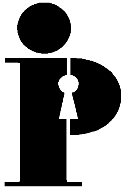

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER PO-2034

## Appeal PA-010291-1

## Ministry of Community and Social Services

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## NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Community & Social Services (the Ministry, now the Ministry of Community, Family and Children's Services) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> Copies of any and all materials and/or instructions that may have been given or imparted to employees and/or contractees of the Family Responsibility Office [the FRO] during the past four years with respect to the application and/or interpretation of section 41 of the *Family Responsibility and Support Arrears Enforcement Act* [the *FRSAEA*], or any subsections thereof. I include in the definition of "contractees" panel lawyers who may from time to time represent the FRO in section 41 hearings.

The Ministry located eight records, totaling 129 pages, as being responsive to the request and initially denied access to them pursuant to the discretionary exemptions in sections 14(1)(c) (law enforcement - investigative techniques) and 19 (solicitor-client privilege) of the *Act*. The Ministry attached to the decision letter an index of records entitled "Summary of Records Being Denied".

The appellant appealed the Ministry's decision.

During mediation, the mediator noted that one of the records at issue had the discretionary exemption in section 13(1) written on it as well as the two exemptions referred to by the Ministry in its decision. The Ministry confirmed that it had decided not to rely on this provision. The mediator also referred the Ministry to some orders issued by this Office that had addressed similar issues to the ones raised in this appeal (Orders PO-1921 and PO-1928). After reviewing these orders, the Ministry reconsidered its position and issued a revised decision letter on November 21, 2001 together with an index of records entitled "Updated Document Control List".

In its revised decision letter, the Ministry granted full access to Record 1, partial access to Records 3, 4, 5, 6, and 7 and continued to deny access to Records 2 and 8. The Ministry also raised two additional discretionary exemptions in its revised decision (sections 13(1) (advice or recommendations) and 18(1)(e) (economic and other interests)) and claimed that some of the records were not responsive to the request. The "Updated Document Control List" which the Ministry attached to its revised decision cites the exemptions claimed for every page of each record.

In his initial letter of appeal, the appellant indicated that disclosure of the records was in the public interest, thus raising the possible application of the so-called "public interest override" in section 23 of the *Act*. Section 23 does not override the exemptions in sections 14 or 19 of the Act. In view of the conclusions I have reached about the application of the exemptions that can be overridden (sections 13(1) and 18(1)(e)), it will not be necessary for me to consider whether or not section 23 applies in the circumstances of this appeal and I will not refer to it further in this order.

After reviewing the Ministry's decision, the appellant agreed not to pursue access to the remaining portions of records 4, 7, and 8 (which the Ministry claimed were not responsive to the request). However, the appellant disputed the Ministry's claim that certain other information in the records was not relevant to the request. The appellant also took issue with the late raising of sections 13(1) and 18(1)(e). Accordingly, the responsiveness of records and the late raising of a new discretionary exemption are at issue in this appeal, and I will deal with these as preliminary issues. In addition, the appellant has objected to the Ministry's reliance on his personal information both in its decision-making at the request stage and in its representations on appeal. He has made privacy complaints regarding these objections. However, as this also relates to the adjudication of the appeal, I will comment on these objections as a preliminary issue.

Further mediation could not be effected and this appeal was moved into inquiry. I decided to seek representations from the Ministry initially, and sent it a Notice of Inquiry setting out the facts and issues on appeal. The Ministry submitted representations in response, the majority of which I then sent to the appellant along with a Notice of Inquiry. The appellant submitted representations in response. After reviewing them, I sent the Ministry a Reply Notice along with the appellant's representations and asked it to comment on certain portions of them. The Ministry submitted representations in reply.

## RECORDS:

As a result of the above decisions and discussions during mediation, the records and parts of records that remain at issue in this appeal are as follows:

- Record 2 (pages 20-24, withheld in full) – Client Service Associate Policy and Procedures: Default Hearings (sec 41);
- Record 3 (withheld portions of pages 27, 36, 37) - Manual for Counsel Representing the Director of the FRO, Default Hearings;
- Record 5 (withheld portions of pages 88, 93, 101, 106, 107 and 108, and pages 64 – 71, 77, 78, 82, 83, 94, 95, 102, 103, 104 and 105 in their entirety) – Default Hearings (prepared for Client Service Associates/Client Service Clerks); and
- Record 6 (withheld portions of pages 111, 114 and 117, pages 110, 112, 113, 115, 116 and 118 in their entirety, and pages 119-123 in their entirety).

Although the Ministry has withheld pages 119-123 of Record 6 as being non-responsive to the request, it continues to claim sections 14(1)(c) and section 19 for this information, in the alternative.

### BACKGROUND AND PRELIMINARY MATTERS:

In 1987, the *Support and Custody Orders Enforcement Act* (*SCOEA*) was enacted to address spousal and child support arrears. *SCOEA* was repealed in 1992 and replaced by the *Family Support Plan Act* (*FSPA*). The *FSPA* was subsequently repealed in 1997 and replaced by the

*FRSAEA*. Pursuant to section 5(1) of the *FRSAEA*, the Director of the FRO is under a duty to enforce all "support orders", as defined in that Act, which are filed with it.

In order to place its representations on the issues in perspective, the Ministry has provided background on the FRO and its place in the overall family law scheme:

> The [FRO] occupies a unique position in the provincial government. As an enforcement agency, FRO must be equipped with effective mechanisms for ensuring that child and spousal support monies are collected and paid to whom they are owed. As a public agency, FRO is governed by the [*Act*], and is obligated to respond to appropriate requests for information. Fulfilling dual roles requires FRO to strike a delicate balance between seemingly competing public interests: the interest of addressing child poverty by ensuring effective enforcement of support orders on one hand, and the interest in open access to information on the other.

The Ministry states that the *FRSAEA* gave the newly established FRO "new and stronger mechanisms to use in enforcement and a positive duty to do so". In particular, the Ministry states that:

> FRO is the only body empowered with the duty and mandate to actively and, where necessary, aggressively enforce orders that are civil in nature. Because of FRO's distinct status, it is, at times, difficult to apply civil litigation jurisprudence to our office.

The Ministry explains the role the FRO plays in the larger system of family law litigation. In short, all court ordered support orders are filed with the FRO by the court, but the parties may opt out if they choose. The FRO's initial role is to facilitate the process of collecting payment from support payors and to remit those funds to the support recipients. As I indicated above, where a support payor is in arrears, the *FRSAEA* gives the Director the mandate to enforce the order.

The FRO's role, as provided for in the *FRSAEA*, does not extend to issues regarding the amount of support awarded, and the FRO will only become involved in court proceedings where that is at issue if the support payor requests enforcement relief. The Ministry states:

> The objective of enforcement is to get funds flowing. The most aggressive option open to FRO is a default proceeding. At a default proceeding, the Director may negotiate with the payor with respect to the repayment schedule, but never with respect to the amount owing. In other words, the support payors have relief available to them *before* FRO steps in to enforce. Those cases that make it to the stage of default proceedings are generally those that have been the most difficult cases to enforce.

**USE AND DISCLOSURE OF APPELLANT'S PERSONAL INFORMATION/ADMISSIBILITY AND RELEVANCE AT INQUIRY**

As noted above, the appellant objects to the Ministry's reliance on his personal information both in its decision-making at the request stage and in its representations on appeal. More particularly, the Ministry considered the appellant's identity and past relations with the FRO during its initial decision-making, and has provided detailed representations on this subject in this appeal. Referring to section 42(d) of the *Act* and the Information and Privacy Commissioner/Ontario (the IPC)'s *Code of Procedure*, the appellant states:

> In its Code of Practice, the [IPC] states the following:
>
> > *Anyone, including employees of an institution, is entitled to exercise his or her right to access information under the acts or make a privacy complaint, without being unnecessarily identified and without fear of negative repercussions.*
> >
> > ...
> >
> > *Employees of an institution responsible for responding to requests – generally the Freedom of Information and Privacy Co-ordinator [the Co-ordinator] and assisting staff – should not identify any requester when processing requests for general records. There is no reason to identify an individual requesting general records to employees outside the Co-ordinator's office.*
>
> [I]n the letter of apology dated 20 September 2001 … [relating to the appellant's privacy complaint about the use of his personal information at the request stage, the Co-ordinator] said the following:
>
> > *Please accept my assurance that it is not ministry practice to inquire into reasons a person might have for making an access request.*
>
> I submit that the Ministry, in its representations, has
>
> > a. Contradicted and repudiated the "assurance" given by [the Co-ordinator] in her letter of 20 September 2001;
> >
> > b. Offended [the *Act*] and the practices and procedures promulgated thereunder;
> >
> > c. Betrayed the transparency of its attempts to disguise its general records as records intended to be used in a specific litigation against a specific person.

[emphasis in the original]

In other words, The appellant asserts that the identification of him as the requester (by the Co-ordinator to the FRO) and the subsequent disclosure of information about him to the IPC offends section 42(d) of the *Act* and the principles set out in the IPC *Code of Procedure*. Moreover, he does not believe that these factors are relevant to the issues on appeal. This raises the question whether I should admit this evidence, and if I do admit it, whether I should give it any weight.

Referring to *Ethicon v. Cyanamid of Canada Inc.* [1977] FCJ No. 302 (F.C.T.D.) and *R. v. Wray* [1971] S.C.R. 272, the Ministry notes that a decision-maker must have all "relevant" information before him or her in order to make a proper decision and states:

> The Ministry relies on the common law rules of evidence to support its submission that the appellant's history is relevant and necessary to the IPC being able to make an informed decision on the question of anticipated litigation, and therefore, litigation privilege.

In contrast to the strict rules of evidence at common law, administrative tribunals are generally not bound to apply the more traditional grounds for "admissibility" of evidence, but consider, rather, its relevance to the issues to be decided and the weight to be given to the information (see: Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, (Carswell: Toronto, 2001) at paragraphs 17(1)(a) through (f)).

Sections 42(d) and (m) of the *Act* provide:

> An institution shall not disclose personal information in its custody or under its control except,
>
> (d) where disclosure is made to an officer or employee of the institution who needs the record in the performance of his or her duties and where disclosure is necessary and proper in the discharge of the institution's functions;
>
> (m) to the Information and Privacy Commissioner.

The crux of the appellant's argument is that he requested general records under the *Act*, and he should have been free to do so anonymously. In a general records request, there should normally be no need to identify the requester to the area holding the records in order for it to respond to the request, and I would expect that such information would not be routinely shared by the Ministry.

However, in order to properly apply the *Act,* the Ministry has a responsibility to ensure that the information does not fall within one of the exemptions or exceptions set out therein, and if it believes that it does, to decide whether it can be disclosed regardless. Even in a request for

general records, there are limited circumstances in which the identity of the requester is relevant in assessing the applicability of an exemption.

For example, in a section 19 claim based on solicitor-client privilege, it may not be possible to assert privilege if the requester is a client and therefore part of the solicitor-client relationship (Order PO-2006).

Other sections of the *Act*, such as sections 20 (danger to safety or health) and 14(1)(e) (danger to life or safety) contain no requirement that the information be "personal information". In some cases, the identity of the requester is not relevant to their application (for example, as in Reconsideration Order PO-1817). In others, however, the identity of the requester is the very reason the exemption was claimed (see: for example, Order PO-2003).

It is apparent from these examples that the decision to identify a requester in relation to a particular request is context specific. In this case, the contentious nature of the enforcement process forms the backdrop to the Ministry's decision-making. The Ministry's interpretation of the role of the FRO as expressed in its representations and the manner in which the exemptions should be applied reflects its belief that the identity of the appellant is relevant in the circumstances. Despite my ultimate findings on the issues below, I accept that it was reasonable in the circumstances for the Ministry to take its knowledge of and relationship with the appellant into consideration in arriving at its decision on access as well as in defending that decision during mediation and at inquiry.

In my view, the information provided in the representations relating to the various exemption claims is relevant to the application of some of the exemptions as interpreted and argued by the Ministry, and should therefore be considered by me in disposing of those issues. Given the analysis that led to my findings below, however, it is not necessary for me to determine what weight to give to this evidence.

**NON-RESPONSIVE INFORMATION**

The Ministry has withheld the majority of a chart (on pages 119-123) as being non-responsive to the appellant's request.

In Order P-880, former Adjudicator Anita Fineberg canvassed the issue of responsiveness of records in detail. In applying the direction provided by the Divisional Court in *Ontario (Attorney-General) v. Fineberg* (1994), 19 O.R. (3rd) 197, she concluded:

> 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 the request. It is an integral part of any decision by a head. The request 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.

In responding to this issue, the Ministry states:

> The Ministry relies on the wording of [the *Act*], which gives requesters a right of access to "a record or part of a record" (s.10). This wording gives institutions flexibility when making decisions regarding responsiveness (MO-1483)… Many previous orders indicate that records are often severed by an institution on the basis that certain portions do not fall within the scope of the request.
>
> Additionally, s. 10 permits government organizations to disclose "part of a record" if only part contains responsive information … This approach is practical because it recognizes that government organizations create records for a variety of reasons, and some documents may be created to serve multiple purposes (P-913).

Referring to the principles set out in Order P-880, the Ministry states further:

> [T]here was no doubt as to the interpretation of the request. The request was not considered to be too broad, or so vague as to cause uncertainty regarding what the appellant was seeking. The appellant requested "copies of any and all materials and/or instructions that may have been given or imparted to employees and/or contractees of FRO … with respect to the application and/or interpretation of s. 41 …or any subsection thereof …" It is clear that this request is quite specific, and that portions of these materials that are reasonably related to the request should be disclosed …
>
> The chart in question, entitled "What you should note on your court Results", contains information that is not relevant to "the application and/or interpretation of s. 41" of the *FRSAEA*, the section that deals with default hearings. The chart is administrative in nature, and consists of basic directions on how to fill out a Panel Lawyer Report Form. This chart contains brief notes on what should be recorded by a lawyer after attending court on any of the proceedings referred to …
>
> …the ministry has decided to release a portion of the chart on page 120 that may be somewhat related to the request. However, the remaining portions of the chart deal with other facets which are in no way included in the appellant's request. The withheld sections in the chart briefly deal with refraining orders, variation orders, costs orders, and substitutional service orders made against FRO, all of which require completely separate proceedings from a default hearing.
>
> …

> The ministry would like to emphasize that the appellant in no way has requested records or information concerning refraining orders, variations, costs, or sub-service matters… Thus, these materials are not reasonably relevant to the request, as they do not contain information regarding default hearings brought pursuant to s. 41 *FRSAEA*.

In responding to the Ministry's representations on this issue, the appellant takes the position that "if a portion of a chart is deemed to be 'related to the request'…, then the entire chart is related to the request". The appellant submits that:

> [T]o invoke s. 10(1) of [the *Act*], as the Ministry does, is to go beyond the meaning and intent of the *Act*. I suggest that the words of that section … do not contemplate or authorize the editing of a single item (the chart) in a record when at least part of that item is acknowledged to be "related to the request".

Referring to the Ministry's reliance on Order MO-1483, the appellant attempts to distinguish the conclusions of Assistant Commissioner Tom Mitchinson on the basis that there were a large number of records at issue in that order, whereas the only record at issue in the present case consists of a single chart of only a few pages.

In the appeal dealt with in Order MO-1483, the appellant argued that if a record contains both responsive and non-responsive information, the institution must disclose the non-responsive portions unless they qualify for exemption under the *Act*. Assistant Commissioner Mitchinson explained the rationale for withholding non-responsive information from disclosure:

> It is clear from previous orders of this Office that records are often severed by an institution or an Adjudicator on the basis that certain portions do not fall within the scope of a request. Perhaps the most common example is a request for records relating to a motor vehicle accident, where certain notebook entries made by an investigating police officer are responsive, and other entries dealing with unrelated activities undertaken by that police officer on the same day are withheld on the basis that they fall outside the scope of the request. Another example might be an audit report dealing with the operation of a number of publicly funded bodies, where only one of these bodies is identified in a request. In my view, this approach to dealing with requests is both practical and supportable by the wording of the *Act*. Section 4 of the *Act* gives requesters a right of access to "a record or **part of a record**", presumably for the purpose of giving institutions flexibility when making decisions regarding responsiveness. Section 17 of the *Act* is also relevant in this regard. It imposes obligations on both institutions and requesters to clearly identify information responsive to a request and, where unclear, to actively work together to ensure that both parties understand what information is requested and what is not. To require all portions of records, whether responsive or not, to undergo an exemption-based review in the context of responding to a particular request would, in my view, impose an unnecessary and unproductive burden on the statutory access scheme.

Commenting on the manner in which severances should be made, Senior Adjudicator David Goodis stated in Order PO-1878:

> A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario(Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].

I agree with the Ministry that the appellant's request is specific to records pertaining to the interpretation and/or application of section 41 of the *FRSAEA*. Section 41 deals only with default hearings, while other sections contemplate a number of different types of proceedings and orders, as explained by the Ministry in its representations. For example, Refraining Orders, which are dealt with in sections 35 to 39 of the *FRSAEA*, would be granted in a motion brought by the support payor. The Ministry indicates that this is a separate proceeding from a default hearing, which is initiated by the Director of the FRO. I accept the Ministry's position that portions of records pertaining to other types of proceedings and orders that fall outside the scope of section 41 are not "reasonably related to" the appellant's request as worded.

I do not accept the appellant's interpretation of section 10 of the *Act*. In my view, regardless of the number of pages at issue, section 10 contemplates that any portion of a record may be severed from a record, either because it is not responsive or because it is exempt under the *Act* as long as to do so does not result in "disconnected snippets", or "worthless", "meaningless" or "misleading" information.

Accordingly, if the chart on pages 119-123 contains information about default hearings and other types of proceedings, the record must be reviewed in order to determine whether the information that is not responsive to the appellant's request can be reasonably severed.

It is apparent from a review of this record that it is designed for multi-purpose use, that is, it is intended to provide panel lawyers with a checklist of what is required to be included in their reports for the different types of proceedings in which they act for the FRO. The chart is broken down into three columns and a number of rows, each row addressing a separate type of proceeding. The information contained in each row is specific to the type of hearing specified and is not dependent on or related to the information contained in the other rows and columns. The only information on this chart that pertains to default hearings is found in the three columns that comprise the second row on page 120. I find that this information is clearly related to the appellant's request and that it is severable from the remaining information in the chart. I find that the remaining information on this record is not reasonably related to the appellant's request and is, therefore, not responsive. I will not consider the non-responsive information further in this order.

Because the Ministry has decided to disclose the responsive portion of this chart, pages 119-123 are no longer at issue.

## LATE RAISING OF NEW DISCRETIONARY EXEMPTIONS

On August 22, 2001, the Commissioner's office provided the Ministry with a Confirmation of Appeal, which indicated that an appeal from the Ministry's decision had been received. This Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Ministry would have 35 days from the date of the confirmation (that is, until September 26, 2001) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

Previous orders issued by the Commissioner's office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeal process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*.

Former Adjudicator Fineberg also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, former Adjudicator Fineberg made the important point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

In this case, as I indicated above, the decision to claim additional exemptions was made during mediation, but after the 35 day deadline, when the Ministry sought to apply sections 13(1) and 18(1)(e) to some of the records at issue. Since the Notice of Inquiry had not yet been issued, it was possible to seek representations on these issues without delaying the inquiry.

The Ministry’s representations explain why it did not raise the discretionary exemptions in sections 13(1) and 18(1)(e) earlier in the processing of the appellant’s request and appeal:

> The delay in identifying new discretionary exemptions (during the mediation stage), resulted in part because of the recent transfer of the [FRO] Branch from the Ministry of the Attorney General (MAG) to the [Ministry], which took place on April 9, 2001. With respect to requests for information made pursuant to [the *Act*], the reporting procedures or these two ministries are different.
>
> In any event, the FRO and the ministry were confident at the beginning stages that they had exercised their obligation for the due diligence in reviewing the information, and denying the requester access to it by relying on s. 19 and s. 14(1)(c). It seemed unnecessary at that time to have to include additional discretionary exemptions which the ministry considered applicable in denying access to the information. The ministry believed, and continues to believe that they have a very strong case pursuant to s. 19 and s. 14(1)(c), as initially relied on.
>
> It wasn't until the mediation stage that the ministry was referred to the very recent IPC decisions of the Office of the Children's Lawyer, under MAG (PO-1928) and the Office of the Fire Marshal (OFM), under the Ministry of the Solicitor General (PO-1921). To the ministry's surprise these two cases challenged their position with respect to the scope of the protection of information afforded by s. 19 and s. 14(1)(c). It was only in response to these two decisions, that the ministry reconsidered its position and after an in-depth review of the documents, decided to release a large part of the information and also determined the necessity to claim additional discretionary exemptions that applied to the information that the ministry continued to deny to the requester. The ministry's decision to release information and add exemptions was promptly done in response to the communication with the mediator at this stage, and the appellant was immediately notified.
>
> …any delay caused was not excessive. The amended decision was made during the mediation stage, thus giving the appellant ample time to address the application of the new exemptions (Order PO-1840) … The purpose and objective of the mediation process is to investigate the decision on the request, and to attempt to effect a settlement and/or narrow the issues. The ministry complied with this process and effectively narrowed the issues.

The Ministry notes that during mediation, it decided to disclose 87 of the 129 pages in whole or part to the appellant, which, it submits, was "clearly to the benefit of the appellant". The Ministry points out that this is not a case where it is seeking to reverse its position such that new information is being denied, but rather, new exemptions are being invoked to further defend its decision to deny access to the records. The Ministry concludes:

> In this case, the records at issue were narrowed by the same review process that also resulted in adding new discretionary exemptions. Despite the mediation process, the records that remain at issue are the same as those which were

> originally exempted. Thus there is no resulting prejudice to the appellant, nor is the integrity of the appeal process compromised.

It appears that the appellant's primary objection to the late raising of a new discretionary exemption arises from the delay overall in the processing of his request. Moreover, he interprets the Ministry's "explanation" for the delay in addressing this issue (that is, the transfer of the FRO from the MAG to the Ministry) as an "excuse" for inaction. Overall, he believes that he has been prejudiced by the Ministry's actions in the manner in which it has dealt with his request and appeal.

While I recognize that administrative changes can result in unintentional and/or unavoidable delay, it does not appear that these changes had any impact on the decision-making with respect to the appellant's request. As the appellant notes (referring to the dates provided by the Ministry), the FRO was transferred in early April, 2001 but he did not submit his request until late June, 2001 and the Ministry's decision was not issued until early August 2001. I have concluded, therefore, that this factor did not produce any substantial delay in responding to the issues. The issuance of relatively recent decisions appears to have had a greater impact on the Ministry's decision-making.

Once the appellant appealed the Ministry's decision, the matter proceeded in accordance with the mediation timelines established by the IPC. As a result of mediation, the Ministry disclosed a large number of records to the appellant, which allowed him access more quickly than would have occurred if disclosure took place as a result of an order. Moreover, I find the Ministry's initial approach to the application of exemptions to be reasonable, that is, since the Ministry believed that two of the exemptions claimed were sufficient to justify its decision to withhold the records, it was not necessary at that time to include every possible exemption. However, in this case, once the Ministry had amended its decision during mediation to disclose a number of records and parts of records, it determined that it would now be prudent to claim the additional exemptions. In my view, to deny the Ministry an opportunity in these circumstances to re-assess the basis for withholding those records which it had initially determined should not be disclosed may ultimately de-motivate the Ministry from entering into mediation in a meaningful way.

In this case, the Ministry never intended to disclose the records at issue, it simply altered the basis for withholding them. Moreover, this decision was made during the mediation stage and the appellant was fully apprised of the changes at that time. In effect, there has been no additional delay to the process because of the Ministry's actions and, in fact, the change in the Ministry's decision conferred benefits on the appellant, since he obtained access to a substantial number of records that had previously been denied. In my view, there was no prejudice to the appellant under the circumstances.

Accordingly, I will consider the possible application of sections 13(1) and 18(1)(e) in this order.

## DISCUSSION:

### ADVICE OR RECOMMENDATIONS

The Ministry claims that section 13 applies to the records. This 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.

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].

In previous orders, this office has found that the words "advice" and "recommendations" have similar meanings, and that in order to qualify as "advice or recommendations" in the context of section 13(1), the information in question must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making [see, for example, Orders P-118, P-348, P-883, P-1398 and PO-1993]. In addition, adjudicators have found that advice or recommendations may be revealed in two ways: (i) the information itself consists of advice or recommendations; or (ii) the information, if disclosed, would permit one to accurately infer the advice or recommendations given [see Orders P-1037 and P-1631].

The Ministry states:

> The records in question contain two specific sets of materials. The records contain advice and recommendations from the FRO legal department to the Director's enforcement officers (records 2 and 5), and advice and recommendations from the FRO legal department to FRO panel lawyers (records 3 and 6). Both sets of materials are written with an envisioned measure of flexibility to deal with the specific facts of a given case. The advice and recommendations act as 'maps and boundaries' outlining the optimal strategy that panel lawyers and enforcement officers should adopt with regard to the circumstances. It is legal advice that can be accepted or rejected by its client (CSA's [Client Service Associates] in the case of CSA manuals) and recommended instructions that may be subject to adjustment depending on information disclosed during the court proceedings, as related by its panel lawyers (in the case of panel lawyer manuals). Therefore, the manuals contain a

> *suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process* and thus, follows the precedent laid out in [previous orders of this office]. [emphasis in the original]

Referring to section 5(1) of the *FRSAEA*, the Ministry states further that:

> Section 5(1) makes it clear that the enforcement measures outlined in the severed material is clearly related to the actual business of the [Ministry]. For this reason, allowing the exemption to stand in these circumstances would *not* be extending the exemption beyond its purpose and intent [Order P-434]. [emphasis in the original]

The Ministry notes that section 6(1) of the *FRSAEA* provides discretion for the Director to enforce in the manner that is most practical:

> Section 6(1) clearly envisions that the Director's enforcement officers and solicitors will take actions that correspond to the particular circumstances of a given case. It provides enforcement officers and solicitors with a measure of flexibility that is exercised as a given situation presents itself and stands as recognition of the valuable role that individual decision making plays in the Director's officers and solicitors daily actions. For this reason, the information contained within the severed pages can be viewed as a "submission of a suggested course of action, which will ultimately be rejected or accepted" and thus be categorized as recommendations.
>
> Because the information could be used by defaulting payors to thwart default proceedings, the free flow of such advice and recommendations in the future would be significantly inhibited to avoid such an outcome. As a result, the Director's duty of enforcing support orders to collect money for recipients and their children would be negatively affected. Moreover, since new enforcement tools are always being developed, the free flow of advice and recommendations regarding the development and implementation of these new tools would be inhibited to avoid having them being rendered useless. Consequently, the risk of release of such information will result in a "catch-22" situation since it is the giving of such advice and recommendations that result in the success of any enforcement mechanism that is utilized.

In responding to the Ministry's representations, the appellant notes that the Ministry describes the records at issue as "materials intended to 'train' panel lawyers and CSAs with respect to default hearings. He continues:

> More particularly, the information at issue is described by the Director of the FRO as Panel Lawyer Presentations Materials", "Client Service Associate Policy and Procedures", "Manual for Counsel Representing the Director of the FRO, Default Hearings", "Panel Lawyers' Meeting", "Default Hearings (prepared for Client

> Service Associates/Client Service Clerks", "Panel Lawyer Training Sessions", and "Panel Lawyer Newsletter(s)"… These materials were issued to hundreds of employees and panel lawyers. They may be described as "guidelines" or "instructions" but they do not begin to meet the definition of "advice" or "recommendations".

The Ministry correctly points out in response that it is the substance of the information that determines whether the exemption applies to it rather than the "label" that is used to describe it. In my view, however, the nature of the information at issue as described by the appellant is relevant to its substance.

In Order PO-1928, former Adjudicator Dora Nipp addressed the institution's argument that certain records of the Office of the Children's Lawyer (the OCL) relating to interviewing techniques, procedures followed, and if they exist, policies and procedures manuals and training manuals used by OCL lawyers to determine a child's wishes in determining questions of custody and/or access, and "anything that pertains to how the office conducts their investigations and decision-making practices" were exempt under section 13(1) of the *Act:*

> The Ministry submits:
>
> > The documents were prepared by in-house staff for use by staff and panel lawyers and social workers when rendering services to OCL on behalf of children. The records are intended to provide suggestions and guidance to lawyers and social workers who are providing legal representation to children or preparing an investigation and report in personal rights cases when so ordered by the court. The documents at issue were used for discussion purposes at province-wide training. At no time were they intended for public distribution.
>
> I do not accept the Ministry's position. Although these records contain guidelines for OCL staff, they do not constitute the type of advice or recommendations that may be accepted or rejected in the deliberative process of government decision-making and policy-making [see Order 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.)].

In my view, these findings are similarly applicable to the types of records at issue in the current appeal. The records at issue are best described as instructions and guidelines for panel lawyers and CSAs to follow in carrying out their responsibilities under the *Act*. Rather than establishing a rigid process, these guidelines may offer suggested approaches that are available to these representatives of the Director. Even though I accept that the guidelines pertain to the central role of the FRO, I am not persuaded that documents of this nature, which provide only general guidance and instructions and do not relate to any specific "fact" situation, can or should be

interpreted as advice or recommendations in the sense contemplated by this section of the *Act*. On this basis, I find that the records do not qualify for exemption under section 13(1) of the *Act*.

## LAW ENFORCEMENT – INVESTIGATIVE TECHNIQUES AND PROCEDURES

### Introduction

The Ministry submits that the records qualify for exemption under Section 14(1)(c) of the *Act*. This section reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

In order to establish that the particular harm in question under section 14(1)(c) "could reasonably be expected" to result from disclosure of the records, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order PO-1772; see also 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.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

The Ministry claims that this exemption applies to all of the records at issue, and provides specific examples of "techniques and procedures" which it submits are described in the records.

In order to establish that section 14(1)(c) applies, the Ministry must demonstrate that:

> (i) disclosure of the record could reasonably be expected to reveal investigative techniques and procedures; and
>
> (ii) the techniques and procedures are currently in use or likely to be used in law enforcement.

*Investigative techniques and procedures*

In order to constitute an "investigative technique or procedure", it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that its effectiveness would not be hindered or compromised by disclosure and accordingly that the technique or procedure in question is not within the scope of section 14(1)(c) [see Orders P-170, P-1487].

The Ministry states:

> In 1993, the Information and Privacy Commissioner issued Order P-589, an oft-cited order which states that the information gathering process used by the FRO in the enforcement of support deduction orders is, in fact, a law enforcement matter. In addition, the provisions of the *FRSAEA* make it clear that the FRO engages in law enforcement activities, as defined in subsection 2(1) of [the *Act*]. Subsection 5(1) of the *FRSAEA* states that it is the duty of the Director to enforce support orders that are filed in the Director's office, and to pay the amounts collected to the person to whom they are owed. In order to carry out this duty, the Director may employ a variety of law enforcement tools. For example, where arrears exist, the Director may file writs of seizure and sale against the payor, institute garnishment proceedings against a payor, and the Director can serve the payor with a notice of default (a default hearing, pursuant to section 41 of *FRSAEA*…).
>
> It is sometimes the case that support payors registered with the FRO deliberately attempt to delay or subvert the enforcement of their support obligations. Willful refusal to pay can lead to enforcement proceedings, including default hearings. At these hearings, unless the payor can satisfy the court that he or she is unable to pay for valid reasons, the court may make a number of orders pursuant to s. 41(9) *FRSAEA* to facilitate compliance with the court ordered support obligation.
>
> The responsive records in this request are manuals drafted to assist CSA's, who initiate and pursue these aggressive enforcement techniques, as well as to assist the panel lawyers who represent the Director before the court in these proceedings.

The Ministry notes that the records describe the process for commencing enforcement action including timelines, describe the enforcement remedies available to the FRO, describe circumstances where investigation and inquiry are essential prior to pursuing a court action and describe negotiation strategies to be utilized by office staff or FRO counsel. The Ministry describes various ways in which, it submits, knowledge of this information could be used by support payors to manipulate and effectively thwart the FRO with respect to the enforcement proceedings.

The appellant takes the position that hearings under section 41 of the *FRSAEA* are "convened not to enforce the law but to enforce court orders. Court orders are not laws". In fact, the definition of "law enforcement" in section 2 of the *Act* includes "proceedings in a court or tribunal if a penalty or sanction could be imposed", and section 41 of the *FRSAEA* provides for sanctions such as the issuance of a warrant for the payor's arrest (section 41(6)). In my view, therefore, hearings under section 41 meet the definition of "law enforcement". This conclusion is consistent with previous orders of this office (as discussed further below).

The appellant further argues that any powers or duties assigned to the FRO by virtue of section 41 are "mechanical or administrative in nature". Referring to the various subsections of section 41 of the *FRSAEA*, the appellant states:

> I submit that none of the functions of the FRO set out in s.41(1) refer to the use of "investigative techniques or procedures". I further submit that there is no "reasonable expectation of harm" if the public is made privy to the manner in which the FRO (a) prepares statements of arrears, and (b) serves notice on payors to deliver a financial statement and to appear in court

In Order P-1340, former Adjudicator Fineberg commented on records in the Family Support Plan (the FSP) which, as noted above, was replaced by the *FRSAEA*:

> The records at issue contain information gathered by the FSP under the *Family Support Plan Act* (the *FSPA*) R.S.O. 1990, c.S.28. The FSP has broad investigatory and enforcement powers in relation to the administration of the *FSPA* and the enforcement of support and custody orders filed with the Director of the FSP. The Director, or any person designated by the Director as an enforcement officer, has the power to commence and conduct a proceeding and to take steps for the enforcement of an order. The enforcement of a support deduction order does not end until the support order to which it relates is terminated and there are no arrears owing, and enforcement continues despite the fact that the support order has not been filed in, or has been withdrawn from, the Director's office.
>
> The *FSPA* also provides that when a payor under a support order is in default, the Director may require the payor to file a financial statement and to appear before the court to explain the default. If the payor fails to appear before the court, the court may issue a warrant for the payor's arrest for the purpose of bringing him or her before the court. The court may also order the arrest of an absconding payor.
>
> The *FSPA* also provides that, in addition to its powers in respect of contempt, the court may punish by fine or imprisonment, or by both, any wilful contempt of, or resistance to, its process, rules or orders under the *FSPA*.
>
> In Order P-589, former Inquiry Officer Asfaw Seife concluded that, on the basis of the above description of the jurisdiction of the FSP, information gathered by the FSP under the *FSPA* in enforcement of a support deduction order issued by the court against the appellant was a law enforcement matter. This approach has been adopted in Orders P-1198 and P-1269 of this office.
>
> The appellant submits that the issue involved in this FSP file was not one of "law enforcement" but rather one of the interpretation of the separation agreement between him and the affected person. The interpretation of the separation

> agreement was resolved by a decision of the Provincial Court dated April 26, 1996.
>
> In this case, the separation agreement between the appellant and the affected person was filed with the Director of the FSP who then proceeded to monitor and enforce the support provisions of the agreement pursuant to the provisions of the *FSPA* as described above. In my view, that the issue of arrears was ultimately resolved by a court judgement, does not negate the fact that the matters contained in the records deal with the functions of the FSP as set out in the *FSPA*. Accordingly, I find that these are "law enforcement" matters for the purposes of section 14(1) of the *Act*.
>
> Records 6-7 and 16 are FSP computer printouts. Records 6-7 are entitled "Debtor Tracing Information" and "Payor Tracing Information" respectively. Record 16 is entitled "Payor Assets Information". Apart from the standard information headings and the case, file and enforcement officers' numbers which appear on Records 7 and 16, these documents are blank.
>
> …
>
> Section 14(1)(c) has also been claimed by the Ministry on the basis that the disclosure of these records could reasonably be expected to reveal investigative techniques and procedures currently in use.
>
> …
>
> [I]n my view, **the records relate to what is more appropriately categorized as an enforcement technique as opposed to an investigative technique**. [emphasis added]

I agree with this line of orders and find that, similar to the conclusions drawn by former Adjudicator Fineberg in Order P-1340 (and former Adjudicator Holly Big Canoe in Order P-1269), the records at issue in this appeal relate to "enforcement" not "investigation" and are more appropriately characterized as "enforcement techniques and procedures" rather than "investigative techniques and procedures". As a result, section 14(1)(c) is not applicable to exempt them from disclosure.

## ECONOMIC AND OTHER INTERESTS

### Introduction

The Ministry claims that section 18(1)(e) applies to pages 104-108 the records. This section reads:

> A head may refuse to disclose a record that contains,

> positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

In order to qualify for exemption under section 18(1)(e), the Ministry must establish the following:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; **and**

3. the negotiations must be carried on currently, or will be carried on in the future; **and**

4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

(Order P-219)

In Orders MO-1199-F and MO-1264 I stated the following with respect to the municipal equivalent of section 18(1)(e) of the *Act*:

> Previous orders of the Commissioner's office have defined "plan" as "... a formulated and especially detailed method by which a thing is to be done; a design or scheme" (Order P-229).
>
> In my view, the other terms in section 11(e), that is, "positions", "procedures", "criteria" and "instructions", are similarly referable to pre-determined courses of action or ways of proceeding.

Applying this reasoning, I find that there must be some evidence that a course of action or manner of proceeding is “pre-determined”, that is, there is some organized structure or definition given to the course to be taken.

The Ministry notes that pages 104-108 of the records comprise a part of the manual, which was produced by the legal department for CSAs, and submits:

> The information on pages 104 to 108 are instructional in nature and describe certain enforcement tools available to the ministry, and how to use them in negotiations to obtain the most favourable outcome. The purpose of the enforcement tool described here is to come to a satisfactory payment order in the context of a default hearing, whether it is an interim or final order. The Director,

> FRO under the ministry has found that the use of this tool is very effective in achieving this purpose.
>
> Section 38(1)(d) [of the *FRSAEA*] grants the ministry valuable negotiating power in the type of agreements mentioned in the last paragraph of page 104, and described on pages 105 and 106. The ministry submits that if this information is released, it will decrease the negotiating power and will cause unfavourable results. All of the pages withheld under this exemption deal with how this negotiation process can be most successful.

With respect to the four parts of the above test, the Ministry states:

> 1) The records clearly meet the first requirement, as the withheld information constitutes procedures, criteria and instructions, as well as the position of the ministry in these matters.
>
> 2) The procedures, instructions and criteria contained in the records are directly applied to negotiations required with support payors in the context of a default hearing (CSAs and panel lawyers are in consultation in this regard)…
>
> 3) Negotiations occur during the course of default hearings conducted by the ministry. There are currently numerous default hearing appearances conducted daily across Ontario, all of which include negotiations through the CSAs and panel lawyers. These negotiations and default hearing appearances will continue to proceed in the future…
>
> 4) Negotiations in the context of a default hearing are by the Director for the benefit of the recipient of support. In circumstances where a support recipient is collecting social assistance, some arrears may be owing to the [Ministry] by virtue of an assignment of the support owed. Thus the economic interests of support recipients as well as the ministry are at stake and should be protected by the s.18(1)(e) exemption.

The appellant simply takes the position that section 41 of the *FRSAEA* "makes no reference or allusion to 'negotiations' or any of its variants, and has nothing to do with 'negotiations'."

Comments made at page 321 of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) are helpful in understanding the Legislature's intention in including this section of the *Act*:

> There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives

> or may create a situation in which some members of the public may enjoy an unfair advantage …
>
> …
>
> [T]here are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other governments. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively.

With respect to the types of "negotiations" to recognize under this exemption claim, the Williams Commission Report recommended at page 323:

> The ability of the government to effectively negotiate with other parties must be protected. Although many documents relating to negotiating strategy would be exempt as either Cabinet documents or documents containing advice or recommendations, it is possible that documents containing instructions for public officials who are to conduct the process of negotiation might be considered to be beyond the protection of those two exemptions. A useful model of a provision that would offer adequate protection to materials of this kind appears in the Australian Minority Report Bill:
>
>> An agency may refuse to disclose:
>>
>>> A document containing instructions to officers of an agency on procedures to be followed and the criteria to be applied in negotiations, including financial, commercial, labour and international negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the agency to the detriment of the public interest.
>>
>> We favour the adoption of a similar provision in our proposed legislation.

The records at issue are contained in procedural manuals and are designed to establish guidelines and/or instructions on proceeding through the various steps involved in enforcing support orders through the provisions of section 41 of the *FRSAEA* (and its numerous subsections). I agree that they contain procedures, criteria and instructions and the first part of the test is satisfied.

Although the legislation enacted to facilitate the enforcement of support orders would appear to be intended to benefit the support recipients (as determined by court order), its overall objective is to "address the massive default rates regarding spousal and child support, and the resulting poverty of children". The Ministry plays an integral role in accomplishing this objective, in the overall support scheme in "addressing child poverty" and through the more general "social assistance" regime. On this basis, I find that any "negotiations" conducted by the Ministry would be by or on behalf of the government of Ontario, as discussed in requirement 4, for the benefit of the government of Ontario.

That being said, I do not agree with the Ministry that pages 104-108 contain "negotiation strategies" or "procedures, criteria or instruction to be applied to negotiations" as discussed in requirement 2. This portion of the records refers to certain "negotiations" under a different section of the *FRSAEA*, but, in my view, it does not relate to a strategy or approach to the negotiations themselves. Rather, the information at issue in this discussion simply reflects mandatory steps to follow in connection with an alternate enforcement provision under the *FRSAEA*. It would appear that in any case in which the alternate enforcement mechanism is relevant, the steps taken as described in these pages would be followed – and would likely become common knowledge to anyone involved in this process. Accordingly, I find that pages 104-108 do not contain positions, plans, procedures, criteria or instructions "to be applied to any negotiations" within the meaning of this section as required in order to satisfy the second part of the section 18(1)(e) test, and this section, therefore, does not apply.

In concluding this discussion, I am mindful of the comments made by Senior Adjudicator Goodis in Order PO-1921 with respect to the records at issue in that appeal, which consisted of training and instructional materials, and guidelines, which are intended to assist OFM staff in discharging their statutory duties in investigating the cause, origin and circumstances of certain fires, explosions or conditions under section 9(2)(a) of the *Fire Protection and Prevention Act* (*FPPA*):

> Although it is not necessary to my determination, I find support in sections 33(1)(b) and 35(2) of the *Act* for the conclusion that the records should be disclosed, with certain minor exceptions. These sections require institutions to make certain types of records available to the public:
>
> > **33.** (1) A head shall make available, in the manner described in section 35,
> >
> > (b) instructions to, and guidelines for, officers of the institution on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration or enforcement of the provisions of any enactment or scheme administered by the institution that affects the public.

> **35.** (2) Every head shall cause the materials described in sections 33 and 34 to be made available to the public in the reading room, library or office designated by each institution for this purpose.

> In my view, the records can be described as instructions to, and guidelines for, officers of the OFM on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration of the provisions of the *FPPA*, an enactment or scheme which affects the public. Sections 33(1)(b) and 35(2) thus signal the Legislature's intent that records of this nature ought to be made available to the public, subject to any necessary severances for exempt information. If I were to accept the Ministry's submission that records of the nature at issue in this appeal are exempt on the basis that they are not now publicly available and their contents makes them useful to others, the legislative intent reflected in sections 33(1)(b) and 35(2) could be largely frustrated. I do not accept that sections 18(1)(a) and (c) in particular were intended to be so applied.

In my view, these comments are similarly applicable to training and instructional records designed, for general application, to assist the Director and her enforcement officers and panel lawyers in commencing and proceeding through default hearings.

## SOLICITOR-CLIENT PRIVILEGE

### *Introduction*

The Ministry claims that the section 19 exemption applies to all of the records at issue. Section 19 of the *Act* states:

> 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 institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-1879].

The Ministry relies on the application of both heads of privilege to the records.

## LITIGATION PRIVILEGE

### *Introduction*

In Order MO-1337-I, Assistant Commissioner Mitchinson discussed the scope of litigation privilege, particularly in light of a landmark decision of the Court of Appeal for Ontario in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321:

In *General Accident*, the majority of the Court of Appeal questioned the "zone of privacy" approach and adopted a test which requires that the "dominant purpose" for the creation of a record must have been reasonably contemplated litigation in order for it to qualify for litigation privilege . . .

. . . . .

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
>> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> The test really consists of three elements, each of which must be met. First, it must have been *produced* with contemplated litigation in mind. Second, the document must have been produced for the *dominant purpose* of receiving legal advice or as an aid to the conduct of litigation - in other words for the dominant purpose of contemplated litigation. Third, the prospect of litigation must be *reasonable* - meaning that there is a reasonable contemplation of litigation.
>
> Thus, there must be more than a vague or general apprehension of litigation.

Applying the direction of the Courts and experts in the area of litigation privilege, in my view, a record must satisfy each of the following requirements in order to meet the "dominant purpose" test:

> 1. The record must have been created with existing or contemplated litigation in mind.
>
> 2. The record must have been created for the dominant purpose of existing or contemplated litigation.
>
> 3. If litigation had not been commenced when the record was created, there must have been a reasonable contemplation of litigation at that time, i.e. more than a vague or general apprehension of litigation.
>
> In applying this test, it is necessary to bear in mind the time sensitive nature of this type of privilege, and the fact that, even if the dominant purpose for creating a record was contemplated litigation, privilege only lasts as long as there is reasonably contemplated or actual litigation.

In Order MO-1337-I, Assistant Commissioner Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief. This aspect of litigation privilege arises from a line of cases that includes *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.) and *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.). As the Assistant Commissioner points out in his analysis, the test for this aspect of litigation privilege from *Nickmar* was quoted with approval by two of the three judges in *General Accident*. As a result, the Assistant Commissioner concluded that this aspect of privilege remains available after *General Accident*, and he adopted the test in *Nickmar*:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

The Assistant Commissioner then elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere," and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief." Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation under the *Nickmar* test and should be tested under "dominant purpose."

I agree with the Assistant Commissioner's approach to litigation privilege as set out above, and I will apply it for the purpose of this appeal.
In its representations, the Ministry states:

> The ministry acknowledges that the documents at no time constituted part of the lawyer's brief; therefore, this line of submissions will rely on the "dominant purpose" test.

***Dominant purpose***

In Order PO-1928, former Adjudicator Nipp dealt with the application of section 19 to information contained in "handbooks" and/or "training manuals" developed and used by the Office of the Children's Lawyer. With respect to litigation privilege, she found:

> In order to qualify for litigation privilege, a record must meet the three-part test articulated above. Each element of the test requires a specific nexus between the creation of the record and "existing" or "contemplated" litigation. The Ministry's position is essentially that litigation privilege can apply to a record created not for the dominant purpose of a particular piece of litigation, but rather for litigation in general. In my view, it is apparent from the authorities that litigation privilege is an *ad hoc* type of privilege, designed to protect documents that pertain to a particular piece of litigation while that litigation is continuing or reasonably in contemplation, but no longer. This type of privilege was subjected to extensive analysis by the court in *General Accident*, above. Justice Carthy, the author of the majority reasons, quoted several authorities which support this view:
>
> The origins and character of litigation privilege are well described by Sopinka, Lederman and Bryant in The Law of Evidence in Canada (Toronto: Butterworths, 1992), at p. 653:
>
>> As the principle of solicitor-client privilege developed, the breadth of protection took on different dimensions. It expanded beyond communications passing between the client and solicitor and their respective agents, to encompass communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation. Although this extension was spawned out of the traditional solicitor-client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, *it was founded upon our adversary system of litigation by which counsel control fact-presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without*

> *any obligation to make prior disclosure of the material acquired in preparation of the case . . .*
>
> [emphasis added]

R.J. Sharpe, prior to his judicial appointment, published a thoughtful lecture on this subject, entitled "Claiming Privilege in the Discovery Process" in Law in Transition: Evidence, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) at p. 163. He stated at pp. 164-65:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege . . . Litigation privilege . . . is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. *Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate . . .*
>
> [emphasis added]

In my view, these extracts, quoted with approval by the Court of Appeal for Ontario, indicate that documents which may qualify for litigation privilege under the dominant purpose test must have been produced with *particular* litigation in mind, and not litigation generally. This view is reinforced by the following extract from *Susan Hosiery Ltd. v. M.N.R.*, [1969] 2 Ex. C.R. 27 at 33-34:

> . . . [U]nder our adversary system of litigation, *a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared*. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.
>
> [emphasis added]

> In my view, based on the records themselves and the surrounding circumstances, the dominant purpose for preparing the records was to train OCL staff in discharging their duties. While one of the lesser purposes for creating the records may have been to foster the conduct of litigation generally, this would not attract litigation privilege, even if it were the dominant purpose, since they were not prepared with any particular litigation in mind.
>
> For these reasons, I find that the guide portion of record 4, and records 1, 2 and 3, do not meet the dominant purpose test.

The Ministry submits that Order PO-1928 is distinguishable from the current appeal:

> In Order PO-1928, the case of *Susan Hosiery Ltd. V. M.N.R.* is quoted as standing for the proposition that "the dominant purpose test must have been produced with a particular litigation in mind, and not litigation generally."[*sic*] However, the case itself states that the *purpose* of the privilege is to protect the possibility of the "distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation". The ministry respectfully submits that the protection from the possibility of the distortion of truth of support payors' financial or other circumstances (the purpose of the privilege) must be kept in mind when analyzing whether litigation privilege applies to the records at issue in the case at hand. Moreover, PO-1928 – which did not find that the Office of the Children's Lawyer (OCL) manuals were covered by litigation privilege – can be distinguished from the case at hand. The manuals in this case were produced to prepare the client's (Director's) case with respect to a "particular litigation in mind," that being s. 41 default hearings, whereas the OCL's manuals were created to train OCL staff in discharging their duties.
>
> The pages at issue contain FRO's strategies in court and mechanisms by which FRO collects payments from those payors who do not live up to their court ordered support obligations. When dealing with such payors, FRO needs to avail itself of more aggressive enforcement techniques. The responsive records in this request are manuals to assist CSA's, who initiate and pursue these aggressive enforcement techniques, as well as to assist the panel lawyers who represent the Director before the court in these proceedings.

The Ministry believes that access to the information in the records at issue would assist a support payor to manipulate the enforcement proceedings and concludes:

> It is crucial then, that the information contained in the severed pages be protected under litigation privilege. This litigation is "particularly related to the needs of the adversarial trial process." Further, it "is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate." [R.J.Sharpe. "Claiming Privilege in the Discovery Process" in Law in

> Transition: Evidence, L.S.U.C. Special lectures (Toronto: De Boo, 1984) at pg. 163.]

The Ministry also seeks to distinguish the findings in Order PO-1928 on the basis that the authorities referred to in it do not explicitly state that litigation privilege must attach itself strictly to a single case, that one of them relates to documents in a lawyer's brief, for which the Ministry is not asserting privilege, and because they concerned litigation privilege and its relation to examination for discovery.

I do not agree that Order PO-1928 is distinguishable from the present appeal. I am not persuaded that the Legislature intended this privilege to extend to procedures to be applied generally. This view is amply supported by the authorities cited by former Adjudicator Nipp, above. It finds further support in dictionary definitions.

The *Concise Oxford Dictionary of Current English*, 8th ed., R.E. Allen, ed. (Oxford: Oxford University Press, 1990) defines the term "litigate" as:

- Be a party to a lawsuit;
- Contest (a point) in a lawsuit

*Black's Law Dictionary*, 6th ed., J.R. Nolan et al., (St. Paul, MN: West Publishing Co., 1990) (*Black's*) defines the term "litigate", in part as:

- To dispute or contend in form of law; to settle a dispute or seek relief in a court of law; to carry on a lawsuit.
- To bring into or engage in litigation; the act of carrying on a suit in a law court.

"Litigation" is defined in *Black's* as:

- A lawsuit.
- Legal action, including all proceedings therein.
- Contest in a court of law for the purpose of enforcing a right or seeking a remedy.

Finally, *Black's* defines "lawsuit" as:

- A vernacular term for a suit, action, or cause instituted or depending between two private persons in the courts of law.
- A suit at law or in equity.
- An action or proceeding in a civil court.
- A process in law instituted by one party to compel another to do him justice.

Whether in common usage or as a term of art in the legal context, reference to the term "litigation" is primarily recognized as pertaining to a specific proceeding relating to arguably identified parties. In my view, it is entirely reasonable to incorporate these definitions into the interpretation of the term as used in section 19 of the *Act*.

Consequently, I have concluded that the findings of former Adjudicator Nipp in Order PO-1928 are similarly applicable in the circumstances of this appeal. Moreover, I find that her comments and the authorities on which they are based pertain to all aspects of the litigation of a particular matter. This does not, in my view, encompass general guidelines or manuals such as the records at issue here.

In a further argument, the Ministry refers to a recent decision of the Ontario Divisional Court overturning the decision of Adjudicator Big Canoe in Order P-1561 (*Ontario (Attorney General) v. Big Canoe* [2001] O.J. No. 4876):

> [I]n the judicial review of Order P-1561, the Ontario Divisional Court rules that s. 19 contains two branches of privilege. The first is solicitor-client privilege, which includes within its ambit litigation privilege, but that the words "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation" create a discretionary privilege, to which the common law rules of privilege do not apply.
>
> The court said:
>
> > When it comes to Branch 2, there is no issue to "clarify". There is no reference in Branch 2 to the common law principle of solicitor-client privilege (which includes litigation privilege). A head may refuse to disclose a record that was prepared by Crown counsel for use in giving legal advice or in contemplation of, or for use in, litigation. The language is clear and unambiguous. Unlike Branch 1, no external considerations such as a change in the common law, can serve to import a different way of construing Branch 2 … [t]hus, if it was not the intention of Branch 2 of s. 19 to enable government lawyers to assert a privilege more expansive or durable than that available at common law … it was open to parliament to say so.
>
> What the court is saying is that s. 19 affords solicitor-client privilege (which includes litigation privilege) *and* a second branch of privilege that is wider than common law litigation privilege. The court is clear that all materials prepared for or in contemplation of litigation are protected under this discretionary privilege, and the common law doctrine surrounding "a particular piece of litigation" are not to be applied under that branch.

As the Ministry notes, the Ontario Divisional Court found that "if it was not the intention of Branch 2 of s. 19 to enable government lawyers to assert a privilege more expansive or durable than that available at common law … it was open to parliament to say so."
I do not accept the Ministry's argument that any document relating to the litigation process, provided it was drafted by a Crown counsel, was intended to be exempt under section 19. In my view, if the record does not relate to a particular piece of litigation, it was not prepared "in contemplation of or for use in litigation" within the meaning of section 19, and is not exempt. This view is reinforced by the purposes of the *Act* recited in section 1, which require exemptions from access to be "limited and specific", and by sections 33(1)(b) and 35(2) of the Act, referred to above, which specifically identify the type of records at issue in this appeal as "public records".

The Ministry also submits that application of the strict rules designed for two-party litigation is not appropriate to proceedings under section 41 of the *FRSAEA*. Referring to the "tremendous social need for FRO's work" (as discussed in the background section above) and the nature of its work, the Ministry states:

> FRO's default proceedings are unique and, as a result, the ministry submits that it should be allowed some flexibility in using s. 19 of [the *Act*] to protect information that was prepared for use in litigation.
>
> …
>
> The strict common law rules were developed in the context of private litigation. In that context it makes sense that when one court case ends, litigation privilege is likely no longer necessary. In FRO's case, however, hundreds of default proceedings are conducted every month. It would be impossible for FRO counsel to write out instructions for every panel lawyer every time she or he was going to represent the Direct at a default proceeding. The same holds true for FRO counsel to write out instructions to CSAs regarding the commencement of default proceedings.

In my view, the social context of the FRO's work is not the governing factor in deciding whether section 19 applies. Section 19 is not a harms-based exemption, and its application depends on the factors I have already considered. In my view, this argument does not advance the Ministry's position.

The Ministry also submits that access to the information in the records at issue would assist a support payor to manipulate the enforcement proceedings and concludes:

> It is crucial then, that the information contained in the severed pages be protected under litigation privilege. This litigation is "particularly related to the needs of the adversarial trial process." Further, it "is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate." [R.J.Sharpe. "Claiming Privilege in the Discovery Process" in Law in

> Transition: Evidence, L.S.U.C. Special lectures (Toronto: De Boo, 1984) at pg. 163.]

Again, section 19 does not have a "harms" component. That is, it is not the consequences of disclosure but the nature of the record itself that will determine whether it meets the requirements of the exemption. The record either meets the test as set out in this order or it does not. Therefore, many of the concerns and arguments raised by the Ministry with respect to the unique nature of the FRO, the need for its work and the perceived consequences of disclosure do not assist me in determining whether section 19 applies in the circumstances.

Applying the above discussion to the records at issue in this appeal, I find that they do not pertain to a particular litigation and on this basis, do not qualify for exemption pursuant to the litigation aspect of the solicitor-client privilege in section 19 of the *Act*.

## SOLICITOR-CLIENT COMMUNICATION PRIVILEGE

### *Introduction*

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].

The Ministry states:

> The pages at issue as outlined above are taken from the [FRO] Policy & Procedures Manual. This material is prepared exclusively for FRO's enforcement officers as defined in the paragraph above and therefore satisfies the test… The material is written by the Director's legal counsel; contains information of a confidential nature that is not distributed to anyone other than those expected to initiate Default Proceedings on the Director's behalf; has been written by the Director's legal advisors for the use of the Director and her enforcement officers; and is designed to give legal advice as to how and when a default proceeding should be commenced, and how it is to proceed.
>
> …
>
> … It provides comprehensive and direct legal *advice* as to what should prudently and sensibly be done in a particular legal context.
>
> …
>
> [Other pages] contain information found in the panel lawyer training material. FRO has just over 100 panel lawyers across Ontario who regularly appear in their local courts on behalf of FRO, a centralized agency. Each panel lawyer is retained to appear on a specific matter in each case.
>
> …
>
> The solicitor/client relationship here is akin to a common scenario in private practice where a client seeks legal advice from a senior lawyer, decides on a course of action, and instructs the senior lawyer to proceed. The senior lawyer, with the client's consent, may instruct a junior lawyer to draft materials or appear in court to move the proceedings forward.
>
> …
>
> In the case at hand, the Director originally sought the advice of FRO in-house counsel with regard to the commencement and litigation of default hearings. This

> advice was provided to the Director, and the Director gave instructions regarding the procedures to be followed in default hearings. In-house counsel then prepared these materials, reflecting the Director's instructions, to the panel lawyers in the form of a manual or training material.

Commenting on the application of the solicitor-client communication privilege to similar types of records, former Adjudicator Nipp found in Order PO-1928:

> [I]n a similar vein to my finding above under litigation privilege, to be subject to solicitor-client communication privilege, the communication in question must relate to a particular matter on which legal advice is being sought or provided. This privilege is not intended to apply to general guidelines to staff or agents, or policies about how to carry out their duties, in the absence of a specific legal issue on which advice is being sought. By contrast, had legal advice been sought and given on the specific legal issue of what the guidelines should contain, then confidential communications between legal counsel and an OCL client made for this purpose may well have attracted privilege.

I agree with these conclusions and find that they are similarly applicable in the circumstances of the current appeal. I accept that the records were prepared by legal counsel for the Director, and that during their preparation, any communications between the Director and/or her staff and/or agents with respect to the interpretation of the relevant sections of the *FRSAEA,* and the content of the procedures and guidelines may well have attracted privilege. However, once the document was completed, its purpose was not to communicate advice from legal counsel to the Director and her staff and agents, but rather, to be then used by her in overseeing the procedures to be followed by staff in applying and enforcing the legislation. I am not persuaded that simply because these records pertain to one specific section of the *FRSAEA* that they pertain to a "particular legal context" in the requisite sense. These are guidelines, procedures and instructions for "general application" in the default hearing process under section 41 of the *FRSAEA* as opposed to being in relation to a particular proceeding on which legal advice is sought or given. Accordingly, I find that the records are not exempt under the solicitor-client communication privilege aspect of the section 19 exemption.

## ORDER:

1. I uphold the Ministry's decision to withhold the portions of pages 119-123 that are not responsive to the appellant's request.

2. I order the Ministry to disclose the remaining records and parts of records at issue by providing him with copies of these pages on or before **September 10, 2002**.

3. In order to verify compliance with Provision 2 of this order, I reserve the right to require the Ministry to provide me with a copy of the disclosed records, only upon request.

Original signed by: August 21, 2002
Laurel Cropley
Adjudicator