



Information and Privacy
Commissioner/Ontario

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

ORDER P-827

Appeal P-9400326

Ministry of Consumer and Commercial Relations



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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 Ministry of Consumer and Commercial Relations (the Ministry) received a four-part request for access to all information in the custody of the Ontario Racing Commission (the ORC) relating to the requester and to a specific racing incident. Partial access to the records was granted. The requester appealed the decision to deny access to the remaining records.

The records at issue and the exemptions claimed for each record are set out in Appendix "A" to this order. The records consist of letters and memoranda prepared by legal counsel for the ORC and relate to proposed amendments to legislation and other matters arising from the incident.

The Ministry relies on the following exemptions to deny access to the records:

- advice or recommendations - section 13(1)
- solicitor-client privilege - section 19

A Notice of Inquiry was sent to the appellant and the Ministry. Because the records for which sections 13(1) and 19 of the Act have been claimed may contain the appellant's personal information, the parties were invited to make submissions on the relevance of section 49(a) of the Act. Representations were received from both parties.

PRELIMINARY MATTERS

In its submissions, the Ministry advised that it was withdrawing the application of sections 13(1) and 19 of the Act to Records 9, 13 and 15. I have reviewed these records and since no mandatory exemptions apply, I am ordering that they be disclosed to the appellant. In addition, the Ministry also withdrew the application of section 13(1) to Record 17 and section 19 to Record 18. Therefore, Records 17 and 18 will be discussed below only with regard to the application of sections 19 and 13(1) respectively.

In his representations, the appellant makes reference to the attachments referred to in Records 3, 4 and 5, previously disclosed to him by the Ministry. Because these attachments were not included in the records disclosed to him, the appellant believes that more records should exist. The Ministry advised that it contacted the ORC and received confirmation that all the records responsive to the request have been forwarded to the Ministry.

In response to the issue raised by the appellant, the Ministry states that it believes that Record 6, which consists of a memorandum and a recommendation, may be the attachment referred to in Records 3, 4 and 5.

I have reviewed the records previously disclosed to the appellant and the records that remain at issue. Record 6 is a memorandum dated August 13, 1991 with a recommendation attached to it. It is the only record where the date matches or is close to the dates in Records 3, 4 and 5.

In my view, it is highly likely that Record 6 is the attachment referred to in Records 3, 4 and 5. Record 6 is included in the records which remain at issue and which I will consider in this appeal.

The appellant also makes reference to a letter dated April 19, 1990 from the ORC, referred to in a letter dated May 2, 1990 from the Ombudsman, the latter being previously disclosed to him. Record 9 is a letter dated April 19, 1990 from the ORC. As I have noted above, the Ministry has withdrawn the exemptions from this record and I am ordering it to be disclosed.

I have reviewed the evidence before me and I am satisfied that the Ministry's search for records responsive to the request was reasonable in the circumstances of this appeal.

DISCUSSION:

I will first consider the application of section 19 to Records 1, 6, 7, 8, 10 and 17.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that section 19 of the Act applies to exempt Records 1, 6, 7, 8, 10 and 17 from disclosure. 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.

In its representations, the Ministry indicates that it is relying on the first part of Branch 1 and on Branch 2 as the bases for claiming this exemption. With respect to the first part of Branch 1, the Ministry states that the records represent confidential written communication between a solicitor and a client or its agent, 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 a client. The Ministry submits that even though the bulk of the records are from Crown counsel to the Director of Legal Services, they represent communication between the agent for the client and a legal advisor and are confidential.

The Ministry asserts that the records also qualify for exemption under Branch 2 because the records were prepared by Crown counsel, relate to proposed amendments to legislation and/or to the specific incident and contain advice based on legal analyses.

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.

I have carefully reviewed the information in the records and the representations of the parties. I make the following findings:

Branch 1

I find that Record 17 meets all the requirements of Branch 1 and qualifies for exemption under section 19 of the Act.

Branch 2

I find that Records 1, 6, 7, 8 and 10 were prepared by Crown counsel for the purpose of giving, seeking or formulating legal advice. I find that Records 6, 7 and 8 in their entirety and parts of Records 1 and 10 satisfy the requirements of Branch 2 and qualify for exemption under section 19 of the Act.

I have highlighted those portions of Records 1 and 10 which qualify for exemption under section 19 on the copy of the record which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

I will now consider the application of section 13(1) of the Act to the remaining portions of Records 1 and 10.

ADVICE OR RECOMMENDATIONS

Section 13(1) of the Act states that:

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.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the
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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.

The Ministry submits that Records 1 and 10 contain advice and recommendations from a civil servant and that disclosure of the information in the records would reveal the substance of deliberations in the deliberative process. I have carefully reviewed the remaining portions of Records 1 and 10 and find that they contain factual information. In my view, this information does not qualify for exemption under section 13(1) of the Act.

Record 16 is a draft letter to counsel for the appellant and Record 18 is a draft letter to the appellant. The Ministry submits that drafts are a form of recommendation and, therefore, section 13(1) should apply to the records. There is nothing on the face of the records to indicate who prepared the draft letters, for whom and what, if any, changes were made in the final versions. In my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. Further, my review of the information in the records does not reveal a suggested course of action which will ultimately be accepted or rejected. Section 13(1) of the Act was not intended to protect these types of records and does not apply to Records 16 and 18.

I find that section 13(1) of the Act does not apply. Records 16, 18 and the remaining portions of Records 1 and 10 should be disclosed to the appellant.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

As discussed above, I found that Records 6, 7, 8 and 17 in their entirety and parts of Records 1 and 10 qualify for exemption under section 19 of the Act.

Under section 2(1) of the Act, "personal information is defined, in part, to mean recorded information about an identifiable individual, including 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.

The records which I have found to qualify for exemption under section 19 all 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.

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, including section 19, would otherwise apply to that information.

Accordingly, I find that Records 6, 7, 8 and 17 in their entirety and the highlighted portions of Records 1 and 10 are exempt under section 49(a).

PUBLIC INTEREST IN DISCLOSURE

The appellant claims that section 23 of the Act applies in that there is a public interest in disclosure of the information in the records. The public interest consideration in section 23 of the Act is only available to override those exemptions specifically referred to in that provision.

I have found that section 13(1) does not apply to the records. I have found that section 19 applies to exempt Records 6, 7, 8 and 17 and parts of Records 1 and 10 from disclosure. However, section 19 is not included in the exemptions listed in section 23. Therefore, I am precluded from considering whether section 23 might apply to the records.

ORDER:

1. I uphold the decision of the Ministry to deny access to Records 6, 7, 8 and 17 in their entirety and to those parts of Records 1 and 10 which are highlighted on the copy of the records which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose to the appellant Records 9, 13, 15, 16 and 18 and those portions of Records 1 and 10 which are **not** highlighted on the copy of the records provided to the Freedom of Information and Privacy Co-ordinator within fifteen (15) days of the date of this order.
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 2.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ December 30, 1994

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED
1	Letter dated September 24, 1991 from Legal Counsel to Director of Legal Services	19, 13(1)
6	Memorandum dated August 13, 1991 from Legal Counsel to Director of Legal Services	19, 13(1)
7	Memorandum dated March 26, 1991 from Legal Counsel to Director of Legal Services	19, 13(1)
8	Memorandum dated March 26, 1991 from Legal Counsel to Director of Legal Services	19, 13(1)
9	Letter dated April 19, 1990 from Legal Counsel to Ombudsman	19, 13(1) Exemptions withdrawn
10	Letter dated February 19, 1991 from Legal Counsel to Director of Legal Services	19, 13(1)
13	Memorandum dated February 14, 1989 from Legal Counsel to the Director of the ORC	19 Exemption withdrawn
15	Letter dated August 11, 1988 from the Director of the ORC to the Attorney General	13(1) Exemption withdrawn
16	Draft Letter dated November 5, 1986	13(1)
17	Memorandum dated March 19, 1990 from Legal Counsel to the Director of the ORC	19 13(1) withdrawn
18	Draft letter dated February 8, 1990 to appellant	13(1) 19 withdrawn