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

ORDER P-1490

Appeal P_9700214

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 all records relating to the appellant, who's bookstore was alleged to have been spreading hate propaganda in the 1980's.

The Ministry responded by providing partial access to the records. Access was denied to the remaining portions of the records pursuant to the following exemptions:

- law enforcement - section 14(2)(a)
- solicitor-client privilege - section 19
- danger to safety or health - section 20
- invasion of privacy - sections 21 and 49(b)
- discretion to refuse appellant's own information - section 49(a)

The appellant appealed the Ministry's decision to deny access.

This office sent a Notice of Inquiry to the Ministry and the appellant. Representations were received from the Ministry only. In its representations, the Ministry indicated that it has decided to disclose Records 3-18 to 3-20 (with the exception of the name of an individual, severed pursuant to section 21) and Records 3-33 to 3-34.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. The Ministry submits, and I agree, that the records contain the personal information of 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. Section 49(a) reads:

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

LAW ENFORCEMENT

The Ministry submits that Record 4 qualifies for exemption under section 14(2)(a) of the Act. In order for a record to qualify for exemption under section 14(2)(a), the Ministry must satisfy each part of the following three part test:

1. the record must be a report; **and**

2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Order 200 and P-324]

The word "report" is not defined in the Act. However, in order to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200). Having reviewed Record 4, I am satisfied that it is a "report" for the purposes of section 14(2)(a).

The Ministry submits that Record 4 was prepared in the course of a Metropolitan Toronto Police investigation into a matter in order to determine if the evidence warranted a prosecution under the Hate Propaganda section of the Criminal Code. I am satisfied that Record 4 was prepared in the course of law enforcement, by the Metropolitan Toronto Police, which is an agency which has the function of enforcing and regulating compliance with a law, in this case the Criminal Code. Accordingly, all parts of the test have been met. Record 4 qualifies for exemption under section 14(2)(a) of the Act, and section 49(a) applies.

SOLICITOR-CLIENT PRIVILEGE

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 relies on Branch 2 of the exemption with respect to the following records: Records 3-1 to 3-17, 3-21 to 3-32, 3-35, 3-36 to 3-46, 7, 8-1, 11-1, 11-8, 11-15 to 11-18, 11-24 to 11-26, 11-28, and 11-36 to 11-37. 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 all of these records were prepared by or for various Crown counsel for use in giving legal advice and/or in contemplation of or for use in litigation. The Ministry argues that the records clearly demonstrate that the police conducted a criminal investigation regarding the sale of certain videos. Various Crown counsel were involved in providing legal advice to the police regarding their investigation, as well as to senior Ministry officials. The Ministry submits that the memos, notes of meetings and other documentation prepared for their use are exempt from disclosure.

All of these records, with the exception of Record 8-1, 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 3-22, 3-44 to 3-46, 8-1, 11-15, 11-18, 11-24 to 11-26 and 11-36 qualify for exemption under Branch 2 of the exemption, and section 49(a) applies.

Record 8-1 is a letter to the Ontario Provincial Police, and was not prepared by or for Crown counsel. Records 3-22, 3-44 to 3-46, 11-15, 11-18, 11-24 to 11-26 and 11-36 are administrative in nature and were not, in my view, prepared for use in giving legal advice or for use in litigation. Accordingly, Records 3-22, 3-44 to 3-46, 8-1, 11-15, 11-18, 11-24 to 11-26 and 11-36 do not qualify for exemption under section 19.

INVASION OF PRIVACY

The Ministry submits that the name, address and any information leading to the identification of individuals (other than those acting in an official capacity as government officials or those for whom consent has been obtained) mentioned in the records constitutes personal information.

Having reviewed the records, I am satisfied that Records 3-18 to 3-20, 5-9 to 5-11, 8-1, 9-1, 9-2, 10-1, 11-3 to 11-5, 11-10, 11-15, 11-20, 11-23, 11-31 to 11-33, 11-34, 11-36 and 11-38 contain the personal information of the appellant and other identifiable individuals. I find that Records 2-1, 3-22, 3-44, 3-45, 11-18, 11-24 and 11-25 do not contain information about an identifiable individual and do not, therefore, contain personal information.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other identifiable 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. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's 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 the personal information.

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.

The Ministry argues that the records 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, with the exception of Records 5-9 to 5-11 and 8-1, the requirements of section 21(3)(b) have not been met. I am not satisfied that the remaining records, which are correspondence and correspondence control records from the Minister's office, were compiled and are identifiable **as part of an investigation** into a possible violation of law.

However, given the nature of the correspondence, I find that section 21(3)(h) applies to information which would identify the authors of the correspondence. This section states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
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> > indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

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 the information severed from Records 3-18 to 3-20, 5-9 to 5-11, 10-1, 11-3 to 11-5, 11-10, 11-20, 11-23, 11-31 to 11-34 and 11-38 and Records 8-1, 9-1 and 9-2 in their entirety are exempt under section 49(b) of the Act. I also find that the name of the author of the correspondence referred to in Records 11-15 and 11_36 qualifies for exemption under section 49(b).

DANGER TO SAFETY OR HEALTH

Section 20 of the Act states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The Ministry claims that Records 2-1 to 2-2 and 8-2 to 8-4 are exempt under section 20 of the Act on the basis that release of such material could reasonably be expected to seriously threaten the safety and/or health of individuals in the community

The Ministry submits that the above material is rife with offensive, inflammatory and hateful comments directed at identifiable groups, and that publication of such material can reasonably be expected to seriously threaten the health and/or safety of individuals targeted by such hate propaganda.

The Ministry refers to a number of court decisions regarding judicial recognition of the harms caused by hate propaganda.

The Ministry indicates that although distribution of some of this hate material might not necessarily give rise to a criminal prosecution pursuant to the Criminal Code, it is nevertheless conducive to the promotion of hatred against the individuals and groups targeted. In this regard, the Ministry states that the Supreme Court of Canada has recognized the benefit of recourse to alternative means to suppress the dissemination of hate propaganda. The Ministry submits that, in the context of an access request, the invocation of the discretionary exemption provided by section 20 of the Act is an appropriate and effective means of suppressing the dissemination of hate propaganda.

The Ministry states that it wishes to have absolutely no part in the communication, dissemination or further propagation of these hate materials. Further, the Ministry argues that in addition to the certain and serious psychological harms caused by dissemination of this material, there is a real risk that public dissemination of these materials may lead to an increase in racially motivated hate crimes and to a general escalation of intolerance in our society.

Section 20 stipulates that the Ministry may refuse to disclose a record where doing so **could reasonably be expected to** result in a specified type of harm. Section 20 similarly requires that the expectation of a serious threat to the safety or health of an individual, should a record be disclosed, must not be fanciful, imaginary or contrived but rather one which is based on reason. The Ministry must offer sufficient evidence to support the position that the record at issue could reasonably be expected to seriously threaten the safety or health of an individual.

In the circumstances of this appeal, the appellant is clearly aware of the literature, having been involved in its dissemination and production. In my view, the Ministry has not established that disclosure of this information to the appellant would result in the harms referred to in section 20 as this information has already been published.

Therefore, while I accept that the materials at issue in this appeal may be extremely offensive, I do not accept the Ministry's arguments that section 20 applies to them.

ORDER:

1. I order the Ministry to disclose Records 2-1, 2-2, 3-22, 3-44, 3-45, 3-46, 8-2 to 8-4, 11-18 and 11-24 to 11-26, and Records 11-15 and 11-36, with the exception of the name of the author of the correspondence referred to therein, to the appellant by sending her a copy by **December 11, 1997**.

2. I uphold the Ministry's decision to refuse to disclose the remaining records or parts of records.

3. In order to verify compliance with 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: November 20, 1997
Holly Big Canoe
Inquiry Officer