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

INTERIM ORDER PO-1891-I

Appeal PA_990408_1

Ministry of the Attorney General

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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 information concerning proposed amendments to the *Criminal Code* regarding hate laws.

In response, the Ministry asked the appellant to provide further information to assist it in identifying responsive records. In particular, the Ministry asked the appellant to provide time frames for the request, and to provide any other information which would enable the Ministry to identify responsive records.

In reply, the appellant stated:

> . . . I am looking for any documents concerning the meeting which took place in Regina by Ministry officials regarding proposed amendments to the hate law in the Criminal Code. According to the National Post article I sent you, dated November 25, 1998, it stated that:
>
> > Federal and provincial justice ministers quietly agreed to the changes recently during a meeting in Regina.
>
> I am therefore looking for a copy of the proposals Ontario agreed to at that meeting and any other documents surrounding the negotiations which preceded this agreement. Probably going back 3 years would cover it, but obviously if you find a paper trail that exceeds that, I would like those documents also included in the request as well.
>
> I would also like any documents which **follow** the agreement made in Regina concerning the agreed amendments, if such documents exist, to the date of this letter.

The Ministry later identified responsive records and advised the appellant that it was granting partial access to these records. The Ministry enclosed records with this letter, portions of which were severed. The Ministry stated that it was denying access to the remaining records (approximately 2,502 pages) pursuant to sections 13, 15, 19 and 21 of the *Act*. The Ministry further stated:

> The exempt material consists of briefing materials, reports of various working groups and background material for working groups.
>
> Access to part of the records (where indicated on the enclosed documents) is denied pursuant to subsection 15(1)(b) of the *Act* as described above.
>
> In addition, some portions of the responsive records have been marked as not responsive (N/R) as they do not pertain to your request.

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

During the mediation stage of the appeal, the appellant indicated that she was not seeking access to any names of individuals, unless they appeared in their professional capacity.

Also during the mediation stage, the Ministry provided an index of records to the appellant and this office, listing the records or portions of records the Ministry withheld, as well as the basis for non-disclosure. The index indicated that page numbers which did not appear in the index "have been removed as they do not pertain to the request."

The appellant also agreed that she was not seeking records identified by the Mediator as duplicates or as being non-responsive to the request. Finally, the appellant agreed that she was not seeking access to a group of records specified in the Report of Mediator consisting of "the participants of the working group members and agendas and schedules of meetings."

I sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry, which provided representations in response. I then sent the Notice of Inquiry, together with a copy of the Ministry's representations, to the appellant. The appellant did not provide representations in response.

RECORDS:

The records remaining at issue consist of briefing materials, reports and background materials of working groups. The Ministry's index indicates that originally there were 2,788 pages of records at issue. As a result of mediation, 2,223 records remain at issue, either in whole or in part.

ISSUES:

SOLICITOR-CLIENT PRIVILEGE

Introduction

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.

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.

Solicitor-client communication privilege

The Ministry claims that the following records are exempt under the solicitor-client communication privilege aspect of section 19: Records 26-28, 32-35, 72-74, 75-85, 86-91,108-110, 120-144a, 292-299, 369-373, 467-496, 525-536, 580-587, 633-639, 1275, 1382-1391, 2117-

2317, 2389-2393, 2395-2432, 2433-2439, 2481-2491, 2571-2577, 2657-2677, 2760-2770, 2771-2775 and 2776-2786.

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].
The Ministry submits:

> [The section 19] privilege exemption includes:

a. Briefing notes summarizing the substance of an opinion given by an institution's legal counsel. (Order #P-135)

b. A "request for legal opinion" together with the resultant legal memorandum. (Order #P-823)

c. Correspondence between a ministry solicitor and a senior crown counsel at the Ministry of the Attorney General concerning legal issues. These records contained instructions provided by the ministry solicitor to counsel with respect to the preparation of a legal opinion, information related to the creation of an opinion, the opinion itself and the clarification of an opinion. (Order #P-979)

d. Memorandum from legal counsel to a program area about the relevant issues surrounding a particular issue and a transmittal letter from legal counsel for the Attorney General to legal counsel for the Ministry which accompanied a briefing note on changes to regulations. (Order #P-1205)

The records consist of correspondence, briefing notes and attachments. The vast majority of records exempted under this section are records retained by counsel in the Criminal Law Division. Counsel were extensively involved in the subject matter as advisors to the ministry and as participants in the various intergovernmental working groups. The records contain legal advice in respect of various propositions concerning Criminal Code amendments, as well as working papers directly related to the giving of legal advice. These written communications are protected by solicitor-client privilege as they arose in the context of deliberations by [federal, provincial and territorial (FTP)] justice ministers and their officials on the issue of hate crime. The briefing notes were prepared by legal counsel to give advice to the Minister and senior management on issues relating to hate law. The dominant purpose was to brief the Minister on a matter that was discussed at the FPT meetings. These notes demonstrate a "continuum of communications" in view of the fact that the subject matter has been an item of discussion at FPT meetings for a number of years.

The following records contain communications that are solicitor-client privileged:

Minister's briefing notes summarizing the substance of an opinion given by an institution's legal counsel

Records 86-91,108-110, 120-144a, 369-373, 633-639, 2203-2212, 2213-2234, 2247-2287, 2292-2317, 2389-2393, 2395-2432, 2433-2439, 2481-2487, 2571-2577, 2760-2770 and 2771-2775

Correspondence between solicitor and counsel at the Ministry of the Attorney General concerning legal issues.

Records 26-28, 32-35, 72-74, 292-299, 467-496, 525-536, 580-587, 2117-2317

Legal advisor's working papers

Records 1275, 1382-1391, 2148-2175, 2176-2199

Records 86-91, 108-110, 120-144a, 369-373, 633-639, 2203-2212, 2213-2234, 2247-2287, 2292-2317, 2389-2393, 2395-2432, 2433-2439, 2481-2487, 2571-2577, 2760-2770 and 2771-2775

The Ministry describes this group of records as "Minister's briefing notes summarizing the substance of an opinion given by an institution's legal counsel."

I am satisfied that each of these records was prepared by Ministry counsel for the purpose of giving legal advice and receiving instructions from the minister, the Attorney General, on the matter of proposed amendments to the *Criminal Code*. I am also satisfied that these records form part of the continuum of communications between a lawyer and client for the purpose of keeping one another informed. In addition, I am satisfied that these communications were treated in a confidential manner. Therefore, these records qualify for solicitor-client communication privilege.

Records 26-28, 32-35, 72-74, 292-299, 467-496, 525-536, 580-587, 2117-2317

The Ministry describes this group of records as "correspondence between solicitor and counsel at the Ministry of the Attorney General concerning legal issues". I have already found above that Records 2203-2212, 2213-2234, 2247-2287 and 2292-2317 are subject to solicitor-client communication privilege, so I will not further consider them under this heading.

Records 26-28 consist of e-mail correspondence between two federal government officials. Records 32-35 consist of notes from an intergovernmental working group meeting. The notes were sent from the British Columbia Attorney General to the Ministry. Records 72-74 consist of e-mail correspondence among members of an intergovernmental working group. Records 292-299 consist of a legal memorandum from a British Columbia government counsel to a British Columbia government client. Records 467-496 consist of a covering letter to the federal government from Ministry counsel, with attached paper dealing with hate crime issues. Records 525-536, and 580-587 consist of correspondence from members of an intergovernmental working group to other members of the group. In my view, these records cannot qualify for exemption under section 19, since they do not consist of confidential communications between a Ministry lawyer and his/her client, and are not otherwise subject to solicitor-client communication privilege.

Records 2130-2137 constitute the Ministry's response to a draft hate crime report of the federal government. Records 2146-2147 consist of a memorandum from the Assistant Deputy Minister, Ministry of the Solicitor General and Correctional Services, to the Assistant Deputy Attorney General and the Ontario Women's Directorate. Records 2176-2199 are a report prepared by the federal government on behalf of an intergovernmental working group. Records 2288-2291 are

communications among officials of the federal government and several provinces. I am not persuaded that these records consist of confidential communications between a lawyer and a client, or that they otherwise qualify for solicitor-client communication privilege under section 19.

Records 2117-2128, 2138-2145, 2148-2174, 2200-2202, 2203-2212, and 2235-2246 are Ministry internal communications on hate crime issues. I am satisfied that these records consist of confidential communications between a lawyer and client made for the purpose of giving or receiving legal advice. Therefore, these records qualify for solicitor-client communication privilege under section 19 of the *Act*.

Records 1275, 1382-1391, 2148-2175, 2176-2199

I have already found above that Records 2148-2175 are exempt under section 19, and that Records 2176-2199 do not qualify for solicitor-client communication privilege, so I will not further address these records under this heading.

Record 1275 is a set of handwritten notes that appear to have been authored by Ministry counsel. I am satisfied in the circumstances that these notes form part of counsel's working papers directly related to the seeking, formulating and giving of legal advice [see *Susan Hosiery Ltd.*, above].

Records 1382-1391 consist of City of Toronto Committee on Community and Race Relations, Legal Sub-Committee, notes for discussion with Ontario government officials. I am not satisfied that this record consists of a confidential communication between a lawyer and a client for the purpose of giving or receiving legal advice, or that it otherwise qualifies for solicitor-client communication privilege.

Records 75-85, 2488-2491, 2657-2666, 2667-2677, 2776-2786

The Ministry claims that these records are exempt under section 19, but provides no specific submissions on them.

Records 75-85, 2488-2491 and 2667-2677 consist of internal Ministry communications regarding hate crime issues. These records qualify for exemption under section 19 for the same reasons the first group of records qualifies as set out above.

Records 2657-2666 consist of correspondence to the federal government from the Ministry. For reasons similar to those for which I did not accept the section 19 claim under the second group of records, above, I find that these records do not qualify for solicitor-client communication privilege.

Records 2776-2786 are a working paper of the Law Reform Commission of Canada on hate propaganda. This record appears to be publically available and clearly does not qualify for solicitor-client communication privilege under section 19.

Litigation privilege

Section 19 also encompasses common law litigation privilege. This privilege protects records created for existing or contemplated litigation. The privilege may also apply to pre-existing records which have found their way into the litigation lawyer's brief [see *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) and Order MO-1337-I].

The Ministry's representations imply that the records at issue in this appeal may be subject to litigation privilege. However, the Ministry makes no specific submissions on its application, and none of the records for which section 19 was claimed, on their face, appear to be covered by litigation privilege. Based on the material before me, I find that litigation privilege does not apply to any of the records for which the Ministry claimed section 19.

Conclusion

The following records qualify for exemption under section 19 of the *Act* because they are subject to solicitor-client communication privilege:

> Records 75-85, 86-91, 108-110, 120-144a, 369-373, 633-639, 1275, 2117-2128, 2138-2145, 2148-2174, 2200-2202, 2203-2212, 2213-2234, 2235-2246, 2247-2287, 2292-2317, 2389-2393, 2395-2432, 2433-2439, 2481-2487, 2488-2491, 2571-2577, 2667-2677, 2760-2770 and 2771-2775

As a result, I uphold the Ministry's decision to deny access to these records, and I will not further consider these records in this order.

The following records do not qualify for exemption under section 19:

> Records 26-28, 32-35, 72-74, 292-299, 467-496, 525-536, 580-587, 1382-1391, 2130-2137, 2146-2147, 2176-2199, 2288-2291, 2657-2666 and 2776-2786

Although these records do not qualify for exemption under section 19, I will consider below whether or not they are exempt under the advice to government (section 13) and/or relations with other governments (section 15) exemptions as claimed.

RELATIONS WITH OTHER GOVERNMENTS

Introduction

The Ministry claims that most of the records at issue are exempt under both paragraphs (a) and (b) of section 15 of the *Act*. Since I have already found that several records are exempt under section 19, I will list below only those that remain at issue:

> Records 1-74, 111-116, 145-148, 212-368, 374-496, 500-512, 525-536, 580-587, 602-606, 613-620, 640-694, 726-844, 876-951, 972-1070, 1125-1200, 1201-1274a, 1276-1278, 1286-1327, 1381-1470, 1475-1803, 1858, 1860-2116, 2129-2137, 2146-2147, 2175-2199, 2288-2291, 2348-2354, 2359, 2370, 2378-2379, 2388, 2394, 2440-2441, 2444-2446, 2452, 2468, 2471, 2479, 2492-2493, 2498-

2499, 2513-2544, 2551-2558, 2578, 2583-2589, 2612, 2614-2615, 2617-2619, 2630-2642, 2646, 2649-2652, 2654, 2657-2666, 2787-2788

Sections 15(a) and (b) read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution;
>
> . . . . .
>
> and shall not disclose any such record without the prior approval of the Executive Council.

The words "could reasonably be expected to" appear in the preamble of section 15, as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, including section 15, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, party with the burden of proof (in this case the Ministry) must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.)].

Representations

The Ministry submits:

> . . . [T]he bulk of the records at issue concern relations between the Ontario government and its provincial, territorial and federal counterparts. These records contain information from other governments that was received in confidence by Ontario, as a participant in the intergovernmental meetings.
>
> These records were produced as a result of FTP meetings and shared with Ontario as a result of long-standing practices that rely on confidentiality as between the various members . . . [D]isclosure could prejudice the conduct of intergovernmental relations by the Ontario government or reveal information that the province received in confidence from other governments at FPT meetings.
>
> . . . [I]t should be noted that [the Information and Privacy Commissioner] has previously upheld the section 15 exemption in respect of records from analogous settings, on the basis that a "reasonable expectation of probable harm" would result from disclosure of those records. The previous decisions include:

a. Correspondence between senior justice officials of two governments dealing with highly sensitive and controversial issues (Order #P-123)

b. A proposed agenda and other records that would reveal the substance of Ontario's proposal to the federal government for resolving an international trade dispute were exempt. (Order #P-883)

c. The requested records, if disclosed, could reasonably be expected to prejudice intergovernmental relations between Ontario and Canada. This presumption was based on the sensitive and complex nature of land claims negotiations generally and the particulars of these records which included the need for ongoing negotiations to implement a land settlement agreement. (Order #P-908)

d. Briefing notes prepared by Ontario officials which discuss the contents of other province's briefing notes pertaining to matters discussed at interprovincial conferences (Order #P-1202)

See also Orders #P-210, P-883, P-1202.

Section 15(a) exemption

The records claimed under this exemption are either:

a. briefing notes prepared for the Minister and the ministry's senior management;

b. working papers or background papers circulated to all the participants at the FPT meetings of justice ministers; or,

c. reports that were considered at these meetings.

The records relate to the conduct of intergovernmental relations, which in this case, are the FPT meetings attended by justice ministers.

The FPT meetings provide a forum for justice ministers to discuss and consider proposals on justice matters. To facilitate frank discussion of issues by the federal government, provinces and territories, the meetings are held with the expectation that confidentiality of deliberations is protected. The practice is that documents used for and at the meetings are regarded as confidential materials that should be made available only to appropriate government officials that require them in the course of performing their duty.

Ontario, like other provinces and territories, takes seriously its participation at the FPT meetings. If the records were to be released, their disclosure could create a

> chill on the relations among various governments as participants could no longer be assured of the confidentiality of the deliberative process at these meetings. The result could be lack of candour and openness at these meetings designed to enable justice ministers [to] deal with issues of national importance to the justice system.
>
> It is not in the interest of Ontario to unilaterally decide to release documents that constitute FPT materials, materials that are a product of contributions from participants at the meetings. To do so would impair the provincial government's role in the FPT meetings.
>
> . . . [D]isclosure of the records could prejudice the conduct of intergovernmental relations . . . [I]t is in the interest of Ontario to foster these relations rather than taking actions that are detrimental to the FPT process.
>
> *Section 15(b) exemption*
>
> . . . FPT documents, especially background materials and working group papers, generally receive input from some or all of the participants. These records, if disclosed, would reveal information received from other governments whose ministers and officials attended FPT meetings.
>
> FPT meetings are held in camera and documents used at the meetings are not routinely disclosed to the public. Usually, a statement is released to the press at the end of each meeting highlighting issues that dominated the ministers' agenda. Indeed, the appellant learnt from the newspaper about the agreement by the ministers to amend the Criminal Code regarding hate law.
>
> Ontario could not unilaterally release the records to the appellant as they contained information that was received in confidence about a subject matter discussed at FPT meetings. The province does not have the consent of other governments to disclose these records as the expectation of participants at FPT meetings is that the whole process of consultation and deliberations is based on confidentiality.

Analysis

In previous orders, this office has found that disclosure of records generated in the context of discussions among the federal government and/or its provincial and territorial counterparts could reasonably be expected to prejudice the conduct of intergovernmental relations within the meaning of section 15(a) of the *Act*. For example, in Order P-1137, Assistant Commissioner Tom Mitchinson found that this exemption applied to records relating to a conference of provincial and territorial deputy ministers of health, concerning the question of financial assistance to persons infected with HIV via the blood system. In that order, the Assistant Commissioner stated:

> These records consist of communications exchanged directly between Ontario and the other provinces and/or territories, as well as correspondence between these other parties which was copied to Ontario. Some of these records were created by the Ministry for internal use and incorporate the information received from the other provinces and/or territories.
>
> As part of its submissions, the Ministry has provided an overview of the context in which the [Multi-Provincial and Territorial Assistance Plan (MPTAP)] discussions between the provinces and territories were conducted. The Ministry indicates that, from the outset, the provinces and territories were encouraged to discuss any issues in an open and candid manner. The Ministry states that these discussions and supporting documentation were shared on an explicitly confidential basis.
>
> It is the position of the Ministry that disclosure of such information could reasonably be expected to inhibit any further co-operative ventures among the provinces and territories, not only with respect to MPTAP, but also with respect to other issues requiring national cooperation and consultation . . .
>
> All of the provinces and territories which submitted representations support the Ministry's characterization of the discussions and negotiations leading to the development of the MPTAP, their expectations of confidentiality with respect to communications provided to Ontario and their concerns about the reasonable expectation of prejudice to their relationships with Ontario that could occur upon disclosure of the records.
> Having reviewed the records and the submissions of the parties, I make the following findings:
>
> (1) Records 5, 9-12, 15-19, 24, 28, 32-34, 36, 39, 40, 43, 46, 48-54, 56-58, 70, 72-81, 84, 87, 88, 90-92, 93 (except for the electronic mail (e-mail) message of July 20, 1993), 95, 97_100, 103, 104, 110-112, 115, 118, 123-125, 127, 129, 133, 138, 139, portions of 140, 141-144, 160, 161 and 163 are exempt under section 15(a). I find that their disclosure could reasonably be expected to prejudice the conduct of the intergovernmental relations between the Ministry and the governments of the other provinces and territories . . .

Similarly, in the context of records relating to a provincial/territorial ministers' meeting concerning social services issues, the Assistant Commissioner stated:

> In support of its position with respect to both sections 15(a) and (b), the Ministry's representations provide an overview of the context in which discussions between provinces and territories are conducted at P/T Ministers' Meetings. The Ministry indicates that disclosure of the type of records which are at issue in this appeal would call into question long standing practices and understandings reached among the provinces and territories concerning meetings, exchange of information, preparation of common briefing notes, and exchange of

> documents. The Ministry states that supporting documentation prepared for P/T Ministers' Meetings is always shared on a confidential basis. According to the Ministry, if the records at issue in this appeal are disclosed, this would severely prejudice relations with other provincial and territorial governments and inhibit Ontario's ability to participate in future interprovincial/territorial meetings and exchanges of information and documents.
>
> . . . . .
>
> The Ministry's representations point out that all of the records concern relations between the Ontario government and its provincial, territorial and federal counterparts. I agree, and find that the first requirement of the section 15(a) exemption claim has been established.
>
> The Ministry also submits that the process of P/T Ministers' Meetings has allowed the development of practices that encourage interprovincial/territorial co-operation and information-sharing which benefits all participants. According to the Ministry, the understandings and practices have helped to generate a sense of confidence and trust among provincial and territorial officials and Ministers which has gone beyond the P/T Ministers' Meetings themselves, and resulted in the opening of channels of communication which operate throughout the year.
>
> The Ministry has provided detailed representations regarding the context of each record and reasons why it feels that prejudice to the conduct of intergovernmental relations would result from disclosure. Having reviewed these representations and the records, I find that the Ministry has provided sufficient evidence to establish that disclosure of the exempt portions of Records 18, 19, 22, 30 and 40, and all of Records 21, 28, 29, 31, 32, 34, 40, 44, 45, 50 and 51 could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations. Therefore, I find that these records qualify for exemption under section 15(a) of the *Act*.

Based on the approach taken to section 15(a) in similar circumstances in these earlier orders, as well as the representations of the Ministry and the records themselves, I am satisfied that disclosure of the vast majority of the records at issue under section 15 could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario. In my view, the Ministry has provided detailed and convincing evidence to establish a reasonable expectation of probable harm, under section 15(a), to the conduct of relations between the Government of Ontario and the federal government and the other provinces and territories participating in discussions concerning amendments to the hate crime provisions of the *Criminal Code*. I am satisfied that disclosure of these records could reasonably be expected to inhibit any further co-operative ventures among the federal, provincial and territorial governments with respect to these and other issues requiring national cooperation and consultation.

Some of the documents for which section 15(a) and (b) was claimed clearly do not fall within the scope of either of these exemptions. These records have been published and are widely available through public sources, such as the internet. These records include publications on the topic of hate crime by the federal government, the City of Toronto, the University of Windsor, the Canadian Bar Association, B'Nai Brith Canada and the United Nations. These records are:

Records 374-438a, 439-466a, 726-827, 1201-1274a, 1305-1327, 1524-1531, 1566-1587, 1588-1619, 1620-1636, 1728-1781, 1864-1986, 2706-2759, 2776-2786

In addition, some of the records for which section 15 was claimed consist of materials either sent to or received from the City of Toronto and/or the former Municipality of Metropolitan Toronto (the City). In my view, while they may fall within the scope of section 15(a) or (b) for other reasons, this exemption does not apply solely on the basis of the reasons articulated by the Ministry respecting relations between Ontario and the governments of Canada and other provinces and territories. In the circumstances, I have decided not to make a specific finding on the applicability of section 15 to these records, but will seek further representations from the City and the Ministry on this issue from the perspective of relations between the City and Ontario. These records are:

Records 1276-1278, 1286-1290, 1291-1294, 1295-1304, 1381, 1382-1391, 1392-1394, 1395-1470, 1858-1863

PERSONAL INFORMATION

The Ministry has claimed that records 2318-2345, which consist of a series of letters between the Ministry and individual members of the public regarding hate crime, are exempt under the personal privacy exemption at section 21. This exemption applies only if the information at issue constitutes personal information.

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. In my view, once the names and addresses of the individual members of the public on these records are removed, it is not reasonably possible to ascertain these individuals' identities. Therefore, I find that, with the exception of the individuals' names and addresses, the records do not contain personal information.

UNJUSTIFIED INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In the circumstances, since the appellant has made no representations on whether any of the exceptions in section 21(1) applies, I find that the names and addresses of the individuals are exempt under section 21.

ADVICE TO GOVERNMENT

Introduction

The Ministry has claimed that many of the records at issue qualify for exemption under section 13(1) of the *Act*. Since I have found that the vast majority of records are exempt under section 19 or section 15, I need only consider this exemption with respect to the following records:

> Records 374-438a, 439-466a, 726-827, 1201-1274a, 1305-1327, 1524-1531, 1566-1587, 1588-1619, 1620-1636, 1728-1781, 1864-1986, 2706-2759, 2776-2786 [the records found above under the section 15 heading to be publicly available]
>
> Records 1276-1278, 1286-1290, 1291-1294, 1295-1304, 1381, 1382-1391, 1392-1394, 1395-1470, 1858-1863 [the records sent to or received by the City, on which I made no determination respecting section 15]
>
> Records 2318-2345 [the records I found above not to be exempt under section 21, except for the names and addresses of individual members of the public]

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of the "advice or recommendations" 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's representations are general in nature, and no doubt would be applicable to many of the records I previously found to be exempt under sections 19 and 15. However, having reviewed each of the records that remain at issue, I am satisfied that none contains information which constitutes or would reveal a suggested course of action which would ultimately be excepted or rejected by its recipient during the Ministry's deliberative processes. As a result, section 13 does not apply to the records listed above.

SCOPE OF THE REQUEST

The Ministry claims that Records 304-309, 311-314, 721-725, 828-832, 949-951, 2076-2116 and 2630-2640 are not responsive to the request. The appellant takes issue with the Ministry's position.

The Ministry submits:

> Except where identified, . . . these records do not relate to the subject matter of the request. The request specifically identifies proposed amendments to the hate law *in the Criminal Code* . . . [R]ecords that will not shed light on the subject matter of the request cannot be deemed responsive to the request. Records that relate to legislation other than the *Criminal Code* or that deal with other matters raised at FPT meetings cannot be deemed as responsive to the request.
>
> *Records 304-309 and 311-314* are concerned with legislation other than the *Criminal Code* and are not responsive to the request.
>
> *Records 721-725* consist of case extracts and handwritten notes on a generalized legal issue and contain no references to the subject matter. *Records 828-832*, while ostensibly addressed to the subject matter, also addresses a very generalized legal issue. As these records are of such a generalized nature, [they] are not responsive to the request.
>
> The ministry withdraws its reliance on non-responsiveness in respect of *Records 949-951* and *Records 2076-2116*. The ministry relies on the exemptions listed in the Index [Records 949-951: 13(1), 15(a) and (b); Records 2076-2116: sections 15(a) and (b)].

I found above that Records 212-368 (which include Records 304-309 and 311-314) fall within the scope of the section 15 exemption. As a result, no useful purpose would be served by making a specific finding on the responsiveness of these particular records.

With respect to *Records 721-725*, whether or not they are responsive to the request, they would clearly qualify for exemption under section 19, as forming part of counsel's working papers. Therefore, it is not necessary for me to make a finding on the responsiveness of these records as well.

The Ministry now claims that Records 949-951 and 2076-2116 are responsive, but exempt under sections 13 and 15. I have already found above that these records fall within the scope of section 15 and, in the circumstances, there is no need to make any additional finding here.

The Ministry makes no specific representations on Records 2630-2640. These records consist of a Ministry internal briefing note and, for similar reasons expressed above, these records would be exempt under section 15. Therefore, no useful purpose would be served by making a specific finding on responsiveness with regard to this record.

ORDER:

1. I uphold the Ministry's decision to withhold the bulk of the records at issue.

2. I order the Ministry to disclose to the appellant in full Records 374-438a, 439-466a, 726-827, 1201-1274a, 1305-1327, 1524-1531, 1566-1587, 1588-1619, 1620-1636, 1728-1781, 1864-1986, 2706-2759, 2776-2786.

3. I order the Ministry to disclose Records 2318-2345 to the appellant, with the exception of the portions highlighted on the copy of these records included with the Ministry's copy of this order.

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

Original Signed By: April 3, 2001
David Goodis
Senior Adjudicator