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

ORDER P-1379

Appeal P_9700012

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The appellant, described in the request as a historian, is barred from entering Canada because of accusations that, on a previous speaking tour of Canada, he had incited hatred, contrary to the Criminal Code.

By an authorized agent, the appellant submitted a request to the Ministry of the Attorney General (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for all documents and information concerning the appellant.

The Ministry sought clarification of the request. The appellant's agent explained that the requested records would be in the Ministry's criminal division, and that the request is aimed at determining whether "... any person or organization or police in fact ever approached the Ministry of the Attorney General regarding [the appellant]'s activities in Canada."

The Ministry identified five pages of responsive records. Two pages were disclosed in full. Part of an additional page was also disclosed. The remaining two pages were withheld in full.

The Ministry explained that it was denying access pursuant to the following exemption in the Act:

- solicitor-client privilege - section 19.

The appellant appealed this denial of access, and also indicated that additional records should exist.

This office sent a Notice of Inquiry to the appellant and the Ministry. In addition to the issues of the possible existence of additional records and the application of section 19, the Notice also invited representations from the parties on section 49(a). This section provides an exemption in situations where a record contains a requester's own personal information and one of the exemptions listed in the section would otherwise apply.

In response to the Notice of Inquiry, both parties submitted representations.

The records at issue in this appeal consist of a handwritten note to file occupying part of one page (the remainder of which was disclosed) and a two-page memorandum.

DISCUSSION:

PERSONAL INFORMATION/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 the records at issue. I find that they contain personal information pertaining 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 institution has the discretion to deny access to records which contain an individual's own personal information in instances where certain exemptions, including the one provided by section 19 of the Act, would otherwise apply to that information.

Section 49(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information. (emphasis added)

I have held that the records at issue contain the appellant's own personal information. Therefore, I will consider whether they qualify for exemption under section 19 as a preliminary step in determining whether section 49(a) applies.

SOLICITOR-CLIENT PRIVILEGE

This exemption appears in section 19 of the Act, which states:

> 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 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 argues that the handwritten note is exempt under Branch 1, and that the two-page memorandum is exempt under Branch 2.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**

(c) the communication must be between a client (or his agent) and a legal advisor, **and**

(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. 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 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]

The Ministry submits that the handwritten note was made by counsel and that it reveals the contents of a confidential solicitor-client communication in which legal advice was requested. I have reviewed the record and I agree with this characterization. Accordingly, this record meets the four criteria listed above with respect to Branch 1. Therefore, I find that this record qualifies for exemption under Branch 1 of section 19.

The two-page memorandum was prepared by Crown counsel and addressed to another Crown counsel. I have reviewed this record. It is apparent that it was prepared for Crown counsel for use in giving legal advice. Therefore, I find that it qualifies for exemption under Branch 2 of section 19.

Because both records qualify for exemption under section 19, I find that they are exempt under section 49(a) of the Act.

EXISTENCE OF ADDITIONAL RECORDS

Where a requester provides sufficient details about the records which he or she 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.

According to the appellant's agent, during the appellant's previous visits to Canada, certain organizations called repeatedly in the media for the appellant to be charged. For this reason, she believes that more records must exist.

In the appellant's representations, the appellant's agent states:

> ... given the extreme accusations and actions taken against him during his lecture tours, the Ministry of the Attorney General must have more documents concerning him. However, he has no proof of this. If it is possible, he is requesting a sworn affidavit from the Ministry that the documents produced are the only documents they have concerning him.

With respect to the request for an affidavit, it is well established that the Act does not require institutions to create records in order to respond to a request. Although the IPC sometimes requests evidence in affidavit form at this stage in the proceedings, I am not prepared to order the Ministry to execute an affidavit and provide it to the appellant. However, the discussion which follows will provide the appellant with information about the steps followed by the Ministry in its attempts to locate responsive records.

The search was supervised and co-ordinated by a Ministry lawyer within its Criminal Division. An extensive search of all the Ministry's "hate files" was conducted. For this purpose, all file indices and other lists were consulted. Approximately 160 "hate" files were identified and reviewed. Of these, only one file contained relevant information, and this contained only the five pages of responsive records previously identified.

During the course of this appeal, in connection with a much broader, unrelated request relating to alleged "hate" crimes, the Ministry spent 42 hours reviewing all the "hate" files, comprising approximately 2900 pages. The Ministry indicates that "[t]his recent and very thorough search confirmed that the Ministry has only 5 pages of responsive records concerning [the appellant] in its files."

I find that the Ministry took reasonable steps to locate responsive records.

ORDER:

1. I uphold the Ministry's decision to deny access to the records at issue in this appeal.

2. The Ministry's search for responsive records was reasonable and this aspect of the appeal is dismissed.

Original signed by: April 25, 1997
John Higgins
Inquiry Officer