



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

ORDER P-998

Appeal P-9500087

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 Ministry of the Attorney General (the Ministry) received a request for copies of information which is held in the Attorney General's office pertaining to two named individuals.

The Ministry located 37 records (comprising a total of 78 pages) and denied access to them pursuant to the following exemptions:

- advice and recommendations - section 13(1) (Records 1, 4, 6 and 37)
- law enforcement - section 14(1)(a) (Record 6)
- right to a fair trial - section 14(1)(f) (Record 6)
- solicitor-client privilege - section 19 (Records 6 and 37)
- invasion of privacy - section 21(1) (Records 3, 8 - 11, 13 - 30 and 32 - 36)
- information published or available - section 22(a) (Records 2, 5, 7, 12 and 31)

The index prepared by the Ministry and provided to this office with a copy of the records identified the records by page number, which the Ministry then grouped into documents (i.e. pages 3 - 6 were grouped together in the index to indicate that the particular document consisted of four pages). For ease of reference, I have assigned record numbers to each document (i.e. pages 3 - 6 constitute Record 3). Although I will refer primarily to record numbers in this order, where appropriate, I will also identify the particular page to which the discussion is directed. A brief description of the records at issue is provided at the end of this section.

During mediation, the appellant agreed to exclude Records 1, 2, 7, 12 and 31, which consist of newspaper articles, from the list of records at issue. In addition, the Ministry issued a revised decision letter to the appellant in which it indicated that Records 5 and 6 are subject to a publication ban and are, therefore, excluded from the scope of the Act. In the alternative, the Ministry claimed that sections 14(1)(a) and (f) also apply to Record 5. The appellant did not object to the removal of Records 5 and 6 from the list of records at issue in this appeal and, accordingly, I will not consider them further in this order.

A Notice of Inquiry was provided to the Ministry, the appellant and the authors of the letters (the affected parties). Representations were received from the Ministry and 10 affected parties, four of whom consented to the disclosure of the contents of their letters. One affected party consented to the disclosure of her letter including her personal information. In its representations, the Ministry indicated that it has decided to release Record 4 (a news release dated September 20, 1993). This record is, therefore, no longer at issue in this appeal, and should be disclosed to the appellant.

In summary, Records 1, 2, 4, 5, 6, 7, 12 and 31 are no longer at issue in this appeal. As a result, sections 14(1)(a) and (f) and section 22(a) are no longer at issue since they have been applied to these records only.

RECORDS AT ISSUE

Four of the records at issue consist of Minister's correspondence routing slips (Record 3, the first page of Records 8 and 16 (pages 15 and 27 of the Ministry's index respectively)), and an excerpt from a book with a handwritten note on the front page (Record 37). The remaining records, including the remaining pages of Records 8 and 16, consist of 28 letters to a former Attorney General (the Attorney General) from concerned citizens.

DISCUSSION:

PERSONAL INFORMATION

The Ministry claims that, with the exception of Record 37, all the records at issue contain the personal information of individuals other than the appellant.

Under section 2(1) of the Act, "personal information" is defined, in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

...

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

(e) the personal opinions or views of the individual except where they relate to another 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;

I have reviewed the records, and I find as follows:

1. The letters which were addressed to the Attorney General (Records 8 (pages 16 - 17), 9 - 11, 13 - 15, 16 (pages 28 - 29), 17 - 30 and 32 - 36) contain the authors' names and addresses and in some cases, telephone numbers. Some letters also contain other personal information of the authors. Portions of these letters contain the personal views and opinions of the authors about the justice system generally, and these qualify as their personal information.

2. Many of the letters also contain the views and opinions of the authors about other identifiable individuals. This information constitutes the personal information of the individuals referred to and does not qualify as the personal information of the authors.
3. The routing slips (Record 3 and the first page of Records 8 and 16) contain the names of the authors of the letters to which the routing slips have been attached, and these constitute their personal information.
4. The remaining portions of the routing slips do not contain personal information, and as no other exemptions have been claimed for them, this information should be disclosed to the appellant.
5. None of the records contain the personal information of the appellant.

INVASION OF PRIVACY

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. The only exceptions to the mandatory exemption which may apply in the circumstances of this appeal are sections 21(1)(a) and (f), which read as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

The effect of section 21(1)(f) is that the section 21(1) exemption will not apply if disclosure of the personal information would not be an unjustified invasion of another individual's personal privacy.

Section 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy.

In its representations, the Ministry indicates generally that disclosure of the records would constitute an unjustified invasion of personal privacy.

The appellant has not submitted representations outlining any factors which favour the disclosure of the personal information in the circumstances of this appeal.

As I indicated above, of the 10 affected parties who submitted representations, four consented to the disclosure of the contents of their letters only (Records 14, 16, 30 and 33). This consent did not extend to disclosure of their identities. One affected party consented to the disclosure of her letter and her personal information (Record 35). I have found that these five records also contain the personal information of individuals who did not consent to disclosure. The consent of the affected parties under section 21(1)(a), therefore, cannot apply to the portions of these records which pertain to individuals who did not consent, and this information must be analyzed under sections 21(2), (3) and (4). I will refer to this issue below in my findings regarding section 21.

Three affected parties objected to the disclosure of their letters. The representations of these three affected parties focused on the disclosure of their identities and on the fact that they did not know the identity of the requester.

Having reviewed the records and the representations of all the parties, I find as follows:

1. In the absence of any relevant considerations favouring disclosure, I find that disclosure of the names, addresses, telephone numbers and other personal information of the authors of these letters (except Record 35) would constitute an unjustified invasion of their personal privacy. Accordingly, section 21 applies to exempt disclosure of the personal information of the authors contained in Records 8 - 11, 13, 15, 17 - 29, 31, 32, 34 and 36, as well as the names, addresses and telephone numbers of the authors of Records 14, 16, 30 and 33). I have highlighted this information in yellow, on the copy of the records which will be sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. In the circumstances of this appeal, it is possible to separate the names, addresses and telephone numbers of the authors as well as other personal information pertaining directly to them from their views and opinions regarding the justice system generally, and about the individuals referred to in particular. Once this former category of information is removed, nothing remains in the letters which would identify the authors. Accordingly, disclosure of the remaining information would not constitute an unjustified invasion of their personal privacy.
3. Much of the information in the portions of the records which has not been highlighted, pertaining to individuals other than the authors, is provided in the context of the trial of one of these individuals, a matter which has received wide media attention. This information primarily reflects the authors' views of this trial and the sentencing of the individual. Some references are also made to individuals who have been identified in the media in relation to other criminal matters. I find that because of the public nature of the events which have transpired, the individuals referred to in the letters must have a lesser expectation of personal privacy with respect to these events. Accordingly, I find that, in the circumstances of this appeal, disclosure of the views and opinions of the authors about the individuals referred to in the letters would not constitute an unjustified invasion of their personal privacy.

4. I have found that, with the exception of the information which has been highlighted on the copy of the records which will be sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order, the disclosure of the remaining information would not constitute an unjustified invasion of personal privacy. As no other exemptions have been claimed for these portions of the records they should be disclosed to the appellant.
5. The author of Record 35 (pages 64 - 65) has consented to the release of the entire document including her personal information. Accordingly, this record should be disclosed to the appellant in its entirety pursuant to section 21(1)(a) of the Act. The authors of Records 14, 16, 30 and 33 consented to the disclosure of the contents of their letters, including their personal information other than that which would identify them. Accordingly, the portions of these records which have not been highlighted should also be disclosed to the appellant pursuant to section 21(1)(a) of the Act.

ADVICE AND RECOMMENDATIONS

The Ministry claims that section 13(1) applies to exempt Record 37 from disclosure. As I indicated above, this record consists of an excerpt from a book. On the bottom of the first page, the Assistant Deputy Attorney General has written a note which, in essence, refers the article to the Attorney General's attention.

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.

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.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of the exemption in section 13(1) of the Act. He stated that "this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making."

The Ministry submits that the terms "advice" and "recommendations" must be considered to have separate and distinct meanings. It suggests that "recommendations" be defined as the "submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process". "Advice", it submits, must encompass information provided to a decision maker to assist him or her in deciding on the proper course of action to take. The Ministry states that this interpretation is consistent with the general purpose of the section 13 exemption as set out in Order 94 (which I have referred to above).

In accordance with the rules of statutory interpretation, I accept that the use of both terms in the same provision would indicate that separate and distinct meanings should be given to each term. I also agree that "advice" would appear to encompass a broader class of information than "recommendations", which in my view, directly relates to the submission of a specific course of action. However, whether the information is a recommendation suggesting a particular course of action, or whether it is in the nature of advising a decision-maker in a more general sense, on an issue, it must relate to a suggested course of action under consideration which a decision-maker may accept or reject during the deliberative process.

The Ministry suggests that the record contains confidential advice to the Attorney General regarding matters to be considered by her in her legal role in a particular type of proceeding and to generally assist her in making decisions in that regard.

In reviewing the excerpt I find that, although this record may have been submitted to the Attorney General, it was provided for informational purposes only. Moreover, although the contents of the record may be relevant to the Attorney General's role, it does not refer in any way to a suggested course of action which may be rejected or accepted as part of the deliberative process. Accordingly, this record does not qualify for exemption under section 13(1).

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that section 19 also applies to exempt Record 37 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).

For a record to qualify for exemption under the first branch of the solicitor-client privilege, the following four criteria must be satisfied:

1. there must be a written or oral communication;
2. the communication must be of a confidential nature;
3. the communication must be between a client and a legal adviser; and
4. the communication must be directly related to seeking, formulating or giving legal advice.

OR

5. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

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 submits that Record 37 qualifies for exemption under both branches of section 19, because the record was prepared by the Assistant Deputy Attorney General in his capacity as a senior Crown counsel and legal advisor. Furthermore, the Ministry states that the record was prepared for use in giving legal advice to the Attorney General regarding her legal role in a particular type of proceeding, and thus, in contemplation of litigation. The Ministry bases its arguments on the fact that a senior legal advisor to the Attorney General chose to provide a particular article to the Attorney General for her consideration.

The general principles as outlined in section 1 of the Act provide, in part:

The purposes of this Act are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,
 - (ii) **necessary exemptions from the right of access should be limited and specific,** and
 - (iii) decisions on the disclosure of government information should be reviewed independently of government; [emphasis added]

...

In my view, the Ministry has taken an overly broad interpretation of the exemption in section 19. The mere fact that a particular type of issue has arisen which the Attorney General will ultimately have to decide on does not automatically make any communication from her legal advisors regarding this issue qualify as legal advice.

With respect to the first branch of section 19, I find that the handwritten note on the first page of the record constitutes a written communication between a client and a legal advisor. However, I am not satisfied that this communication is of a confidential nature, nor do I find that it is directly related to the seeking, formulating and giving of legal advice. Accordingly, it does not qualify for exemption under the first branch of section 19.

Similarly, with respect to the second branch of section 19, I find that the Ministry has not tendered any evidence in support of its position that the document was "prepared for use in giving legal advice". On the contrary, as I indicated above, the notations on the first page of the record indicate that the excerpt was sent to the Attorney General for informational purposes only. I find, therefore, that it does not qualify for exemption under the second branch of section 19.

As no other exemptions have been claimed for Record 37, it should be disclosed to the appellant.

ORDER:

1. I uphold the Ministry's decision to deny access to the portions of Records 3, 8 - 11, 13 - 30 and 32 - 36 which have been highlighted in yellow on the copy of these records provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order. The highlighted portions of the records should not be disclosed.
2. I order the Ministry to disclose to the appellant the remaining portions of these records, and Records 4, 35 and 37 in their entirety, within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day following 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 copies of the records disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Laurel Cropley
Inquiry Officer

September 12, 1995