



Information and Privacy
Commissioner/Ontario

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

ORDER P-849

Appeal P-9400465

Ministry of the Attorney General



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant submitted a request to the Ministry of the Attorney General (the Ministry) for access to Crown Attorney and police files pertaining to his son. The files in question relate to charges which had been brought against the son for sexual assault of a child. During the mediation stage of this appeal, the appellant clarified that he was acting as his son's agent for the purposes of this appeal, and provided a signed authorization from his son to that effect.

The Ministry advised the appellant that a request for police files should be made to the appropriate police force and provided an address to which the request should be directed.

The Ministry located 109 pages of records and granted access in part. The Ministry relies on the following exemptions in denying access to the remaining pages:

- advice and recommendations - section 13(1)
- solicitor-client privilege - section 19
- invasion of privacy - section 21(1).

Because it appeared that the records at issue could contain the personal information of the appellant and/or his son, the Commissioner's office also raised the possible application of sections 49(a) and (b) of the Act (discretion to refuse requester's own information and invasion of privacy respectively).

The records at issue consist of the following:

- internal memoranda between the Acting Regional Director and the Assistant Deputy Attorney General, Criminal Law Division (Records 1(a) to 1(e)), and between the Acting Regional Director and an Assistant Crown Attorney (Record 1(f))
- Correspondence from a party with an interest in the proceedings against the appellant's son (Record 2(a)), and correspondence from individuals providing character references for the appellant's son (Records 2(b) to 2(g))
- Ministry routing slips (Records 3(a) and 3(e)).

A Notice of Inquiry was sent to the Ministry, the appellant and the six individuals referred to in Records 2(b) to 2(g) (the affected persons). Representations were received from the Ministry and the appellant only.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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 considered the representations of the parties and have reviewed the records, and I make the following findings:

- Records 1(a) to 1(c), 3(a) and 3(e) contain the personal information of the appellant only.
- Record 1(d) contains the personal information of both the appellant and his son. Record 1(f) contains a reference to an individual which is unrelated to the matter concerning the appellant's son. The balance of the record contains only the personal information of the appellant and his son.
- Record 1(e) contains the personal information of the appellant, his son and another identifiable individual.
- Records 2(a) to 2(g) contain the personal information of the appellant's son and other identifiable individuals. These records do not contain the personal information of the appellant.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Two of the exemptions mentioned in section 49(a) are the advice and recommendations exemption in section 13(1) and the solicitor-client privilege exemption in section 19.

The Ministry claims that both sections 13(1) and 19 apply to Records 1(a) to 1(e), and that section 19 applies to Record 1(f). In the following discussion, I will consider whether the records qualify for exemption under these sections as a preliminary step in determining whether the exemption in section 49(a) applies.

ADVICE AND RECOMMENDATIONS

Section 13(1) of the Act states:

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 submits that the information at issue in Records 1(a) to 1(e), 3(a) and 3(e) meets the requirements as set out in Orders 118 and 142 in that they prescribe a "course of action" to be undertaken by the parties.

It was established in Order 118, and followed in many subsequent orders, that advice and recommendations for the purpose of section 13(1) must contain more than just information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

If it is found that a record falls within the provisions of section 13(1), the mandatory exceptions enumerated under section 13(2) must be considered before determining whether or not disclosure of a record can be refused.

As I indicated above, Records 1(a) to 1(e) are memoranda between senior Ministry legal staff. Records 3(a) and 3(e) are Ministry routing slips. The Ministry has agreed to release part of Records 3(a) and 3(e), but has withheld handwritten notes which appear on each page.

I have carefully considered the Ministry's representations and have reviewed the content of these memoranda and routing slips. In my view, Record 1(e) and the last sentence of the second paragraph of Record 1(b) fall within the exemption provided by section 13(1). I have reviewed the list of mandatory exceptions contained in section 13(2) and find that none of them apply in the circumstances of this appeal.

With respect to Record 1(a), and the remainder of Records 1(b), 1(c), 1(d), 3(a) and 3(e), I find that much of the information is factual in nature, and some of it is directive. Although portions of these records may reflect the views or opinions of the writer, they do not relate to a suggested course of action which will be rejected or accepted as part of the deliberative process. Accordingly, these records do not qualify for exemption under section 13(1).

I have highlighted the portion of Record 1(b) which qualifies for exemption on the copy of this record which will be sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order. The highlighted portion should **not** be disclosed to the appellant.

As I have found that Record 1(e) and the highlighted portion of Record 1(b) qualify for exemption under section 13(1), they are both exempt under section 49(a).

SOLICITOR-CLIENT PRIVILEGE

I will now consider the application of section 19 of the Act to the remaining portions of Record 1(b), and Records 1(a), 1(c), 1(d) and 1(f).

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).

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied.

The Ministry claims that Record 1(f) qualifies for exemption under Branch 2 (litigation privilege), and relies on the first part of Branch 1 and Branch 2 (legal advice) as the basis for claiming this exemption for the remaining records.

Record 1(f)

Record 1(f) is a memorandum from the Acting Regional Director to an Assistant Crown Attorney. The Ministry submits that the memorandum was prepared by Crown Counsel for use in litigation. It states further that the dominant purpose of the record was to address a piece of litigation that was still before the courts.

I have reviewed Record 1(f). In my view, the information contained in it is of an administrative nature only. This is not the type of information that section 19 was intended to exempt. Accordingly, Record 1(f) does not qualify for exemption under section 19.

Records 1(a) to 1(d)

As I indicated above, the Ministry relies on the first part of Branch 1 and Branch 2 (legal advice) to exempt the remaining portions of Record 1(b), and Records 1(a), 1(c) and 1(d).

With respect to the first part of Branch 1, the Ministry states that the records represent confidential written communications between the Regional Director (the client) and the Assistant Deputy Attorney General (the solicitor), directly related to the seeking, formulating or giving of legal advice and that disclosure would reveal this advice or the substance of advice given to the client. Under Branch 2, the Ministry also submits

that, because the Regional Director is a crown counsel, the records have been prepared by or for crown counsel.

Not all documents prepared by legal counsel will qualify for exemption under section 19 of the Act. As claimed by the Ministry, both branches of the exemption contain a "legal advice" component. This term is not defined in the Act but has been interpreted in a number of previous orders. Generally speaking, legal advice will include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. It does not include information given about a matter with legal implications, where there is no recommended course of action, based on legal considerations, and where no legal opinion is expressed.

I have carefully reviewed the information in the records and the representations of the parties. I find that none of the records at issue under this section contain a legal opinion about a legal issue. Rather, the records contain discussions between senior legal staff relating to the manner in which they should respond to the appellant. Accordingly, Records 1(a), 1(c), 1(d) and the remaining portion of 1(b) do not qualify for exemption under section 19.

INVASION OF PRIVACY

As I indicated above, the Ministry claims that section 21 applies to Records 2(a) to 2(g). The Ministry did not claim section 21 for Record 1(f). I have found that Records 1(f) and 2(a) to 2(g) contain the personal information of the appellant's son and other identifiable individuals. None of these records contain the personal information of the appellant. However, as the appellant is acting on his son's behalf in this appeal, my analysis of the records will be done under section 49(b) of the Act.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

In its representations, the Ministry indicates that, during the mediation stage of this appeal, it reviewed again the contents of the correspondence. Where it was possible to sever the personal opinions of the authors

about the appellant's son without identifying the author, this was done and the information was disclosed to the appellant.

The Ministry claims that the remaining information is exempt because it was compiled and is identifiable as part of an investigation of a possible violation of law. Therefore, the Ministry submits, the presumed unjustified invasion of personal privacy found in section 21(3)(b) applies. The Ministry submits further that the information contained in Record 2(a) is highly sensitive and, therefore, the factor in section 21(2)(f) is relevant.

In his representations, the appellant states that sections 21(2)(a) (public scrutiny) and 21(2)(d) (fair determination of rights) are factors which should be considered in balancing his son's right to access to this information. The appellant refers to previous correspondence and documentation which he had sent to the Appeals Officer during the mediation stage of the appeal. This documentation refers generally to the issue of individuals "falsely" accused of child abuse. However, apart from a statement that the above sections should be considered, the appellant did not provide any further information which relates to the particular circumstances of **this case**.

I have considered the representations of the parties and the previous documentation received from the appellant. I have also reviewed Records 2(a) to 2(g) and I make the following findings:

- (1) The presumption in section 21(3)(b) does not apply to the remaining records at issue. Section 1(a)(ii) of the Act states that exemptions from the right of access should be limited and specific. In my view, section 21(3)(b) is limited to records which are compiled and identifiable as part of an **investigation** into a possible violation of law. To expand the scope of section 21(3)(b) to encompass any information which finds its way into the Crown file once the charges have already been laid would enlarge the scope of the section beyond what was intended.

None of these records was elicited or obtained by the Crown or the police, nor do they contain information relating to the substance of the specific complaint. Records 2(b) to 2(g) contain, rather, comments about the appellant's son's character, most of which have already been released to him. Record 2(a) relates to an interested party's concerns and views about individuals other than the appellant's son.

In my view, these are not the types of documents which are intended to be caught within section 21(3)(b). Accordingly, the presumption in section 21(3)(b) does not apply to these records.

- (2) I have independently reviewed Records 2(b) to 2(g) however, and I find that the name, address and any information which would enable anyone to identify the authors is highly sensitive within the meaning of section 21(2)(f), and I find this section to be a relevant consideration.
- (3) I have also independently reviewed Record 1(f). The record contains one reference to another individual in the context of that person's trial. In my view, information relating to the prosecution of

an individual is highly sensitive within the meaning of section 21(2)(f), and I find this section to be a relevant consideration with respect to the name of this individual.

- (4) The information contained in Record 2(a) refers only peripherally to the appellant's son. As I indicated above, the primary content of the letter refers to other individuals and, in my view, is of a very sensitive nature. I am, therefore, satisfied that section 21(2)(f) is a relevant consideration with respect to this record.
- (5) The appellant has provided insufficient evidence for me to determine whether sections 21(2)(a) and/or (e) are relevant considerations in the circumstances of this appeal.

In summary, I find that the factor in section 21(2)(f), which favours non-disclosure, is a relevant consideration with respect to Record 2(a), the name of the individual identified in Record 1(f), and the portions of Records 2(b) to 2(g) which remain at issue. As no factors favouring disclosure have been established with respect to this information, I find that its disclosure would be an unjustified invasion of personal privacy, and it is exempt under section 49(b).

I have highlighted the portion of Record 1(f) which contains a reference to an individual other than the appellant's son on the copy of this record which will be sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order. The highlighted portion should **not** be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose the following records to the appellant within fifteen (15) days after the date of this order: Records 1(a), 1(c), 1(d), 3(a) and 3(e), and the parts of Records 1(b) and 1(f) which are **not** highlighted on the copy of these records which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I uphold the Ministry's decision to withhold the remaining records and parts of records.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ January 30, 1995