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

ORDER PO-1941

Appeal PA-010078-1

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 appellant submitted 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

> . . . a copy of a memo directing Toronto Police Service to make a defence copy of the videotape in Impaired-Over 80 cases and any other year 2000 memos relating to videotape disclosure in Impaired-Over 80 cases.

The appellant later wrote to the Ministry stating that he was also seeking "the date that [the described] memo was sent to the Scarborough Crown Attorney's Office, the means by which it was sent, and to whom it was [addressed]."

The Ministry identified two records responsive to the request, and advised the appellant that access to the records was denied on the basis of the exemptions at sections 13 (advice to government) and 19 (solicitor-client privilege) of the *Act*.

The appellant then appealed the Ministry's decision to this office.

Since mediation was not successful, the matter was streamed to the adjudication stage. I sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry and to the Toronto Police Service (the Police) as an affected person. Prior to the deadline for receipt of representations, the Ministry disclosed one of the records to the appellant, but continued to deny access to the second record. I later received representations from the Ministry and the Police addressing the sole remaining record. Neither set of representations addresses the section 19 solicitor-client privilege exemption and, in the circumstances, I will not consider its application to the record. I also determined that it was not necessary in the circumstances to seek representations from the appellant.

RECORD:

The sole record at issue in this appeal is a two-page letter from the Ministry to the Toronto Police Service.

DISCUSSION:

RESPONSIVENESS OF THE RECORD/SCOPE OF THE REQUEST

The Ministry takes the position that the record is not responsive to the appellant's request.

> [The record] sets out a suggested procedure being negotiated respecting a variety of videotaped evidence, including impaired driving compilation tapes. It is not "a memo *directing* [the Police] to make a defence copy of the videotape in Impaired-Over 80 cases". It does not represent a final decision or policy relating to videotape disclosure in Impaired-Over 80 cases. As such, it is not responsive to the request and ought not to be disclosed [emphasis in original].

The Police submit:

> The proposal involves the distribution of *various types of videotapes*, and is not limited to "Impaired-Over 80 cases" which the appellant specifically identifies in their request [emphasis in original].

Previous orders of the Commissioner have established that in order to be responsive, a record must be "reasonably related" to the request:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The record itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness." That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness," I believe that the term describes anything that is reasonably related to the request [Order P-880; see also Order P-1051].

The appellant's request, although initially referring to a record "directing" the Police to make copies of videotapes, goes on to include "any other year 2000 memos relating to videotape disclosure in Impaired-Over 80 cases." In my view, this latter part of the appellant's request is sufficiently broad in scope to cover the record at issue. Although as the Police indicate portions of the record may deal with matters not directly related to "Impaired-Over 80 cases", I am not prepared to find that portions of the record are not responsive to the request. The Ministry itself identified this record as responsive, and at no time during mediation of this appeal did the Ministry indicate that the record was not responsive. Further, the Report of Mediator, which was sent to the Ministry and the appellant, clearly identifies the record as being at issue, and, despite being given an opportunity to do so, the Ministry did not advise the Mediator of this alleged error. The Ministry, as the relevant institution, has the responsibility to raise issues of responsiveness early in the process, particularly when only two records were originally identified. Raising the issue for the first time in representations is simply too late in the day in these circumstances.

On this basis, I find that the record is reasonably related to and thus responsive to the request.

ADVICE OR RECOMMENDATIONS

Section 13(1) of the *Act* states:

> 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.

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.)].

The Ministry submits:

> The record at issue was prepared by a public servant solely in the course of negotiating with the police a procedure for obtaining from the police by Crown counsel videotapes during the course of various prosecutions. This clearly relates to the core business of the Ministry – prosecution of criminal offences.
> . . .
>
> This exemption also applies to draft documents where they contain advice or recommendations and, by extension, to documents setting out proposed policies suggested courses of action which will be accepted or rejected by the recipient during the deliberative process. (Orders #P-320; P-324; P-92; P-188; P-278; P-324; P-827) In Order P-978, the IPC found that the exemption applied to proposed action plans for community education and development developed by a Ministry in response to a particular issue and to documents containing proposed responses to certain questions because those records contained suggested courses of action which could be accepted or rejected in the deliberative process. Similarly, in this case, the record discloses a "proposed action plan" or a "proposed policy" to deal with a particular issue which could be accepted or rejected by the recipient in the deliberative process.
>
> It is significant that the communication contained in the record is between two separate and autonomous branches of the criminal justice system, the Crown and the police. Indeed, it is a fundamental premise of our system of criminal justice

> that neither agency is in a position to "direct" the other to engage in any particular action. Rather, the agencies are only able to "advise" each other as to appropriate courses of action. For instance, the Crown cannot direct the police to lay charges in any given case, and the police cannot direct the Crown to prosecute any particular charges. Each exercises their independent discretion in this regard. Similarly, the Crown cannot direct the police to investigate any particular case or to compile the fruits of an investigation, including the Crown brief of which the videotapes may form part, in any particular manner. The language of the record, particularly in the introductory paragraph and references to what the policy "would" cover (as opposed to "does" cover), reflects this reality. It also sets out clearly that the policy is not one that has been finalized but one which may be accepted or rejected by the recipient during the deliberative process. As such, the Record contains advice or recommendations and is exempt from disclosure pursuant to section 13(1) of the *Act*.

The Police submit:

> [The record] . . . communicates the author's interpretation of a *proposed* policy and procedure, and recommendations as to how this proposal would be implemented . . .
>
> The word "advice" or "recommendation" may be absent from the record at issue, however, Interim Order P-1621 states:
>
> > Although these records are not in the form of advice or recommendations, in my view, these drafts would reveal the advice or recommendations of a public servant as to their content and the action to be taken . . . I am satisfied that this record also contains advice or recommendations of a public servant that could be accepted or rejected by its recipient and, therefore, I find that the severed portions of pages 115-116 are exempt from disclosure pursuant to Section 13(1).
>
> In the record at hand, the author writes . . . indicating that the [Police were] ultimately in a position to accept or reject the recommended interpretation of the videotape proposal [emphasis in original].

The record neither contains nor reveals advice or recommendations within the meaning of section 13(1) of the *Act*, and is therefore not exempt under this section. As reflected in its first paragraph, the record does no more than set out and clarify the terms of an agreement reached between the Crown and the Police to facilitate cooperation in the video disclosure process. I accept that this agreement may have been tentative, and subject to further revisions based on the wishes of the Crown or the Police. This does not, however, change the nature of the record from the terms of an agreement to advice or recommendations.

Further, section 13(1) was designed to protect the free flow of advice in the deliberative process. In this regard, there must be a relationship of advisor and recipient/decision-maker (i.e., the person who can accept or reject the advice) between the parties in question. Here, neither the Police nor the Crown are in a position to advise the other, nor is either party a decision maker, as would be the case, for example, with a consultant retained to advise a minister. Rather, in this context, the Police and the Crown are independent agencies attempting to reach a mutual understanding of how they will interact with one another. This view is supported by the Ministry's representations, which refer to the Crown "negotiating" with the Police. The term "negotiating" is entirely at odds with an advisor/decision maker relationship. In my view, the section 13 exemption was not intended to protect information of the type in this record.

ORDER:

1. I order the Ministry to disclose the record to the appellant no later than **October 3, 2001**, but not earlier than **September 27, 2001**.

2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with copies of the material disclosed to the appellant.

Original Signed By: August 29, 2001
David Goodis
Senior Adjudicator