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

ORDER P-1115

Appeal P-9500464

Ministry of the Attorney General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the complete contents of a specified file with the Official Guardian as well as any records created by a named individual or his staff in the Official Guardian's office which mention the requester. The request went on to exclude any correspondence with the requester or his counsel and any records which pertain solely to the children of his first marriage. The Official Guardian, now known as the Children's Lawyer, was appointed by an Order of the Ontario Court (Provincial Division) to represent the interests of the requester's six year old son in a custody and access proceeding involving the requester and his second wife. As is the practice in such proceedings, counsel for the child was selected from a panel of lawyers and is acting as agent for the Children's Lawyer.

The Ministry located over 1000 pages of responsive records and granted access to 709 pages in their entirety, as well as portions of two other pages. The Ministry denied access to the remaining records relying on the following exemptions contained in the Act:

- advice or recommendations - section 13(1)
- solicitor-client privilege - section 19
- invasion of privacy - sections 21 and 49(b)
- discretion to refuse requester's own information - section 49(a)

The requester appealed the Ministry's decision to deny access and submitted that the decision letter provided to him was deficient in that it failed to delineate which records were not being disclosed and the statutory justification for doing so. The appellant also expressed his concern that the individual who made the decision to deny access is biased against him. Finally, the appellant argues that additional records responsive to his request exist.

A Notice of Inquiry was sent by the Appeals Officer to the appellant, the Ministry and to seven individuals whose rights may be affected by the disclosure of the information contained in the records. Representations were received from the Ministry, the appellant and four of the affected persons, all of whom consented to the disclosure of their personal information to the appellant.

PRELIMINARY ISSUES:

RESPONSIVENESS OF RECORDS

The appellant specifically excluded from the scope of his original request any records which pertain solely to the children of his first marriage as well as any correspondence directly addressed to himself or his counsel. I have reviewed the documents at issue and have determined that Records 233-236, 237-238, 251 and 971-972 relate to subject matter expressly excluded from the request by the appellant. For this reason, these records are not responsive to the request and should not be disclosed.

IS THERE A REASONABLE APPREHENSION OF BIAS?

In his letter of appeal and in later communications with the Appeals Officer, the appellant indicates that, in his view, the individual who made the decision to deny him access to the records at issue in this appeal is biased against him. The decision-maker in this matter was the Children's Lawyer.

The Ministry submits that the Children's Lawyer has received a delegation by the Ministry to make all decisions under the Act in relation to records within the office of the Children's Lawyer. All such decisions made by the Children's Lawyer are reviewed by the Ministry's Freedom of Information and Privacy Co-ordinator. The Deputy Attorney General has the ultimate decision-making power under the Act should a disagreement occur between the Co-ordinator and the Children's Lawyer.

The Ministry submits that the Commissioner or his delegate do not have the power to review a decision on the basis of bias. It argues that the Commissioner's power is restricted to determining whether or not the records under consideration fall within the exemptions set out in the Act. I disagree with this position. Inherent in the powers granted to the Commissioner, as well as his delegates, is the power to determine questions of bias. The Commissioner's office, in its capacity as an administrative tribunal with certain legislative functions, is required to ensure that the rules of natural justice govern the access to information regime in Ontario. As such, I find that I am acting within my jurisdiction in reviewing and making a determination as to an allegation of bias on the part of a decision maker under the Act.

I have reviewed the records and the submissions of the Ministry on this issue and make the following findings:

1. Many of the records which were disclosed to the appellant were written by or concerned actions taken by the Children's Lawyer.

2. The appellant has failed to provide any evidence of either actual or perceived bias on the part of the Children's Lawyer.

3. The Children's Lawyer has no pecuniary or other interest in the proceedings involving the appellant and does not have any personal or special interest in the records.

For these reasons, I find that there does not exist a reasonable apprehension of bias on the part of the Children's Lawyer.

WAS THERE A PROPER DECISION LETTER?

In his letter of appeal, the appellant submits that:

> I cannot be expected to offer proper response to these two matters [the two requests which form the basis for this appeal] until I receive clarification as to the number of pages being withheld and the justifications claimed for so doing in relation to each individual file.

The decision letter refers to the fact that approximately 280 pages have been withheld in their entirety along with portions of two other pages. It also sets out the exemptions which have been claimed, without specifying which exemption applies to which record. Section 29(1)(b) of the Act sets out the information which is to be included in a notice of refusal to give access where responsive records exist. Section 29(1)(b)(i) and (ii) require that the decision letter indicate the specific provision of the Act under which access is refused and the reason the provision applies to the record.

In my view, the decision letter was deficient in that it failed to describe in sufficient detail the relation between the record and the exemption claimed. A requester is entitled to be provided with sufficient information to enable him or her to make an informed decision as to whether or not to appeal the decision to the Commissioner's office. I find that in the circumstances of this appeal, the Ministry's decision letter was not sufficiently detailed to meet the requirements of section 29(1)(b)(i) and (ii). Had the appellant received an index of the records at issue as well as the exemptions claimed for each, the requirements of the section would have been properly met.

However, it is not necessary for me to remedy by order the deficiencies in the decision letter. I will proceed to render my decision on the application of the exemptions to the records at issue.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 2(1) of the Act, personal information is defined, in part, to mean recorded information about an identifiable individual. I have reviewed each of the records at issue and find that, except as set out below, all of them contain the personal information of the appellant and other identifiable individuals. The undisclosed portions of Records 153 and 244 and Records 290, 291, 292, 320, 324, 326, 327, 844, 845, 924, 925 and 932 do not contain the personal information of any identifiable individuals. Records 62, 822-826(b) and 843 contain the personal information only of individuals other than the appellant. Record 933 is illegible and I am unable to determine whether it contains any personal information. As I cannot determine whether the information contained in Record 933 is exempt, and the Ministry has not provided any representations in regard to it, it should be disclosed to 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 sections 13 and 19, would otherwise apply to that information.

In order to determine whether the exemption provided by section 49(a) applies to the records, I will begin by considering the Ministry's claim that the records qualify for exemption under sections 13 and 19, which are referred to in section 49(a).

SOLICITOR AND CLIENT PRIVILEGE

Section 19 of the Act reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 consists of two branches, which provide the Ministry with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Ministry submits that the time dockets of the agent for the Children's Lawyer which comprise Records 433-437 and a letter which the agent submitted to the Children's Lawyer regarding his account (Records 290, 292 and 293) are subject to the solicitor client privilege in Branch 1.

Following my review of these records, I find that they are written communications of a confidential nature between a client (the appellant's son) or his agent (the Children's Lawyer) and a legal advisor (the panel lawyer). In addition, I find that their contents relate to the seeking, formulating and provision of legal advice. Finally, I find that the disclosure of the information contained in these records would reveal the strategies employed by the agent as well as the particulars of the legal advice provided by him to the Children's Lawyer on behalf of the client, the appellant's young son. Records 290, 292, 293 and 433-437 satisfy the requirements of Branch 1 of the section 19 exemption and are, therefore, exempt under section 49(a).
The Ministry indicates that it is relying on Branch 2 of the section 19 exemption for the following records:

> the severed portions of Records 153 and 244, and Records 2, 4, 62, 68-72, 107, 111, 112, 113-116, 123 &123(a), 130, 163, 189, 192-195, 201-208, 209-211(a), 212, 213 & 214, 219-225, 231-236, 237 & 238, 244, 245-247, 248-255, 259-272, 273 & 274, 274(a), 275, 283-289, 301-303, 312, 313-316, 319 & 320, 321 & 322, 324, 326 & 327, 388 & 389, 393-394(a), 395-432, 438, 701-736, 751-753, 843, 844 & 845, 854, 855-857, 858 & 859, 868, 872 & 873, 887, 892, 924 & 925, 932, 940-942, 947 & 948, 949-951, 952-954, 962-964, 970, 973, 981, 985 and 994-1008.

For a record to qualify for exemption under Branch 2, the Ministry must establish that the document was prepared by or for Crown counsel, and the document must have been prepared (1) for use in giving legal advice, or (2) in contemplation of litigation, or (3) for use in litigation.

The Ministry submits that each record was prepared by Crown counsel, either staff at the office of the Children's Lawyer or the agent for the Children's Lawyer retained to represent the interests of the appellant's son in the custody and access proceedings involving the appellant and

his wife. It states that the dominant purpose of the creation of the records was the conduct of the litigation on behalf of the child. These records consist of various correspondence, notes of telephone conversations, interview notes and other records which passed between the agent and the office of the Children's Lawyer, counsel for the appellant and counsel for the appellant's wife during the course of the custody and access litigation.

The Ministry also suggests that intra-office correspondence and briefing notes created by the office of the Children's Lawyer are also exempt from disclosure under Branch 2 of the section 19 exemption. I cannot agree with this argument. I find that these records were not prepared for use in giving legal advice or in contemplation of or for use in litigation. Rather, they represent the response taken by the Children's Lawyer to various allegations and complaints made by the appellant pertaining to the representation provided on behalf of his son by the agent and the Children's Lawyer. I will deal with these records in more detail in my discussion of section 13(1) of the Act.

Having reviewed the records and considered the submissions of the parties, I accept the submissions of the Ministry with regard to the majority of the records listed above. I find the following records qualify for exemption under Branch 2 of the section 19 exemption as they were prepared by or for Crown counsel (either the agent or the Children's Lawyer's office) for use in giving legal advice or in litigation:

> the severed portions of Records 153 and 244, as well as Records 4, 62 (which is the same as Record 868), 68-72, 107, 111, 112, 113, 130, 163, 189, 192-195, 209-211 (which is the same as Records 245-247), 211(a) (which is the same as Record 214), 273-274(a), 285, 286, 289, 301-303 (which were dealt with in Order P-1075), 312, 313-316, 319, 321 & 322, 324, 326 & 327, 395-432, 701-736, 752, 858 and 859, 872 and 873, 887 (which is the same as Record 892), 924, 932, 940-942, 947 and 948, 948-951, 952-954, 962-964, 970, 973, 981 and 985.

As I have found that these records satisfy the requirements of section 19, they are, accordingly, exempt from disclosure under section 49(a).

ADVICE OR RECOMMENDATIONS

The Ministry claims that Records 123 & 123(a) (which are the same as Records 166 & 167), 145 & 146, 164-179, 183-185, 201-208, 212, 219-225, 231 and 232 and 239 & 240 qualify for exemption from disclosure under section 13(1) of the Act and are, therefore, exempt under section 49(a). These records consist of internal Ministry correspondence in the form of memoranda, draft letters and briefing notes prepared by Ministry staff in response to complaints initiated by the appellant.

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 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.

A number of previous orders of the Commissioner's office have considered the possible application of section 13(1) to briefing notes (Orders P-771 and P-946). In Order P-771, Assistant Commissioner Irwin Glasberg found that the contents of the response sections of briefing notes in that appeal were purely factual in nature and did not contain information relating to a suggested course of action which might be accepted or rejected as part of the deliberative process. He concluded that the exemption in section 13(1) was not applicable to information of this sort.

I have reviewed the contents of the briefing notes (Records 123 & 123(a), 166 & 167, 176 & 177, 202, 207 & 208, 220 & 221 and 231& 232) and find that the portions entitled "Recommended Attorney General Response" contain information relating to a suggested course of action which might be accepted or rejected as part of the deliberative process. The remaining portions in which the background of the complaints by the appellant are described do not contain advice or recommendations within the meaning of section 13(1) and do not, accordingly, qualify for exemption under the section.

The remaining pages (Records 145, 146, 164, 165, 168, 169 & 170, 171 & 172, 173-175, 178 & 179, 183-185, 201, 203 & 204, 205 & 206, 212, 219, 222 & 223, 224, 225 and 239 & 240) consist of communications between civil servants, draft letters for the signature of the Attorney General and Acting Assistant Attorney General and memoranda relating to the proposed responses to be made by the Ministry to the appellant's complaints.

Records 145, 164, 168, 171, 173, 179, 183, 184, 185, 201, 203, 205, 206, 219, 224, 225 and 240 consist of FAX cover pages, routing slips and covering memoranda which do not contain advice or recommendations within the meaning of section 13(1). These documents are not, accordingly, exempt from disclosure under section 49(a).

I find that Records 146, 165, 169 & 170, 172, 174 & 175, 178, 204, 212, 222 & 223 and 239 contain information relating to suggested courses of conduct from one civil servant to another which will either be accepted or rejected by the recipient. I specifically find that these records, as well as those portions of the briefing notes which contain recommended courses of action, fall within the mandate of the child protection and representation function of the office of the Children's Lawyer. The allegations by the appellant which are being addressed in these records pertain to the actual business of the agency. As such, they qualify for exemption under section 13(1) and are, therefore, exempt under section 49(a) of the Act.

INVASION OF PRIVACY

As noted above, 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(b) provides another exception to this general right of access.

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 the other individuals' personal privacy, the Ministry has the discretion to deny the appellant access to that information. In this situation, the appellant is not required to prove that the disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the appellant 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 demonstrated that the disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

When, however, the records contain only the personal information of other individuals, section 21(1) prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

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 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) of 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 which are relevant in the circumstances of the case.

PERSONAL INFORMATION OF INDIVIDUALS OTHER THAN THE APPELLANT

I found above that Records 822-826(b) and 843 contain only the personal information of individuals other than the appellant. Record 843 gives the name and telephone number of one of the affected persons who has provided his consent to its disclosure. Accordingly, I find that, pursuant to section 21(1)(a) of the Act, it ought to be disclosed to the appellant. The information contained in Records 822-826(b) pertains to the qualifications and experience of certain individuals who were considered for the undertaking of a court-ordered assessment.

I have not been provided with any factors weighing in favour of the disclosure of this information. Accordingly, I find that the disclosure of the personal information contained in Records 822-826(b) would constitute an unjustified invasion of personal privacy and is exempt under section 21(1) of the Act.

PERSONAL INFORMATION OF THE APPELLANT AND OTHER INDIVIDUALS

The Ministry submits that the disclosure of the information contained in Records 248, 249 & 250, 252, 253, 254, 255, 259, 260 & 261, 262-272, 275, 283, 287, 288, 388, 389, 438, 393 & 394 (which is the same as Records 856 & 857), 394(a), 854, 855 and 994-1008 would constitute an

unjustified invasion of personal privacy. I have found above that all of these records, which consist of notes taken during telephone conversations between various civil servants and the appellant, a large number of telephone messages and correspondence between the Ministry and counsel for the appellant's son relating to his request under the Act, contain the personal information of the appellant and other identifiable individuals.

The Ministry submits that the information is highly sensitive (section 21(2)(f)) and was submitted in confidence (section 21(2)(h)) as factors weighing against the disclosure of the information contained in these records. By inference, the appellant has raised the application of section 21(2)(a) (public scrutiny) and section 23 (public interest override).

I have reviewed the records at issue and the representations of the parties with regard to the relevance and weight to be placed on the factors favouring disclosure and the protection of privacy. Much of the information in these records was supplied by the appellant and documents his views about the actions of the agent and the office of the Children's Lawyer in the conduct of the representation afforded to his son.

I find that portions of the information contained in Records 393 & 394, 854, 856 & 857, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1006, 1007 and 1008 are "highly sensitive" within the meaning of section 21(2)(f). I have not been provided with any evidence that the information was submitted in confidence and I find, accordingly, that this factor is of little probative value when assessing the weight to be given to it.

Similarly, the appellant has not referred with any degree of specificity to his allegations that the disclosure of these records is desirable for the purpose of subjecting the activities of the Government of Ontario to public scrutiny. Again, I am unable to place any significant weight on this consideration when balancing the competing interests of privacy protection and the appellant's right to disclosure.

Having balanced the competing interests of the appellant's right to disclosure of information against the privacy rights of other individuals, I find that the disclosure of those portions of these records which contain information which is "highly sensitive" would constitute an unjustified invasion of the personal privacy of individuals other than the appellant and that they are, accordingly, exempt under section 49(b). I have provided the Ministry's Freedom of Information and Privacy Co-ordinator with copies of Records 393 & 394, 854, 856 & 857, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1006, 1007 and 1008 in which I have highlighted those portions which are exempt under section 49(b) and which should **not** be disclosed to the appellant.

PUBLIC INTEREST IN DISCLOSURE

I specifically reject the appellant's contention that there exists a compelling public interest in the disclosure of the records at issue in this appeal. The appellant is seeking access to records which relate to the conduct of counsel appointed by the office of the Children's Lawyer in a private custody and access proceeding involving his wife and himself. I cannot agree that there exists a public interest, let alone a compelling public interest, in the disclosure of these records which would clearly outweigh the purpose of the exemption.

REASONABLENESS OF SEARCH

The Ministry attached to its representations an affidavit sworn by counsel to the Office of the Children's Lawyer in which she sets out the steps taken by the Ministry to identify and locate records which are responsive to the appellant's request. She indicates that searches were undertaken at the office of the Children's Lawyer as well as that of its agent and that the entire contents of both files have been provided to me for this inquiry.

The appellant has not provided any basis for his belief that additional records beyond those made available to him should exist. As the appellant was not granted access to a substantial number of responsive records in the first instance, his submission that additional records should exist was not, however, unfounded.

Where a requester provides sufficient details about the records which she is seeking and the Ministry indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

I have considered the affidavit submitted by the Ministry as well as the information supplied by the appellant in his letter of appeal. I am satisfied that the Ministry's search for responsive records was reasonable in the circumstances of this appeal.

ORDER:

1. The search for records was reasonable and this part of the appeal is denied.

2. I uphold the Ministry's decision to deny access to:

   (a) the severed portions of Records 153 and 244;

   (b) Records 4, 62 (which is the same as Record 868), 68-72, 107, 111, 112, 113, 130, 146, 163, 165, 169, 170, 172, 174 & 175, 178, 189, 192-195, 204, 209-211 (which is the same as Records 245-247), 211(a) (which is the same as Record 214), 212, 222 & 223, 239, 273-274(a), 285, 286, 289, 290. 292, 293, 301-303 (which were dealt with in Order P-1075), 312, 313-316, 319, 321 & 322, 324, 326 & 327, 395-432, 433-437, 701-736, 752, 822-826(b), 858 & 859, 872 & 873, 887 (which is the same as Record 892), 924, 932, 940-942, 947-948, 948-951, 952, 953, 954, 962-964, 970, 973, 981, 985 and 994-1008 in their entirety;

   (c) those portions of Records 393 & 394, 854, 856 & 857, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1006, 1007 and 1008 which are highlighted

on the copy of the records provided to the Ministry's Freedom of Information and Privacy Co-ordinator;

(d) those portions of Records 123 & 123(a), 166 & 167, 176 & 177, 202, 207 & 208, 220 & 221 and 231 & 232 entitled "Recommended Attorney General Response".

3. I order the Ministry to disclose to the appellant by **March 11, 1996**, but not earlier than **March 6, 1996** the following records or parts of records:

(a) the unsevered portions of Records 153 and 244;

(b) Records 145, 164, 168, 171, 173, 179, 183, 184, 185, 201, 203, 205, 206, 219, 224, 225 and 240 in their entirety;

(c) those portions of Records 393 & 394, 854, 856 & 857, 933, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1006, 1007 and 1008 which are not highlighted on the copy of the records provided to the Ministry's Freedom of Information and Privacy Co-ordinator;

(d) all of Records 123 & 123 (a), 166 & 167, 176 & 177, 202, 207 & 208, 220 & 221 and 231 & 232 except those portions entitled "Recommended Attorney General Response".

4. In order to verify compliance with the terms 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 3.

Original signed by: February 5, 1996
Donald Hale
Inquiry Officer