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

ORDER PO-1864

Appeal PA-990283-1

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) for access to records relating to Helpline, an association of former students from St. Joseph's Training School for Boys and St. John's Training School for Boys. In particular the appellant sought access to four categories of records as follows:

(a) a signed copy of the Helpline reconciliation agreement and companion agreement;

(b) records relating to the negotiation and implementation of the companion agreement, including correspondence and memoranda between several listed individuals and organizations, including the Premier of Ontario;

(c) the apology which allegedly was introduced in the Ontario Legislature pursuant to the terms of the companion agreement; and

(d) all records between the appellant and the Government of Ontario regarding the issue of apologies in relation to the companion agreement.

The Ministry located responsive records with respect to parts (a) and (c) of the request, and advised the appellant that it was granting access to all of those records, copies of which were enclosed with the letter to the appellant. The Ministry further stated that part (d) of the appellant's request was not sufficiently clear to enable it to identify responsive records. The Ministry asked the appellant to provide additional information regarding the time frames of the request, to whom and from whom the records were sent, and any other relevant information concerning part (d) of the request. The Ministry also asked the appellant to identify time frames for part (b) of his request, and to provide other relevant information. Finally, the Ministry advised that it was forwarding the part of the request dealing with the Premier of Ontario to Cabinet Office for response.

The appellant then wrote to the Ministry stating that the records disclosed pursuant to parts (a) and (c) of the request were not the records he was seeking. The appellant stated that the copies sent under part (a) were drafts, and not the final versions as requested. The appellant also stated that the record sent pursuant to part (c) was "incomplete". The appellant also provided additional information to the Ministry respecting parts (b) and (d).

On the same day he wrote to the Ministry, the appellant appealed the Ministry's decision to this office.

During the mediation stage of the appeal, the Ministry wrote to the appellant stating that it was granting partial access to the remaining requested records under categories (b) and (d). These records were enclosed with the Ministry's letter. The Ministry stated that it was denying access to the balance of the records on the basis of section 49(a) of the *Act*, in conjunction with section 13(1) (advice to government), section 49(a) in conjunction with section 19 (solicitor-client privilege), and section 49(b) in conjunction with section 21 (personal privacy). The Ministry further stated:

> As you are aware the discussions/negotiations regarding this matter were without prejudice and fundamentally based on the undertaking of confidentiality. Accordingly, based on the sections of the *Act* as noted above, access to the remainder of the record is denied.
>
> The exempt material consists of portions of the minutes of the negotiation process, memorandums, correspondence, file notes, briefing notes, draft copies of the companion agreement and reconciliation agreement, draft minutes of committee meetings.
>
> Portions of the record as indicated on the enclosed documents have been marked as not responsive, as it is not relevant to your request.
>
> This is to advise you that this decision pertains to the responsive records that we have located within the Ministry to date. As your request covers a time period of nine years and potentially includes information which may be at the Records Centre our search requires that we retrieve records from the Records Centre. We are awaiting a reply from the Records Centre as to the extent of the search and the time that will be involved in conducting the search. Once we have received a reply, we will notify you of the results.

Also during the mediation stage of the appeal, the Ministry provided this office and the appellant with an index generally describing the records being withheld, as well as the exemption or exemptions being claimed. In addition, the Ministry indicated on the index that some records were being withheld on the basis that they were not responsive to the request. Later, the Ministry provided a revised index to this office and the appellant, which superceded the original.

RECORDS:

The records at issue in this appeal consist of minutes of meetings, memoranda, correspondence, file notes, briefing notes, and draft copies of agreements. These records are described more specifically in the Ministry's revised index.

DISCUSSION:

REASONABLE SEARCH

Introduction

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the institution has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he/she is seeking and the institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records responsive to the request. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a *reasonable* effort to identify and locate responsive records.

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

Representations

The Ministry submits:

> On July 12, 1999 a Program Analyst with the Ministry's Freedom of Information and Protection of Privacy Office conducted two separate searches of files located at the Crown Law Office - Civil. The area of search consisted of three file cabinets and several boxes in the storage room. The search was a manual search where the Program Analyst reviewed the contents of the file to identify any records that may be responsive to the access request. With the exception of the Helpline Reconciliation Agreement and Companion Agreement, the Program Analyst did not identify any other records that were responsive to the access request.
>
> The Crown counsel responsible for dealing with this matter reviewed the legal files in the Crown Law Office - Civil. The counsel also reviewed all the files that were reviewed by the Program Analyst from the Freedom of Information and Protection of Privacy Office. This search was conducted between the time period of June 2, 1999 to October, 1999.

The appellant submits:

> The Ministry . . . did not provide me with true copies of the signed Helpline Reconciliation and Companion Agreements. I received a draft copy, which was signed by the Helpline Representatives. There were not signatures from the other parties on the documents, specifically the Government of Ontario. The Ministry did provide me with copies of . . . an apology introduced in the Ontario Legislature but not a copy of an apology introduced by the Premier in the Ontario Legislature as specified in the Companion Agreement and the attached letter from [named individual], the Chairperson. Decisions of the Chair were binding on all the signatories to the Agreements.
>
> I am amazed that the Ministry has taken almost two years to even begin a search of the Records Centre and still has no reply as to whether records exist or not. I gave them a

> clear time frame, broad though it be and numerous names of individuals who would have either generated or received the information.
>
> I was one of the people involved in the vast majority of the negotiations that took place, to say that I was not privy to the minutes of the meetings and much of the corresponding negotiations and letters and discussions is misleading at best. Until a fire destroyed my home, I had copies of all of the RPIC and Implementation Committee minutes and correspondence between Helpline and the other parties.
>
> . . . . .
>
> There are other relevant records and I am slowly beginning to find them through other sources, the attached copy of a letter from [named individual] to the Premier of Ontario is clear evidence of this fact. I cannot believe that a letter of this importance could have been missing in a reasonable search of the files.

Part (a): signed copies of the agreements

In response to the Report of Mediator, the Ministry wrote to the Mediator stating the following with respect to the signed copies of the agreements:

> . . . The Ministry provided the requester with a decision letter on July 29, 1999. The Ministry's file contains a copy of the text of the final agreement along with the signature pages.
>
> After the text was finalized, the signature pages were circulated among the parties for execution and a copy of the executed signature pages were received by the Ministry.

The Mediator communicated the above to the appellant, who verbally advised the Mediator that he was satisfied with the Ministry's explanation. On this basis, the Mediator concluded that access to the signed copies of the agreements under part (a) of the request was no longer at issue. Accordingly, in my Notice of Inquiry to the parties, I included a statement to this effect. Despite this fact, in his representations, the appellant takes issue with whether or not the Ministry has provided him with a signed copy of the agreements, but makes no comment on my statement that this is no longer an issue in this appeal.

While I believe the appellant should not have advised the Mediator that he was content with the Ministry's explanation if, in fact, he was not, the fact remains that the appellant has not been provided with a complete, signed copy of the agreements. These records are clearly within the scope of his request and the Ministry can easily provide them. In the circumstances, I have decided to order the Ministry to provide the appellant with complete copies of the agreements, including the signatures of all of the parties.

Part (b): records relating to the companion agreement

In my view, the appellant has provided a reasonable basis for believing that additional records may exist and, correspondingly, the Ministry has failed to establish that it conducted a reasonable search for records responsive to this part of the request.

During the mediation stage of the appeal, the Ministry stated the following to the appellant:

> This is to advise you that this decision pertains to the responsive records that we have located within the Ministry to date. As your request covers a time period of nine years and potentially includes information which may be at the Records Centre our search requires that we retrieve records from the Records Centre. We are awaiting a reply from the Records Centre as to the extent of the search and the time that will be involved in conducting the search. Once we have received a reply, we will notify you of the results.

There is no indication based on the material before me that the Ministry has provided a response to the appellant indicating the results of any search conducted at the Records Centre. In addition, the appellant has provided a copy of an additional responsive record, obtained from another source, not identified by the Ministry.

In light of the above, I will order the Ministry to provide the appellant with a decision respecting any records responsive to part (b) of the request the Ministry may have located at its Records Centre or any other location.

SCOPE OF THE REQUEST

The Report of Mediator in this appeal states:

> During mediation, the appellant provided clarification with respect to some of the records that the Ministry had withheld on the basis of non-relevant to the request. The appellant indicated that the reference to Group 2 and Group 3 (for example on page 85 of the record) refers to those members who joined Helpline within a particular time frame and that he considers all records containing such references to be related to the request and therefore, responsive to his request. The appellant stated that the Helpline Newsletter was generated and produced by his group and that it was circulated to some 1400 members of Helpline. The Mediator put forth the appellant's position to the Ministry and the issue of responsiveness of records to the request is included below.

In response to the Report of Mediator, the Ministry submitted:

> The Appellant did not advise the Ministry prior to his appeal of the Ministry's decision that he was seeking additional records (related to a portion of the request) outside the scope of "(b) **negotiation and implementation of the Helpline Reconciliation Agreement and Companion Agreement**." Accordingly, it is the Ministry's position that it would not be

> appropriate to expand the Appellant's request to include records related to Group 2 and Group 3.
>
> In addition, as referenced in the Mediator's Report, and as previously indicated the portion of the request relating to the Premier's Office had been forwarded to the Freedom of Information Coordinator at Cabinet Office for response. Accordingly, it is the Ministry's position that pages 1-4, 6, 9, 10, 357 and 358 are not at issue in this appeal [Ministry's emphasis].

The Ministry submits:

> The negotiations of the Helpline Reconciliation Agreement and the Companion Agreement, which was merely an elaboration of the main agreement, and not intended to create additional obligations, were completed with the development of the document which was thereafter ratified (approved) by the parties. The "negotiations" surrounding the proposals for an "apology" or "institutional apology" were completed with the finalization of the Helpline Reconciliation Agreement.
>
> In the context of the request, the circumstances are important in response to the request. The appellant was a claimant as well as a representative of Helpline under the procedure set out in the Helpline Reconciliation Agreement. To use the appellant's terminology, he was a member of Group One. Groups Two and Three were simply convenient ways of describing two subsequent groupings of applicants for financial benefits, who were not permitted to participate under the arrangements specifically developed for Group One.
>
> The compensation process contemplated by the Helpline Reconciliation Agreement was time limited. That led to large numbers of applications that had not been made in time, being deferred until decisions were made to extend the benefits of the Agreement. Decisions were made subsequently to extend the benefits of the Helpline Reconciliation Agreement to other groups during two later successive time periods. Thus, the designation of Groups Two and Three followed. The appellant was not part of those groups. No new arrangement for an "apology" from the Government was involved during the later extension of the compensation for victims. On the basis of this analysis a search of records, in relation to the administration of the program for Groups Two and Three, would not have been contemplated from a review of the original request. The Ministry interpreted the appellant's access request as being for information sought regarding the apology.

The appellant makes no specific submissions on this issue, although I have considered his position as reflected in the Report of Mediator.

In the circumstances, I am satisfied with the Ministry's representations on this issue, and find that the appellant's request was reasonably construed as covering only those records relating to the discussions and

negotiations leading up to the agreements as they impacted members of the appellant's group, or "Group One". The appellant, if he wishes, may make an additional request for records relating to the other groups.

I am also satisfied that records 1-4, 6, 9-10, 344-346, 355-356, 357-358 and 360 are not at issue in this appeal because, as the Ministry explains, the request for these records was transferred to Cabinet Office.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved [paragraph (b)].

The Ministry submits that some of the records (records 19-22, 23, 33, 36, 49, 52, 55-56, 59, 86-87, 203-207, 257-321 and 353-354) contain the appellant's personal information, and that record 35 contains the personal information of another identifiable individual (the affected person).

Based on my review of the records, I accept the Ministry's submission on which records contain personal information of the appellant and of the affected person.

INVASION OF PRIVACY

I found above that record 35 contains the affected person's personal information. Since I have concluded below that this record is exempt pursuant to the section 19 solicitor-client privilege exemption, it is not necessary for me to consider the application of the section 21 personal privacy exemption to it.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Introduction

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*, an institution 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 has claimed that section 19, in conjunction with section 49(a), applies to certain records at issue (records 19-22, 23, 33, 36, 49, 52, 55-56, 59, 86-87, 203-207, 257-321 and 353-354), and that section 19 applies on its own to other records (records 24-29, 30, 31-32, 34, 35, 37-40, 41, 42, 43, 44-

45, 46, 47, 48, 50-51, 53, 54, 57-58, 60, 61-63, 64-66, 67, 68-70, 72-73, 74-76, 77, 78-81, 82-84, 88-90, 91-102, 103-162, 163-165, 166-167, 168-177, 178-188, 189-193, 194, 195, 196-199, 200-201, 208-209, 210-211, 212-215, 216, 217-221, 222-256, 322, 323, 324, 325-337, 338-342 and 353-354).

Section 19 of the *Act* 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.

This section consists of two branches, which provide an institution with discretion to refuse to disclose:

1. a record that is subject to common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is . . . In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)].

Thus, section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the Ministry must demonstrate that one or the other, or both, of these heads of privilege apply to the records at issue. In this case, the Ministry has claimed the application of solicitor-client communication privilege only.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India,* [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Representations

The Ministry submits:

> The records were compiled by Crown Counsel from the Crown Law Office-Civil who acted on behalf of the Ontario Government. Accordingly, in this matter the Ontario Government was the client and all communications and discussions relating to the terms of the agreement are privileged. In addition, these communications were used for the purpose of giving legal advice to senior management (client communication privilege) regarding the agreement.

> It is worth noting that the discussions/negotiations regarding this matter were without prejudice and fundamentally based on the undertaking of confidentiality.
>
> Solicitor client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

The appellant makes no specific submissions on the application of section 19 of the *Act*.

Records 19-22, 23, 33, 36, 49, 52, 55-56, 59, 86-87, 203-207, 257-321, 353-354

Records 19-22 consist of a memorandum to the Attorney General from the Attorney General's counsel, with two attached draft letters to the appellant. These records provide legal advice and seek instructions from a client. I find that these records consist of confidential communications between a lawyer and his client for the purpose of giving legal advice. As a result, they qualify for exemption under section 49(a) in conjunction with section 19.

Records 23, 33, 86-87, 203-207 and 353-354 are notes or memoranda from counsel in connection with the St. Joseph's and St. John's matters. I am satisfied that these records consist of either confidential communications between a lawyer and his client for the purpose of giving legal advice, or consist of counsel's working papers relating to the giving of legal advice [see *Susan Hosiery* above]. These records also qualify for exemption under section 49(a) in conjunction with section 19.

Records 257-321 consist of a draft copy of the reconciliation agreement. Because this record is a draft of the agreement which was still in the negotiation phase, and given the circumstances of this matter, I am satisfied that it constitutes a confidential communication between a lawyer and a client made for the purpose of providing advice on the negotiations towards reaching an agreement. As such, it qualifies for exemption under section 49(a) in conjunction with section 19.

Records 36 and 52 are letters from Helpline to a Member of Provincial Parliament. Record 59 is a letter from Helpline to the Ministry. These records do not consist of communications between a lawyer and a client, nor are they confidential in nature so as to attract the "lawyer's working papers" privilege described in *Susan Hosiery*.

Record 49 is a memorandum to the Ministry from the Reconciliation Process Implementation Committee (RPIC). This is a joint committee with representatives from some of the key parties to the reconciliation agreement, including the Ministry and Helpline, established (in the words of the Ministry) "to facilitate the negotiation of the terms and conditions of the Helpline Reconciliation Model Agreement". In my view, correspondence to and from this joint committee, which included members of Helpline, cannot be considered confidential in nature for the purpose of the section 19 solicitor-client privilege exemption. I find that section 19 does not apply to this record.

Records 55-56 consist of a letter from the Ministry to the RPIC. Similarly, these records do not consist of communications between a lawyer and a client, nor are they confidential in nature so as to attract the "lawyer's working papers" privilege.

Since no other exemptions are claimed for records 36, 49, 52, 55-56 and 59, I will order the Ministry to disclose them to the appellant.

Records 24-29, 30, 31-32, 34, 35, 37-40, 41, 42, 43, 44-45, 46, 47, 48, 50-51, 53, 54, 57-58, 60, 61-63, 64-66, 67, 68-70, 72-73, 74-76, 77, 78-81, 82-84, 88-90, 91-102, 103-162, 163-165, 166-167, 168-177, 178-188, 189-193, 194, 195, 196-199, 200-201, 208-209, 210-211, 212-215, 216, 217-221, 222-256, 322, 323, 324, 325-337 and 338-342

Records 24-29, 30, 31-32, 35, 68-70, 88-90, 196-199, 216 and 325-337 consist of memoranda, briefing notes or correspondence from a Ministry lawyer to a Ministry client. These records include legal advice on the training school matter, and I am satisfied that they are confidential communications between a lawyer and client for the purpose of providing legal advice. Therefore, they are exempt under section 19.

Records 57-58, 67, 77, 194 and 195 are notes from counsel in connection with the St. Joseph's and St. John's matters. I am satisfied that these records consist of counsel's working papers relating to the giving of legal advice [see *Susan Hosiery* above].

Records 91-102, 103-162, 168-177 and 178-188, consist of partial or full draft copies of the reconciliation agreement. Similar to my finding above regarding records 257-321, I find that these records are exempt under section 19.

Record 34 is a "routing & request" form, containing the name of a sender and recipient, both lawyers within the Ministry, a date and the word "rush". Although this may be considered a communication between a lawyer and client, it cannot reasonably be considered of a confidential nature. Accordingly, I find that it does not qualify for exemption under section 19.

Records 37-40, 41, 43, 44-45, 46, 47, 48, 53, 54, 60 and 64-65 consist of memoranda and correspondence from either Helpline or the RPIC to the Ministry and, in some cases, these communications were copied to other parties to the reconciliation agreement. Similar to my finding above regarding records 36 and 52, they do not consist of communications between a lawyer and a client, nor are they confidential in nature so as to attract the "lawyer's working papers" privilege described in *Susan Hosiery*. Therefore, section 19 does not apply to these records. In addition, records 42, 50-51 and 54, letters from the Ministry to Helpline, cannot be considered confidential communications between a lawyer and a client.

Records 61-63, 66, 72-73 and 74-76 consist of correspondence from Helpline to the RPIC, which was copied to, among others, the Ministry. This record is not a confidential communication between a lawyer and client, and does not otherwise qualify for solicitor-client communication privilege.

Records 78-81 consist of a letter from the RPIC to the Premier of Ontario. This letter does not constitute a confidential communication, nor does it qualify as counsel's working papers and, therefore, section 19 does not apply to it.

Records 82-84, 212-215, 222-256 and 324 are communications from an RPIC member to other RPIC members, including the Ministry. These records do not constitute confidential communications or documents for the purpose of section 19. A portion of record 215 was marked "non-responsive" by the Ministry. For reasons similar to my finding above under "Scope of the Request", I agree with this description and find that the Ministry need not disclose this portion.

Records 163-165, 166-167, 189-193 and 210-211 consist of letters or memoranda from parties to the reconciliation agreement to the RPIC, which appear to have been copied to all other relevant parties, including the Ministry. In the circumstances, I find that these letters lack the requisite element of confidentiality for the purpose of section 19.

Records 200-201 consist of a letter from one of the parties to the agreement to several other parties, including the Ministry. This letter is not a confidential communication between a lawyer and client and does not otherwise qualify for solicitor-client communication privilege.

Records 208-209, 217-221 and 338-342 consist of draft or final minutes of meetings of the RPIC. The Ministry claims that only certain portions are responsive to the appellant's request. For the reasons expressed above under "Scope of the Request", I agree. The remaining, relevant portions do not consist of a confidential communication between a lawyer and client, and do not attract the "lawyer's working papers" aspect of solicitor-client communication privilege. As a result, I find that the relevant portions of these records are not exempt under section 19.

Record 322 is a letter from the Ministry to the RPIC. Record 323 is a letter from one of the parties to the Ministry. These records do not consist of a confidential communication between a lawyer and client, nor are they otherwise exempt under section 19.

Since no other exemptions are claimed for records 34, 37-40, 41, 42, 43, 44-45, 46, 47, 48, 50-51, 53, 54, 60, 61-63, 72-73, 74-76, 78-81, 82-84, 163-165, 189-193, 200-201, 208-209, 210-211, 212-215, 217-221, 322, 323 and 324, I will order the Ministry to disclose them to the appellant (with the exception of any portions I found to be non-responsive).

Although records 64-66, 222-256, 338-342 are not exempt under section 19, since the Ministry also claimed that section 13 (advice and recommendations) applies to these records, I will consider whether this exemption applies to them below.

ADVICE AND RECOMMENDATIONS

Introduction

The Ministry has claimed that section 13 applies to several records at issue. That section reads:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

Since I found above that many of these records are exempt under section 19, I will not consider the application of section 13 to these records. The remaining records, for which I will consider section 13, are records 64-66, 222-256 and 338-342.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

In Order P-434 Assistant Commissioner Tom Mitchinson made the following comments on the "deliberative process":

> In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial *Act*] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exempt[ible] under section 13(1) of the *Act* would be to extend the exemption beyond its purpose and intent.

This approach has been applied in several subsequent orders of this office (Orders P-1147 and P-1299).

Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the *Act*.

Representations

The Ministry submits:

> The records at issue consist of portions of the minutes of the negotiation process, memorandums, file notes, briefing notes, draft copies of the companion agreement and reconciliation agreement, draft minutes of committee meetings, as well as letters and records of telephone conversations regarding amendments to the agreements.
>
> In this case, the negotiation process involved the [RPIC]. This committee was made up of representatives from the [Ministry], the Catholic Archdiocese of Toronto and Ottawa, the Brothers of the Christian Schools and the Helpline. The purpose of the [RPIC] was to facilitate the negotiation of the terms and conditions of the Helpline Reconciliation Model Agreement.
>
> . . .[A]ll the documents in question reflect communications and discussions between [Ministry] staff and/or RPIC regarding the negotiations or implementation of the Reconciliation Agreement, whereby advice and recommendations are provided relating to the terms of the agreement. The advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected during the deliberative process. The information contained in the records was clearly provided for the consideration of a decision-maker and contains suggested courses of action that ultimately led to the final agreement. (Orders P-118, P-135, P-142, P-160, P-167, P-204, P-902, P-1124, P-1194, MO-1299).
>
> The Ministry is also relying on Order P-233 in which it was determined that a record may be exempt if it would reveal advice or recommendations by inference even though it is not itself advisory in nature. The Ministry submits that it has to maintain its ability to have free flow of advice, discussions and recommendations within the deliberative process of government decision making.
>
> The Ministry also submits that it was agreed upon by all the parties that the negotiations and any document generated and shared amongst the parties, in accordance with the practice and procedures agreed upon, be kept in confidence.

Records 64-65 consist of a memorandum from the RPIC to the Catholic Archdiocese of Toronto and Ottawa, the Ottawa District of the Brothers of the Christian Schools, Helpline (including the appellant), and the Ministry. The memorandum advises of a development which could affect the implementation of the agreement, and calls for a meeting to be held. This record clearly neither contains nor reveals any advice or recommendations of a public servant nor any other person referred to in section 13.

Record 66 is a letter from Helpline to the RPIC, which was copied to several parties, including the appellant's counsel and the Ministry. This record clearly neither contains nor reveals advice or recommendations as required by section 13.

Records 222-256 consist of a memorandum from the RPIC to several parties, including the appellant and the Ministry. Attached to the memorandum are portions of the agreement reflecting amendments apparently agreed upon by Helpline and the Ministry. Records 166-167 consist of a letter from a law firm to the RPIC, which was copied to several parties to the agreement, including the appellant. Again, these records clearly neither contain nor reveal advice or recommendations as required by section 13.

Finally, records 338-342 consist of portions of draft minutes of a meeting of the RPIC. This document indicates that the meeting was attended by the appellant's counsel. Having reviewed these records and the Ministry's representations, I am not satisfied that they either contain or reveal advice or recommendations within the meaning of section 13. As indicated above, however, portions of records 338-342 marked by the Ministry as "non-responsive" need not be disclosed.

ORDER:

1. I order the Ministry to disclose to the appellant records 34, 36, 37-40, 41, 42, 43, 44-45, 46, 47, 48, 49, 50-51, 52, 53, 54, 55-56, 59, 60, 61-63, 64-66, 72-73, 74-76, 78-81, 82-84, 163-165, 166-167, 189-193, 200-201, 208-209, 210-211, 212-215, 217-221, 222-256, 322, 323, 324 and 338-342, with the exception of any portions I found to be non-responsive, by **February 16, 2001**.

2. I order the Ministry to disclose to the appellant complete, signed copies of the reconciliation agreement and the companion agreement by **February 16, 2001**.

3. I order the Ministry to issue a decision to the appellant, in accordance with Part II of the *Act*, respecting any additional records responsive to part (b) of the request it may have located at its Records Centre or any other location by **February 16, 2001**.

4. I uphold the Ministry's decision to withhold the balance of the records on the basis of section 19 alone, or section 19 in conjunction with section 49(a).

5. In order to verify compliance with provisions 1, 2 and 3, I reserve the right to require the Ministry to provide me with copies of the material provided to the appellant in accordance with these provisions.

Original Signed By: February 2, 2001
David Goodis
Senior Adjudicator