exemption under Branch 1 even if it was obtained especially for the lawyer's brief. Accordingly, Record B-111(b) does not qualify for exemption under section 19. As no other discretionary exemption has been claimed for it, and no mandatory exemption applies, the portion of it which is at issue should be disclosed. The portion which is not at issue (and which should not be disclosed) is highlighted on the copy of the record which is being sent to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator with this order.

Record Group 13

The only record in this category is A-339. I have previously found that section 65(2)(b) does not apply to exclude this record from the operation of the Act. In the alternative, the Ministry has claimed that it is exempt under section 19. In my view, both the covering memorandum and attachments which comprise this record were created and/or obtained especially for the lawyer's brief for litigation which is ongoing, and accordingly they qualify for exemption under Branch 1 of section 19.

Discretion

Section 19 of the Act is a discretionary exemption. I have reviewed the Ministry's exercise of discretion in favour of refusing to disclose the records which qualify for exemption under section 19. I find nothing improper in the way this discretion was exercised in the circumstances of this appeal.

ISSUE C: Whether the records in Record Groups 14, 15 and 16 contain "personal information" as defined in section 2(1) of the Act, and if so, whether the exemptions in sections 21 and 49(b) of the Act apply.

Because it appeared to the Appeals Officer that some of the records for which section 21 was claimed might contain the personal information of the appellant, the Notice of Inquiry raised the possible application of section 49(b).

Section 2(1) of the Act defines the term "personal information" as "recorded information about an identifiable individual" and lists a number of specific examples, including:

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. (emphasis added)

Record Group 14

This group of records comprises transcripts from examinations for discovery. I have reviewed these records and, in my view, each of them contains "personal information" about the appellant as well as other individuals. Some of this information relates to psychiatric history, and other information relates to employment history.

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

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 49(b) introduces a balancing principle. In this case, the Ministry must consider the information in the records and weigh the appellant's right of access to his own personal information against other individuals' right to the protection of their personal privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the Ministry the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his own personal information, the only situation under section 49(b) in which he can be denied access to the information is if it can be determined that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of another individual's personal privacy. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

Section 21(3) provides, in part, as follows:

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; (emphasis added)

...

(d) relates to **employment** or educational history; (emphasis added)

In my view, the personal information in these records about individuals other than the appellant meets the criteria for a presumed unjustified invasion of privacy. Some of the information relates to the psychiatric history of individuals other than the appellant, while other information relates to the employment history of individuals other than the appellant.

Once a presumption under section 21(3) of the Act has been established, it may only be rebutted by the considerations contained in section 21(4) or by the public interest "override" set out in section 23 of the Act (Order M-170). I am of the opinion that none of the personal information of individuals other than the appellant contained in Record Group 14 falls within the ambit of section 21(4) of the Act. In addition, the appellant has not argued that the public interest override set out in section 16 of the Act applies to the facts of this case.

Section 49(b) is a discretionary exemption. In my view, there was nothing improper about the Ministry's decision to exercise its discretion against disclosing the information in these records about individuals other than the appellant, and I would not disturb it on appeal.

In my view, the balance of these records does not contain personal information of individuals other than the appellant and, therefore, cannot qualify for exemption under sections 21 or 49(b). Since no other exemption has been claimed, the remaining portions of these records should be disclosed. A copy of these records in which the exempt portions are highlighted is being sent to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator with this order.

Record Groups 15 and 16

Record Group 15 consists of a report by Ombudsman Ontario in response to a complaint by a patient at the Penetanguishene Mental Health Centre on behalf of a group of patients, and the accompanying covering letter. Record Group 16 comprises copies of correspondence between the administration of the Penetanguishene Mental Health Centre and the Office of the Ombudsman regarding the complaint. I am satisfied that these records contain the personal information of the patient who filed the complaint, who is an individual other than the appellant.

Section 21(1) of the Act provides that personal information shall not be disclosed "to any person other than the individual to whom the information relates" unless one of the listed exceptions to the exemption applies. The only exception which could be relevant in this appeal is that contained in section 21(1)(f), which applies "... if the disclosure does not constitute an unjustified invasion of personal privacy".

In my view, the presumed unjustified invasion of privacy in section 21(3)(a) which I have referred to in the discussion of Record Group 14, above, applies to the information in Record Groups 15 and 16. Further, if only the information falling under the presumption were withheld from disclosure, the remainder of these records would not be particularly meaningful, nor would they be responsive to the request. I agree with the Ministry's decision to deny access to these records under section 21.

ORDER:

1. I uphold the Ministry's decision to deny access to Records A_10, A-154, A-207 (page 1), A-348, A-376, A-467, A-491, A-546 (pages 1 and 2), A-547 (pages 1 and 3), A-560, A-612, B-25, B_56 (page 1), B-75, B-95, B-261, A-100 (page 1), B-79, B-236 (pages 1 and 2), B-105 (page 1), B-263 (page 1), A-79, A-117, A-222, A-225, A-232, A-230, A_444, A-456, A-534, A-536 (page 1), A-544, A-546 (page 9), A-547 (page 2), B-182, A-97 (pages 2 to end), A-216, A-97 (page 1), A-114, A-132, A-210, A-137, A-452, A_455, A-

591 (page 1), A-662 (page 1), B-8, A-545, A_110, A-208, A-122, A-223, A_224, A-640, B-195, B-196, A-641, B-266(a), A-57, A-93, A-219, A-327, A-448, A_451, B_55, B-65, B-100, B-275, B-276, A-317, A-318, A-320, A-330, A-331, B_56 (pages 2 through 4) A-81, A-147, A-198, A-207 (page 2 to end), A-279, A-536 (pages 2 through 6), A-546 (pages 3 through 8), A-570, A-662 (pages 2 through 11), A-591 (pages 2 through 6), A-118, A-569, A-339, A-321, A-322, A-323, A-326 and the highlighted parts of Records A-245, A-250, A-258 and A-264.

2. I order the Ministry to disclose to the appellant Records A_100 (pages 2 and 3), B-78, B-236 (except pages 1 and 2), B_104, B-105 (pages 2 through 5), A-511, A-116, A-457 (except the highlighted portions), A-155, A_156, A-507, B_56 (pages 5 through 16), B_53, B-54, B-111(b) except the highlighted portion, and all of Records A-245, A-250 and A-264 except the highlighted portions, within fifteen (15) days following the date of this order. The highlighted copy of the records has been provided to the Freedom of Information and Protection of Privacy Co-ordinator at the Ministry with a copy 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 records which is disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: _____
John Higgins
Inquiry Officer

April 28, 1994

**APPENDIX A
LISTING OF RECORDS AT ISSUE**

RECORD GROUP NUMBER	RECORD NUMBER(S)	DESCRIPTION	EXEMPTION(S)/ SECTIONS CLAIMED
1	A_10, A_154, A_207 (p.1)	Correspondence and memoranda from lawyers employed by Ministry of the Attorney General (the AG) to Ministry of Health (MOH) employees	19
2	A_100, A_348 (identical to A_376), A_467, A_491, A_546 (p.1&2), A_547 (p.1&3), A_560, A_612, B_25, B_56 (p.1), B_75, B_78, B_79, B_95, B_104, B_105 (identical to B_263), B_236, B_261	Correspondence and memoranda from MOH employees to lawyers employed by the AG	19
3	A_79, A_97 (p.2 to end), A_117, A_216, A_222, A_225 (identical to A-232), A_230, A-444 (identical to A_456), A_511, A_534, A_536 (p.1), A_544, A_546 (p.9), A_547 (p.2), B_182	Correspondence and memoranda between lawyers employed by the AG at Crown Law Office (Civil)/Constitutional Law Branch, and lawyers employed by the AG assigned to MOH	19
4	A-97 (p.1), A_114, A_116, A_132 (identical to A_210), A_137, A_452, A_455, A_545, A_591 (p.1), A_662 (p.1), B-8	Internal correspondence and memoranda between lawyers employed by the AG within Crown Law Office (Civil) and Constitutional Law Branch	19
5	A_110 (identical to A_208), A_122, A_457 (A-510 identical to pages 3 & 4 of A_457)	Correspondence between lawyers employed by the AG and outside counsel retained by the AG/MOH	19
6	A-223, A_224	Correspondence between MOH employees and expert witnesses	19
[IPC Order P	667/April 28, 1994]	[IPC Order P	667/April 28, 1994]

RECORD GROUP NUMBER	RECORD NUMBER(S)	DESCRIPTION	EXEMPTION(S)/ SECTIONS CLAIMED
8	A_57, A_93, A_155, A_156, A_219, A_317, A_318, A_320, A_327, A_330, A_331, A_448, A_451, A_507, B_55, B_56 (p.2 to end), B_65, B_100, B_275, B_276	Notes and research re litigation	19
9	A_81, A_147, A_198, A_207 (p.2 to end), A_279, A_536 (p.2_6), A_546 (p.3_8), A_570, A_662 (p.2_11)	Draft letters, pleadings and affidavits	19
10	A_591 (p.2_6), A_118	Legal opinions	19
11	B_53, B_54	Notes received from Corrections Canada	19
12	A_569, B_111(b)	Letters and materials received from counsel for other parties	19
13	A_339	Memorandum prepared for Associate Administrator, Oak Ridge, re litigation, dated June 18, 1991	65(2)(b), 19
14	A_245, A_250 (identical to A_258), A_264	Transcripts of examinations for discovery	65(2)(b), 21
15	A_321	Ombudsman Ontario Report and Covering Letter dated September 20, 1989	21
16	A_322, A_323, A_326	Correspondence between Ombudsman Ontario and Penetanguishene Mental Health Centre	21