



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

ORDER P-1238

Appeal P-9500708

Ministry of Community and Social Services



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NATURE OF THE APPEAL:

The Ministry of Community and Social Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records created or received by the Ministry between November 3, 1993 and March 13, 1995 which relate to the requester. The Ministry located 688 records and granted access to 231 of them in their entirety along with portions of an additional 40 documents.

The Ministry prepared an index for the appellant listing the responsive records in chronological order. The records were divided into 11 separate record categories, A through K. Access was granted to all of the documents in Record Category A and portions of the records in Record Categories B, F, H and J. Access was denied to all of the documents in Record Categories C, D, E, G and I. The Ministry also refused to grant access to the responsive records in Record Category K as they had been disclosed to the appellant in response to earlier access requests.

The Ministry claimed the application of the following exemptions to each of the record categories:

- The undisclosed portions of Record Category B and all of Record Category C - section 13(1) - advice or recommendations;
- All of Record Category D - sections 18(1)(e) and (f) - economic and other interests;
- All of Record Category E, the undisclosed portions of Record Category F and Record D-78 - section 19 - solicitor-client privilege;
- All of Record Category G and the undisclosed portions of Record Category H - section 21 - invasion of privacy;
- All of Record Category I and the undisclosed portions of Record Category J - section 49(b) - invasion of privacy.

The requester (now the appellant) appealed the Ministry's decision to deny access to the 268 records listed in Record Categories C, D, E, G and I of the Ministry's index. A Notice of Inquiry was provided to the appellant and the Ministry. A supplemental Notice of Inquiry was then forwarded to an additional 22 individuals whose rights might be affected by the disclosure of the records at issue in this appeal (the affected persons).

As it appeared that Record Categories C, D and E may contain the personal information of the appellant, the parties were asked to make submissions on the application of section 49(a) of the Act, in addition to the exemptions described above.

Representations were received from the Ministry and 11 of the affected persons. All of the affected persons who responded to the Notice of Inquiry objected to the disclosure of their personal information to the appellant. The appellant indicated that she intended to rely on the arguments raised in her letter of appeal.

The Ministry has disclosed Record C-1 to the appellant. As this is the only record remaining at issue for which section 13(1) was claimed, I will not be addressing the application of this exemption further in this order. The Ministry also indicates that it has no objection to the disclosure of Records D-19, D-20 and E-124. I will, therefore, order that they be disclosed to the appellant

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

The Ministry submits that all of the documents contained in Record Category D are exempt under sections 18(1)(e) and (f) of the Act. These sections state:

A head may refuse to disclose a record that contains,

- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public.

Section 18(1)(e)

In order to qualify for exemption under section 18(1)(e), the Ministry must establish the following:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; **and**
3. the negotiations must be carried on currently, or will be carried on in the future; **and**
4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

The records which comprise Record Category D consist of 98 memoranda, notes, fax cover sheets, minutes of meetings, correspondence and other records which document the Ministry's management of a very complex set of grievances and an Application for Judicial Review initiated by the appellant and several of the affected persons. In addition, the Ministry's response to a complaint filed by the appellant with the Ontario Human Rights Commission (the

OHRC) is described in detail. Many of the grievances and the OHRC complaint remain unresolved at the present time.

I have reviewed each of the documents which comprise Record Category D and the representations of the parties and have made the following findings:

1. Records D-2, D-3, D-4, D-7, D-11, D-14, D-15, D-23, D-24, D-27, D-28, D-29, D-30, D-32, D-33, D-35, D-36, D-37, D-38, D-40, D-42, D-43, D-44, D-47, D-48, D-50, D-53, D-54, D-55, D-56, D-60, D-61, D-63, D-64, D-65, D-70, D-71, D-72, D-73, D-78, D-80, D-81, D-84, D-87, D-88 and a letter dated January 23, 1995 contained in Record D-94 qualify for exemption under section 18(1)(e). Each of these documents contain positions, plans or procedures intended to apply to the on-going negotiations involving the Ministry, its union and the appellant over the OHRC complaint and the various grievances.

As all four parts of the section 18(1)(e) test have been met, these records qualify for exemption under this exemption.

2. Records D-12, D-13, D-16, D-22, D-31, D-75, D-77, D-89, D-92 and D-95 are more appropriately discussed under the invasion of privacy (sections 21 and 49(b)) and solicitor-client privilege (section 19) exemptions below.
3. The remaining documents contained in Record Category D are not exempt under section 18(1)(e). While all of them relate to the management by the Ministry of the proceedings involving the appellant, the remaining documents do not contain positions, plans, procedures, criteria or instructions which relate to on-going Ministry negotiations within the meaning of section 18(1)(e).

Section 18(1)(f)

In order to qualify for exemption under section 18(1)(f), the Ministry must establish that a record satisfies each element of a three-part test:

1. the record must contain a plan or plans, **and**
2. the plan or plans must relate to:
 - (i) the management of personnel, or
 - (ii) the administration of an institution, **and**
3. the plan or plans must not yet have been put into operation or made public.

In Order P-784, then Assistant Commissioner Irwin Glasberg adopted the definition used in earlier orders for the word "plan", as "a formulated and especially detailed method by which a thing is to be done; a design or scheme". He then found that records relating to the institution's

approach for dealing with an employee grievance could not be characterized as a “plan” for the purposes of section 18(1)(f). Assistant Commissioner Glasberg held that because the information contained in such records could not be equated to a “plan”, they were not exempt under section 18(1)(f).

I adopt the findings in Order P-784 and agree that records which describe the approaches being contemplated by the Ministry in the management of grievance proceedings do not fall within the definition of a “plan”. Accordingly, as the first part of the test has not been met, the documents which comprise Record Category D are not exempt from disclosure under section 18(1)(f).

Records D-1, D-5, D-6, D-8, D-9, D-10, D-17, D-18, D-19, D-20, D-21, D-25, D-26, D-34, D-39, D-41, D-45, D-46, D-49, D-51, D-52, D-57, D-58, D-59, D-62, D-66, D-67, D-68, D-69, D-74, D-76, D-79, D-82, D-83, D-85, D-86, D-90, D-91, D-96, D-97 and D-98, as well as the records which comprise D-94 with the exception of the January 23, 1995 letter, do not qualify for exemption under sections 18(1)(e) or (f). As no other, mandatory exemptions apply to them, they should be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

The Ministry has claimed the application of section 19 to all of the 145 documents which comprise Record Category E. In addition, the Ministry also claimed the application of section 19 to Record D-78. Section 19 reads:

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).

In order to qualify for exemption under Branch 1, the Ministry must establish the following four requirements:

1. a written or oral communication; **and**
2. the communication must be of a confidential nature; **and**
3. the communication must be between a client (and his agent) and a legal advisor; **and**

4. the communication must be directly related to seeking, formulating or the giving of legal advice.

OR

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 met 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]

I have carefully reviewed the records for which the Ministry has claimed the application of section 19 and make the following findings:

1. The following records qualify for exemption under Branch 1 of section 19: D-78, E-15, E-16, E-20, E-22, E-23, E-24, E-25, E-26, E-28, E-29, E-30, E-31, E-32, E-33, E-34, E-36, E-37, E-38 (Part 2 of Branch 1), E-39, E-40, E-41, E-54, E-58, E-60, E-62, E-63, E-65, E-66, E-67, E-70, E-71, E-72, E-73, E-74, E-75, E-76, E-80, E-82, E-84, E-85, E-86, E-87, E-88, E-96, E-97, E-101, E-102, E-104, E-105, E-107, E-108, E-109, E-113, E-115, E-116, E-118, E-125, E-130, E-131, E-134, E-135, E-137, E-139, E-140, E-141, E-142, E-143 and E-145.
2. The following records qualify for exemption under Branch 2 of section 19: E-1, E-2, E-3, E-4, E-5, E-6, E-7, E-8, E-9, E-10, E-11, E-12, E-14, E-17, E-18, E-49, E-50, E-52, E-53, E-56, E-61, E-64, E-68, E-69, E-89, E-90, E-91, E-92, E-93, E-94, E-95, E-98, E-99, E-106, E-110, E-111, E-112, E-114, E-120, E-121, E-132, E-133 and E-138.
3. The following records are not exempt under section 19: E-13, E-35, E-43, E-44, E-45, E-46, E-47, E-48, E-55, E-57, E-59, E-77, E-78, E-79, E-81, E-83, E-100, E-117, E-118, E-122, E-123, E-126, E-127, E-129, E-136 and E-144. The exemption does not apply because these records represent communications between Ministry staff rather than between counsel and client. In addition, these records are not exempt because they were not created for the lawyer's brief or for counsel's use in giving legal advice or in contemplation of or for use in litigation. As no other mandatory exemptions apply to these records, they should be disclosed to the appellant.
4. Records E-21, E-27, E-42 and E-103 are duplicates of Records D-11, D-15, D-35 and

D-72 respectively which I found were exempt from disclosure under section 18(1)(e).

5. Records E-51 and E-128 are more appropriately discussed in my review of the invasion of privacy exemptions contained in sections 21 and 49(b).

PERSONAL 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 the remaining records and find that Records D-12, E-51, a memorandum dated January 27, 1995 included in Records E-128, G-1, G-5, G-6, I-1 to I-8, I-11, I-12 and I-13 all contain the personal information of the appellant and one or more of the affected persons. Records D-13, D-16, D-22, D-31, D-77, D-89, D-92, D-95, two letters dated August 23 and 26, 1993 which are included in Records E-128, G-2 and G-3 contain only the personal information of one or more of the affected persons.

Record D-12 is identical to Records G-4, G-8 and I-9. Record G-2 is identical to Record G-9. Record G-3 is identical to Record G-10. Records G-5, G-7 and G-11 are copies of the same document. Finally, Record I-10 is identical to Record G-6. My findings with regard to the original documents apply equally to the copies.

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.

The majority of the records which I have found to be exempt under sections 18(1)(e) and 19 contain the personal information of the appellant. 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. Those records containing the personal information of the appellant which qualify for exemption under sections 18(1)(e) and 19, are exempt from disclosure under section 49(a).

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 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 her own personal information, the only situation under section 49(b) where she 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.

Where, 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 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 it.

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), as well as any other considerations which are relevant in the circumstances of the case.

Record E-128 contains a number of attachments. Several portions of this record consist of memoranda received from or drafted by the appellant. I find that the disclosure of this information to the appellant would not constitute an unjustified invasion of the personal privacy of another individual. Accordingly, the memoranda dated January 25, 1993, February 16, 1993, March 18, 29, and 31, 1993 should be disclosed to the appellant.

Section 21 Records

I have found that Records D-13, D-16, D-22, D-31, D-77, D-89, D-92, D-95, two letters dated August 23 and 26, 1993 which are included in Records E-128, G-2 and G-3 contain only the personal information of one or more of the affected persons.

The Ministry submits that Records D-77, D-89, D-92, D-95 and G-2 contain personal information which relate to the medical history of one of the affected persons. As such, it argues that the disclosure of this information is presumed to constitute an unjustified invasion of the personal privacy of the affected person under section 21(3)(a) of the Act. I have reviewed the information contained in these records and find that their disclosure would constitute a presumed unjustified invasion of the personal privacy of the affected person to whom they relate. This information does not fall within section 21(4) and the appellant has not raised the application of section 23. Accordingly, I find that these records are exempt from disclosure under section 21.

The Ministry submits that the information contained in Records D-13, D-16, D-22, D-31, the letters in Records E-128 and G-3 is "highly sensitive" within the meaning of section 21(2)(f) and that it ought not to be disclosed on that basis. I find that the information contained in these records may properly be characterized as "highly sensitive" within the meaning of section 21(2)(f) and that this is a factor favouring privacy protection. The appellant has not referred to any factors which would weigh in favour of a finding that the disclosure of this information would not constitute an unjustified invasion of the personal privacy of the affected persons under section 21(1)(f). Accordingly, I find that the disclosure of the personal information contained in Records D-13, D-16, D-22, D-31, the letters in Records E-128 and G-3 would constitute an unjustified invasion of personal privacy and these records are exempt from disclosure under section 21.

Section 49(b) Records

I have found above that Records D-12, E-51, a memorandum dated January 27, 1995 included in Records E-128, G-1, G-5, G-6, I-1 to I-8, I-11, I-12 and I-13 all contain the personal information of the appellant and one or more of the affected persons.

Again, the Ministry submits that Record D-12 contains personal information relating to the medical history of one of the affected persons and that the disclosure of this information would constitute a presumed unjustified invasion of personal privacy under section 21(3)(a). Again, I have reviewed the information contained in this record and find that its disclosure would constitute a presumed unjustified invasion of the personal privacy of the affected person to whom it relates. This information does not fall within section 21(4) and the appellant has not raised the application of section 23. Accordingly, I find that Record D-12 is exempt from disclosure under section 49(b).

The Ministry submits that the personal information contained in these records is highly sensitive (section 21(2)(f)) and was provided in confidence by the affected persons (section 21(2)(h)). I have reviewed the personal information contained in these documents and the submissions of the Ministry and the affected persons and find that the information is highly sensitive within the meaning of section 21(2)(f). Much of the information contained in the records was provided to the Ministry by the affected persons with an expectation of confidentiality, which I find to have been reasonably held. In addition, the appellant has received substantial disclosure of the information which relates to her through this and previous requests under the Act, as well as through other disclosure mechanisms available in the many other proceedings which she has initiated or been a respondent to. I find that all of these factors weigh in favour of the protection of the privacy of the affected persons.

Balancing the privacy protection interests of the affected persons against the appellant's right of access to the information contained in these records, I find that their disclosure would constitute an unjustified invasion of privacy. The information does not fall within section 21(4) and the appellant has not raised the application of section 23. Accordingly, I find that Records D-12, E-51, a memorandum dated January 27, 1995 included in Records E-128, G-1, G-5, G-6, I-1 to I-8, I-11, I-12 and I-13 are properly exempt under section 49(b).

ORDER:

1. I order the Ministry to disclose to the appellant the following records by providing her with a copy by **September 3, 1996** but not before **August 29, 1996**:
 - (a) Records C-1, D-1, D-5, D-6, D-8, D-9, D-10, D-17, D-18, D-19, D-20, D-21, D-25, D-26, D-34, D-39, D-41, D-45, D-46, D-49, D-51, D-52, D-57, D-58, D-59, D-62, D-66, D-67, D-68, D-69, D-74, D-76, D-79, D-82, D-83, D-85, D-86, D-90, D-91, D-96, D-97 and D-98, as well as the records which comprise D-94 with the exception of the January 23, 1995 letter;
 - (b) Records E-13, E-35, E-43, E-44, E-45, E-46, E-47, E-48, E-55, E-57, E-59, E-77, E-78, E-79, E-81, E-83, E-100, E-117, E-118, E-122, E-123, E-124, E-126, E-127, E-129, E-136 and E-144 and the

memoranda dated January 25, 1993, February 16, 1993, March 18, 29 and 31, 1993 contained in Record E-128.

2. I uphold the Ministry's decision to deny access to the remaining records.
3. 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 1.

Original signed by: _____ July 30, 1996
Donald Hale
Inquiry Officer