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

ORDER P-1617

Appeal P_9800084

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 a copy of the intake form completed by the requester's former spouse (the former spouse) and filed with the Office of the Children's Lawyer. The Ministry denied access to the record on the basis of section 19 (solicitor-client privilege), sections 21(1) and 49(b) (invasion of privacy) and section 49(a) (discretion to refuse requester's own information). The requester, now the appellant, appealed the decision to deny access.

The appellant is involved in a custody proceeding with his former spouse. The record at issue consists of nine pages of the intake form, completed by the former spouse.

This office provided a Notice of Inquiry to the appellant, the former spouse and the Ministry. Representations were received from the appellant and the Ministry.

DISCUSSION:

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 record at issue. I find that it contains information relating to the former spouse, the appellant, their child and another identifiable individual and constitutes the personal information of these individuals. I find, further, that in the context of this record, the information was provided by the former spouse and I will therefore consider it under section 49 of the Act.

INVASION OF PRIVACY

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.

Where a record contains the personal information of both the appellant and other individuals, section 49(b) of the Act allows the Ministry to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy under section 21(1)(f). Before I discuss the application of section 21(1) and 49(b), I will consider the application of the exception under section 21(1)(d) raised by the appellant.

The appellant contends indirectly that section 21(1)(d) operates to authorize the disclosure of the record to him. While the appellant has not made submissions directly on this issue, he has provided copies of various documents: a certified copy of an order of the Ontario Court of Justice confirming the appellant's rights of access to his child, a letter from the Ministry of

Health Freedom of Information and Privacy Co-ordinator, the front page of the intake form used by the Office of the Children's Lawyer, and Orders P-1423 and P-1246 issued by this office.

Both Orders P-1423 and P-1246 addressed the applicability of the exception provided by section 21(1)(d) with respect to section 20(5) of the Children's Law Reform Act (the CLRA). Specifically, the issue was whether the appellant, as an access parent, was entitled to information about the health, education and welfare of his child, under provincial or federal legislation which expressly authorized such disclosure.

In Order P-1423, Adjudicator Laurel Cropley concurred with the findings made by Adjudicator Donald Hale in Order P-1246 where he found that:

> Section 20(5) of the CLRA also grants an access parent the right to be given information "as to the health, education and welfare of the child". As this provision is identical to that contained in section 16(5) of the Divorce Act, I find that the right to information which is contained in section 20(5) of the CLRA is also sufficiently specific to bring it within the exception contained in section 21(1)(d) of the Act.

It appears that the appellant is relying on Orders P-1246 and P-1423 to submit that the exception in section 21(1)(d) also applies in the subject case to grant him a right of access to the record.

The appellant contends that the information provided by the former spouse is not confidential. The appellant has included the front page of the intake form on which he has highlighted certain parts. The form contains instructions on how to and who should complete the form, why the information is required and the process to expect if the Office of the Children's Lawyer does become involved in the case. At the bottom of the form is a statement indicating that the information is subject to the Act (highlighted). The form also contains statements indicating that the Office of the Children's Lawyer will use the information to determine whether to take the case and that the information will be used in the delivery of professional services of the child. And finally that the information is "not confidential" (highlighted).

The Ministry acknowledges the statements on the intake form and points out that the Office of the Children's Lawyer is involved in extremely sensitive cases and is aware that the personal information that it collects should be handled with discretion. In that regard, it has provided a copy of its policy statement which emphasizes to all lawyers and social workers that consents must be obtained prior to the release of third party information. The Ministry argues that "[a]lthough the form stipulates that the information is not confidential, that sentence was inserted so that the Office could release information if necessary to advance the interests of the child client."

With respect to the applicability of Order P-1423, the Ministry does not agree with the appellant's position. The Ministry submits that section 20(5) of the CLRA contemplates a parent's right to consult with school and medical personnel about a child. The Ministry states that it does not grant an access parent the right to seek the opinion of the other parent about the child's health, education and welfare. The Ministry submits that the information in the record

which relates to the child is the opinion of the former spouse and as such, the appellant does not have a right of access to the information.

I have carefully considered the representations of the parties and I have reviewed the record. I am particularly mindful of the context of the request and the resulting appeal. I have previously found that the record contains the personal information of the appellant, the former spouse, the child and another identifiable individual. While I agree with the Ministry that the information was provided by the former spouse and I agree that parts of it do contain her opinion, there is information in the record which pertains to the child and which is, in my view, not opinion, but factual information. The name, sex, date of birth, whether the child attends day care or school and whether he/she has special health or educational needs falls within the confines of section 20(5) of the CLRA. In my view, therefore, the appellant has a right of access to this information and the exception in section 21(1)(d) applies. The information to which I have found the exception to apply appears on page 4 of the record and should be disclosed to the appellant.

I will now consider the remaining information under section 49(b) of the Act, which states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the 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.

If none of the presumptions 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 circumstances that are relevant in the circumstances of the case.

The Ministry submits that the presumptions contained in sections 21(3)(d) and (f) apply to the information relating to the employment status and finances of the former spouse. The Ministry submits also that the presumption in section 21(3)(a) applies to the psychiatric history of the identifiable individual. These sections of the Act read as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) relates to employment or educational history;

> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

Having reviewed the record, I am satisfied that the personal information relating to the former spouse's income and employment status falls within the presumptions in sections 21(3)(b) and (f) and that the information about the identifiable individual's psychiatric history falls within section 21(3)(a) of the Act. I find that section 21(4) does not apply to the information that I have found to be exempt and the appellant has not raised the application of section 23 of the Act.

The Ministry has also raised the application of the factors in sections 21(2)(f) and (h), which state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom it relates in confidence.

The Ministry states that the record contains the former spouse's concerns about the appellant and their child and that disclosure of this information would cause excessive personal distress. The Ministry submits that the extent of these concerns and the underlying reasons make the personal information highly sensitive and should not be disclosed.

The Ministry also points out that while the front page of the intake form states that the information is not confidential, given the sensitivity of the issues involved, there is a high and reasonable expectation that the information will not be disclosed without the consent of the author. The Ministry states that the statement is inserted to enable its office to disclose information where required to further the interests of the child client. The Ministry points out that the appellant's request under the Act is not such a case.

The Ministry also submits that other relevant factors were considered and among them was the context of the request. The request concerns a difficult custody matter in which the relationships are acrimonious and the health and safety of a child are involved. The Ministry submits that these surrounding circumstances are relevant and speak to the protection of the information.

The appellant has made no submissions on the relevance of the above factors or other factors relevant to the disclosure of the record.

I have carefully reviewed the representations of the parties and the record. I have also considered all the relevant circumstances of this appeal. I find that disclosure to the appellant of the information pertaining to him (name, address, date and place of birth) would not constitute an unjustified invasion of personal privacy. I have highlighted this information on the copy of the

record provided to the Freedom of Information and Privacy Co-ordinator with this order and it should be disclosed to the appellant.

I find that the remaining information is highly sensitive in the circumstances of this appeal. Therefore, section 21(2)(f) which weighs in favour of non-disclosure, is relevant. I find that the factor in section 21(2)(h) is relevant in that the author may have a reasonable expectation of confidentiality; however, because the decision to disclose or not to disclose the information by the Office of the Children's Lawyer is based on the protection and furtherance of the child client, this factor cannot have much weight. Finally, I agree with the Ministry that the surrounding circumstances of this case are relevant and this unlisted factor weighs heavily in favour of non-disclosure of the record. I find, on balance, after considering all the factors under section 21(2) together with all relevant circumstances, that the factors in favour of non-disclosure outweigh those favouring disclosure. Accordingly, I find that section 21(1) applies and the remaining personal information is exempt under section 49(b) of the Act.

In summary, I have found that the exception in section 21(1)(d) applies to the child's information on page 4 of the record and this should be disclosed to the appellant. I have also found that disclosure of the highlighted portion of the record (the appellant's name, address, date and place of birth) to the appellant would not constitute an unjustified invasion of personal privacy and this information should also be disclosed. I have also found that the remaining personal information is exempt from disclosure under section 21(1) and section 49(b) of the Act applies.

The Ministry has also claimed the application of section 19 and 49(a) to the record. I will therefore consider its application to the information that I have found is not exempt under section 21(1) of the Act.

DISCRETION TO REFUSE APPELLANT'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

As previously noted, 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 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]

The Ministry submits that section 19 applies to the record. I will consider the application of the solicitor-client privilege to the child's information on Page 4 of the record and the appellant's information which I have highlighted on Page 2.

Section 19 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).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of the following 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]

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 Branch 2 of the exemption applies to the record. As a result of the custody hearing, the court requested the Office of the Children's Lawyer to provide services **to the child** in resolving the access issues. The Ministry explains that the parties are asked to complete intake forms and submit them to the Office of the Children's Lawyer which reviews the forms and determines which type of support is required in each case - legal representative or social worker. Upon review of the intake form, the Office of the Children's Lawyer notifies the court and the parties of its decision. If the Office of the Children's Lawyer decides to become involved in the case, the information in the intake form is shared with the lawyer or social worker assigned to the case. The Ministry submits, therefore, that the record was prepared for

Crown counsel in contemplation of or for use in litigation. The Ministry has also confirmed to this office that the court proceeding has been adjourned with no date pending.

It is not clear from the representations whether the Ministry is claiming that Branch 1 applies. It refers to Order P-1075 wherein former Assistant Commissioner Irwin Glasberg considered a solicitor-client relationship between counsel and a child client and stated as follows:

> Counsel represents the interests of the son, which may not be concurrent with those of the appellant or his former wife. The child's lawyer may take positions which are adverse in interest to those of his former wife. In order to fairly and properly represent the interests of the child, the solicitor-client relationship must be exclusively between counsel and the child, without the involvement of the appellant or his former wife.

The Ministry acknowledges that the information in the record was provided by the mother.

I have carefully reviewed the remaining parts of the record in conjunction with the representations of the parties. I find that Branch 1 does not apply to the record in that it cannot be said to be a confidential communication between a solicitor and his client, the child. The information in the record was provided by the mother, the former spouse, and was not a communication of a confidential nature between a client and a legal advisor. In my view, the intake form is used by the Office of the Children's Lawyer to determine the type of support that is required and best suited to the child's interests. The fact that it is reviewed by the Office of the Children's Lawyer does not bring it within the purview of confidential solicitor-client privilege.

Similarly, with respect to Branch 2, I find the record was not prepared for Crown counsel for use in giving legal advice, or in contemplation of litigation or for use in litigation. Again in my view, the dominant purpose for preparing the record was not litigation but to determine the best support needed by the child. I find, therefore, that Branch 2 does not apply. I find that the record is not exempt under section 19 and section 49(a) does not apply.

ORDER:

1. I order the Ministry to disclose Page 4 of the record and the highlighted parts of Page 2 of the record to the appellant by sending him a copy by **November 6, 1998** but not earlier than **November 2, 1998**.

2. I uphold the Ministry's decision to deny access to the remaining parts of the record.

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: October 2, 1998
Mumtaz Jiwan
Adjudicator