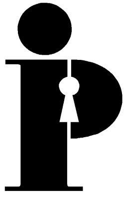

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1309

Appeal P_9600219

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of the Attorney General (the Ministry). The request was for access to records relating to a named individual and a publication edited and published by that individual. The named individual provided written authorization consenting to the disclosure of his personal information to the requester.

The Ministry located 27 responsive records and granted access to them in part. Access was denied under the following sections of the Act:

- advice or recommendations - section 13
- solicitor-client privilege - section 19
- danger to safety or health - section 20
- invasion of privacy - section 21

The Ministry also indicated that Records 22 and 27-1 and parts of Record 2-1 were not disclosed as they were not responsive to the request.

The appellant appealed the Ministry's decision. A Notice of Inquiry was sent to the Ministry and the appellant. Representations were received from both parties.

The appellant has indicated that she is not pursuing access to the information identified as not responsive to her request, nor is she seeking access to the information severed from Records 2-2 and 20-2. Accordingly, Records 2-1, 2-2, 20-2, 22 and 27-1 are not at issue in this appeal.

RECORDS:

The records consist of memoranda, correspondence, notes, publications and the transcript of a speech. The records are related to the Ministry's assessment of whether the publications and the speech constitute hate literature under the provisions of the Criminal Code.

PRELIMINARY ISSUES:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

Upon receipt of the appeal, this office provided the Ministry with a Confirmation of Appeal notice. This notice indicated that the Ministry had 35 days from the date of this notice (an expiry date was provided) to raise any additional discretionary exemptions not claimed in the decision letter. No additional exemptions were raised during this period.

Subsequently, in its representations, the Ministry raised the application of the discretionary exemption provided by section 13 of the Act to Records 5-1, 5-3 and 5-6 and section 19 of the Act to Record 5-6. By this time the expiry date provided in the Confirmation of Appeal had passed by over two months. It is not necessary for me to consider the application of either

section 13 or 19 to Record 5-6, as the Ministry's index indicates that this record has been disclosed to the appellant.

It has been determined in previous orders that the Commissioner has the power to control the process by which an inquiry is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and to limit the time during which an institution may raise new discretionary exemptions not claimed in its original decision letter.

In Order P-658, Inquiry Officer Anita Fineberg concluded that in cases where a discretionary exemption(s) is claimed late in the appeals process, a decision maker has the authority to decline to consider the discretionary exemption(s). I agree with Inquiry Officer Fineberg's reasoning and adopt it for the purposes of this appeal.

The Ministry has provided no explanation for the delay in raising the additional discretionary exemptions. In my view, a departure from the 35-day timeframe is not justified in the circumstances of this appeal. Therefore, I will not consider the application of section 13 to Records 5-1 and 5-3 in this order.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the Act consists of two branches, which provide a head 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 Records 1-1, 1-14, 2-3 to 2-5, 2-7, 2-12, 3-1 to 3-5, 4-1, 4-2, 5-1, 5-3, 7-1 to 7-3, 8-1 to 8-12, 9-1, 9-2, 10-2, 10-3, 11-1, 18-1, 19-1, 20-1, 21-1, 23-1, 23-2, 23-3, 24-1, 24-2, 25-1, 25-2, 26-1, 26-2, 27-3 to 27-7 and 27-25 to 27-41 qualify for exemption under Branch 2 of section 1 as they were prepared by or for Crown Counsel for use in giving legal advice or in contemplation of or for use in 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. Two criteria must be satisfied 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)

All of these records were prepared by or for employees who qualify as "Crown counsel" in the employ of the Ministry. Further, almost all of these records were prepared for use in giving legal advice. Accordingly, I am satisfied that these records, with the exception of Records 5-1, 7-1, 8_3 and 9-1 qualify for exemption under Branch 2 of the exemption.

Records 5-1, 7-1 and 8-3 are letters from Crown counsel to the police, and Record 9-1 is a one-line internal memo to Crown counsel. These records were not, in my view, prepared for use in giving legal advice or for use in litigation. Given the nature of these records and the scarcity of detail in the Ministry's representations, I am also not satisfied that litigation was more than a vague or theoretical possibility at the time the records were prepared, or that litigation was the dominant purpose for the preparation of the records. Therefore, I find that Records 5-1, 7-1, 8-3 and 9-1 were not prepared in contemplation of litigation. Accordingly, Records 5-1, 7-1, 8-3 and 9-1 do not qualify for exemption under section 19.

ADVICE OR RECOMMENDATIONS

I have found that the records in respect of which the Ministry has claimed the section 13 exemption qualify for exemption under section 19 of the Act. Accordingly, it is not necessary for me to address the application of section 13 in this order.

INVASION OF PRIVACY

The Ministry submits that Records 1-3 to 1-13 are exempt under section 21 of the Act as they contain personal information of individuals other than the appellant. In its decision letter, the Ministry also identified Records 1-2, 3-6 to 3-18 and 5-1 as being exempt under section 21 of the Act.

Personal information is defined in section 2(1) of the Act, in part, as "recorded information about an identifiable individual". Having reviewed the records, I am satisfied that Records 1-2 to 1-13 and 3-6 to 3-18 contain personal information of individuals other than the appellant and the individual who has consented to the disclosure of his personal information to her. Having reviewed Record 5-1, I find that it does not contain information about an identifiable individual and does not, therefore, contain personal information.

Section 21(1) of the Act prohibits an institution from disclosing personal information except in the circumstances listed in sections 21(1)(a) through (f). Of these, only section 21(1)(f) could apply in this appeal. It permits disclosure if it "does not constitute an unjustified invasion of personal privacy."

Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the institution can disclose the personal information only if it falls under section 21(4) or if section 23 applies to it. The Ministry submits that section 21(3)(b) applies in the circumstances of this appeal. This section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

If none of the presumptions in section 21(3) apply, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

The Ministry argues that Records 1-2 to 1-13 and 3-6 to 3-18 were compiled as part of an investigation into whether the Criminal Code provisions against promoting hatred had been violated. Having reviewed the information contained in these records, I find that the requirements of section 21(3)(b) have been met.

Section 21(4) has no application in the circumstances of this appeal and the appellant has not raised the application of section 23. Accordingly, I find that Records 1-2 to 1-13 and 3-6 to 3-18 are exempt under section 21 of the Act.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking and the Ministry indicates that further records do not exist, it 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.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The appellant claims that the Ministry must have records which predate November 1983, and provided a newspaper article which refers to a pamphlet written by the named individual in July 1983. The article quoted the then Attorney General as saying, "Six senior attorney-general officials are reviewing the article and the Ontario Provincial Police are investigating its publication and distribution."

The Ministry indicates that this request is the appellant's fourth request for similar types of files, and the Ministry has spent a considerable amount of time searching for the requested records. The Ministry recently found the pre-November 1983 records sought by the appellant in a document which contained records identified as responsive to one of the appellant's previous requests. When the Ministry was searching for records responsive to the request which is the subject of this appeal, the pre-November 1983 records were not found as they had been placed in

the boxes of records identified as responsive to the appellant's earlier request. The Ministry indicates that a decision respecting access to these records has been issued.

Having reviewed the representations, I am satisfied that the Ministry has made a reasonable effort to identify and locate records responsive to the request, and I dismiss this aspect of the appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 1-1 to 1-14, 2-3 to 2-5, 2-7, 2_12, 3-1 to 3-18, 4-1, 4-2, 5-3, 7-2, 7-3, 8-1, 8-2, 8-4 to 8-11, 9-2, 10-2, 10-3, 11-1, 18-1, 19-1, 20-1, 21-1, 23-1 to 23-3, 24-1, 24-2, 25-1, 25-2, 26-1, 26-2, 27-3 to 27-7 and 27-25 to 27-41.

2. I order the Ministry to disclose Records 5-1, 7-1, 8-3 and 9-1 by sending the appellant a copy no later than **December 19, 1996**.

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: November 29, 1996
Holly Big Canoe
Inquiry Officer