



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

ORDER PO-2870-I

Appeal PA08-353

Alcohol and Gaming Commission



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NATURE OF THE APPEAL:

The requester submitted a request to the Alcohol and Gaming Commission (the AGC) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

...copies of all records pertaining to [a named convenience store] as they pertain to the application for maintaining a lottery terminal at [named convenience store] and all records pertaining to the application's refusal, denial, suspension/and/or revocation.

The AGC issued an access decision, granting partial access to the records. It cited the exemptions in sections 19 (solicitor-client privilege), 14(2)(a) (law enforcement report), 13(1)(advice or recommendation) and 21(1) (personal privacy) of the *Act*, as the basis for denying access to the withheld records. Included with its access decision was an index of records listing the records and corresponding exemptions.

The requester, now the appellant, appealed the AGC's decision to deny access.

During mediation, the appellant confirmed that he wished to pursue access to all the records in the index. The appellant also raised the issue of the possible application of the exception to the section 13(1) exemption that is set out in section 13(2). The AGC confirmed that it is claiming the discretionary exemptions in sections 49(a) and (b); section 49(a) in conjunction with sections 13(1), 14(2)(a) and 19 and section 49(b) in conjunction with section 21(1). Finally, the AGC indicated that it would release Records 27 and 31 in full to the appellant. Accordingly, Records 27 and 31 are no longer at issue.

Mediation efforts did not resolve the appeal and the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

I began my inquiry by sending a Notice of Inquiry to the AGC. The AGC provided representations. I then sent a Notice of Inquiry to the appellant, along with a complete copy of the AGC's representations. The appellant also provided representations.

RECORDS:

In its representations, the AGC agreed to release Records 55, 121 and the severed portion of Record 13 to the appellant. Copies of these records were sent to the appellant and they are no longer at issue.

In his representations, the appellant also indicated that he is no longer interested in obtaining access to Records 23, 61, the balance of 63, 64, the balance of 93, 140, 151-156, 162, 163, 164, 165, 166, 167, and 168. Accordingly, I have removed these records from the scope of the appeal and will not be referring again to them.

RECORD	SECTION CLAIMED
9 – Memo to counsel	49(a), 19
10 – Email and investigation report	49(a), 14(2)(a), 49(b), 21
11 – Investigation report	49(a), 14(2)(a)
21 – Email correspondence	49(a), 13
22 – Email correspondence	49(a), 13
62 – Investigation report	49(a), 14(2)(a), 49(b), 21
69 – General occurrence report	49(a), 14(2)(a), 49(b), 21
70 – General occurrence report	49(a), 14(2)(a), 49(b), 21
71 – General occurrence report	49(a), 14(2)(a), 49(b), 21
72 – General occurrence report	49(a), 14(2)(a), 49(b), 21
73 – General occurrence report	49(a), 14(2)(a), 49(b), 21
74 – General occurrence report	49(a), 14(2)(a), 49(b), 21
75 – General occurrence report	49(a), 14(2)(a), 49(b), 21
76 – Occurrence summary	49(a), 14(2)(a), 49(b), 21
77 – Occurrence summary	49(a), 14(2)(a), 49(b), 21
78 – Occurrence summary	49(a), 14(2)(a), 49(b), 21
79 – Occurrence summary	49(a), 14(2)(a), 49(b), 21
80 – Supplementary occurrence report	49(a), 14(2)(a), 49(b), 21
81 – Supplementary occurrence report	49(a), 14(2)(a), 49(b), 21
85 – Fraudulent document report	49(a), 14(2)(a), 49(b), 21
87 – Police report	49(a), 14(2)(a), 49(b), 21
88 – Police report	49(a), 14(2)(a), 49(b), 21
105 – Solicitor’s notes	49(a), 19
109 – Email correspondence	49(a), 19
111 – Solicitor’s notes	49(a), 19
113 – Solicitor’s notes	49(a), 19
114 – Occurrence summary	49(a), 14(2)(a), 49(b), 21
115 – Occurrence summary	49(a), 14(2)(a), 49(b), 21
139 – AGC correspondence	49(a), 19
171 – Supplemental occurrence report	49(a), 14(2)(a), 49(b), 21
172 – Occurrence summary	49(a), 14(2)(a), 49(b), 21
173 – Occurrence summary	49(a), 14(2)(a), 49(b), 21

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The AGC submits that the records contain the personal information of the appellant and other identifiable individuals.

Based on my review of the records, I find that all of the records contain the personal information of the appellant within the meaning of paragraphs (a), (b), (c), (d), (g) and (h) of the definition of that term found in section 2(1) of the *Act*.

In addition, some of the records contain the personal information of the appellant and other identifiable individuals within the meaning of paragraphs (a), (b), (c), (d), and (h) of the definition of that term found in section 2(1) of the *Act*.

As I have found that all of the records contain the personal information of the appellant, his right of access to these records is governed by Part III of the *Act* which gives an individual a general right of access to their own personal information held by institutions.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

As noted above, section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, **13**, **14**, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information.

The AGC relies on section 49(a), in conjunction with sections 13(1), 14(2) (a) and 19 to deny access to some of the records at issue. First, I will consider whether sections 49(a) and 14(2)(a) apply to Records 10, 11, 62, 69 – 81, 85, 87, 88, 114, 115 and 171-173.

LAW ENFORCEMENT

Section 14(2)(a) states:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The term “law enforcement” is used in several parts of section 14, and is defined in section 2(1) as follows:

“law enforcement” means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

The word “report” is not defined in the *Act*. However, previous orders have found that to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order P-200). Previous orders have found that as a general rule, occurrence reports, supplementary reports and similar records of other police agencies have been found not to meet the definition of “report” under the *Act*, because they have been found to be more in the nature of recordings of fact than formal, evaluative accounts of investigations [see Orders M-1109, MO-2065 and PO-1845].

Representations

The AGC submits that it is a law enforcement institution for the purposes of section 14 and cites Orders PO-2796, PO-1889, P-1587 and P-1399 in support of this position. The AGC states the following by way of background as to the nature of the records:

The Registrar of Alcohol and Gaming (the “Registrar”) is responsible for a variety of functions including determining whether or not applicants for gaming registration are eligible to be registered under the *GCA* [*Gaming Control Act, 1992*] [in] accordance with statutory requirements of honesty, integrity and considerations of the public interest.

...

The Registrar has certain responsibilities under the *GCA* with respect to ensuring that applicants for registration meet the statutory requirements prior to being registered and that registrants continue to meet those requirements during the period of their registration.

The Registrar appoints investigators pursuant to section 31 of the *GCA* to carry out investigations into applicants and registrants. By virtue of their office, all police officers are investigators for the purposes of the *GCA*. The AGC's Investigation and Enforcement Branch is also staffed with officers from the Ontario Provincial Police ("OPP") who exercise the authority of peace officers under the *Police Services Act*. All the investigators may lay charges under the *GCA*.

In light of the AGC's recognized role as a law enforcement institution and the law enforcement functions of AGC Investigators/OPP officers, it is submitted that the reports produced by these Investigators in the course of their investigative duties constitute law enforcement reports.

The AGC made the following submissions with respect to each of the specific records for which it claimed section 14(2)(a):

Record 10 is an investigation report and cover e-mail sent by a Gaming Registration Officer to the Deputy Registrar's assistant for the purposes of initiating legal review. The report was produced by an AGC-OPP officer and describes the outcome of his investigation into the Appellant's court charges in relation to his failure to remit monies received from the sales of Break Open Tickets to the requisite charity. The OPP officer had conducted this investigation upon request by the Deputy Registrar who was in the process of considering the Appellant's application for registration as a Lottery Retailer.

Record 11 is an investigation report on the Appellant written by an investigator with the Investigation and Enforcement Branch of the AGC. This report details the due diligence investigation conducted into the Appellant for his registration application, which included a review of the Appellant's criminal record, financial background and the outcome of a personal interview with the Appellant.

Record 62 is an investigation report on the Appellant pertaining to charges against him under the *GCA*, for the purpose of review by the Deputy Registrar in the consideration of the Appellant's application for registration. This report was written by an OPP officer. It also contains the name of several individuals interviewed by the officer together with the name of an organization with which the individuals were associated. The association of these individuals with the voluntary organization is considered personal information.

Records 69-75 are occurrence reports that were prepared by OPP officers...

Records 76-79 are occurrence summary reports by OPP officers...

Record 80 is an OPP incident report...

Record 81 is an OPP report...

Record 85 is an OPP report...

Record 87 is a CPIC (Canadian Police Information Centre) report on the appellant.

Records 114-115 are occurrence summary reports by the OPP...

Record 171 is an OPP report about a break-and-enter incident at the Appellant's store. The report summarizes an interview with the Appellant and investigative steps taken by the police officer.

Records 172-173 are occurrence summary reports by OPP officers which detail the status of certain matters, actions taken, initiation processes and analyses of persons involved in various criminal investigations.

The AGC did not make representations on Record 88; however, this record is also a CPIC report and is similar to Record 87.

The appellant did not specifically make representations on the application of section 14(2)(a) to the records; however, he submits that if the records that the AGC alleges are "reports" contain evidence of the reasons behind the AGC's refusal to grant him a license under the GCA, then these records should be disclosed.

Analysis and finding

I accept the AGC's submission that it is a law enforcement institution for the purposes of section 14. I further accept that the OPP officers at the AGC perform a law enforcement function. Previous orders of this office support the submission and I find no reason, in the present appeal, to find differently. However, based on my review of the records and the AGC's representations, I find that only some of the records qualify as "law enforcement reports" for the purposes of section 14(2)(a).

Records 69 – 72, 76 - 81, 85, 87, 88, 114, 115 and 172 do not qualify as reports for the purposes of section 14(2)(a). I find that the AGC's descriptions of these records do not reflect the fact that they contain mere observations or recordings of fact as to the officer's actions taken or investigations completed. There is no "formal statement or account of the results of the collation and consideration of information" which would be evident in a law enforcement report which falls within the scope of section 14(2)(a). Further, I note that Records 69 – 75 are General Occurrence Reports; Records 76 – 79, 114, 115 and 172 are Occurrence Summaries and Records 80 and 81 are Supplemental Occurrence Reports. These types of reports have, in the past, not been found by this office to be "reports" for the purposes of section 14(2)(a) as they too are more in the nature of recordings of fact than formal, evaluative accounts of investigations [see Orders PO-1845, PO-1796, P-1618, MO-2266, MO-1986, MO-1771-I, M-1341, M-1141 and M-1120]. In Order M-1109, former Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:

An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a “report.”

Based on my review of the occurrence reports and occurrence summaries at issue in this appeal, I am satisfied that they do not meet the definition of “report” under the *Act*, as they consist essentially of observations and recordings of fact. Although there are a few comments by police officers which might be considered evaluative, the records consist primarily and essentially of descriptive information. Accordingly, as section 14(2)(a) does not apply. Records 69 – 72, 76 - 81, 85, 87, 88, 114, 115 and 172 are not exempt under section 49(a).

On the other hand, Records 10, 11, 62, 73, 74, 171 and 173 qualify as reports for the purposes of section 14(2)(a). I find that the AGC’s descriptions of these records to be accurate. They all contain a formal, written account of the information that was either gathered by the OPP officer or investigator with the AGC who conducted the investigations of the appellant’s actions. Unlike the records above, these records are “reports” for the purposes of section 14(2)(a) because they contain the investigator’s conclusions or opinions of the results of the investigations, including recommendations on whether further actions are required.

Further, I find that Records 10, 11 and 62 were reports that were prepared in the course of a law enforcement investigation undertaken by the AGC’s investigator or an OPP officer, specifically the investigation functions authorized by the *GCA*. Records 73, 74, 171 and 173 were reports that were prepared by police officers in the course of their investigations of possible violations under the *Criminal Code*. While these records are occurrence reports, occurrence reports may be found to be law enforcement reports for the purposes of section 14(2)(a) if they contain sufficiently detailed analysis and describe the conclusions drawn by the police as a result of the consideration and assessment of the information.

Accordingly, as I have found that Records 10, 11, 62, 73, 74, 171 and 173 are law enforcement reports for the purposes of section 14(2)(a), they qualify for exemption under section 49(a), subject to my finding on the AGC’s exercise of discretion.

As I have found that section 49(a) does not exempt Records 69 – 72, 76, 77, 78, 79, 80, 81, 85, 87, 88, 114, 115 and 172, I will consider whether these records are otherwise exempt under section 49(b) in my discussion below.

SOLICITOR-CLIENT PRIVILEGE

I will now consider whether section 19 applies to Records 9, 105, 109, 111, 113, and 139. The AGC submits that these records fall squarely within the solicitor-client privilege and litigation privilege exemptions under section 19.

General principles

Section 19 of the *Act* states, in part, as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The institution must establish that at least one branch applies.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of 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-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

The privilege applies to “a continuum of communications” between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above)].

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.

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[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Representations

The AGC submitted the following representations on the application of section 19 to the specific records:

Record 9 is a memorandum from the Deputy Registrar to Legal Counsel instructing counsel to take certain action. This forms direct communication between Legal Counsel and her client, the Deputy Registrar, and is solicitor-client privileged. This record should not be disclosed.

Record 105 is a page of handwritten notes by Legal Counsel about a telephone conversation regarding the Appellant's file. These notes are a work product as a result of communications with third parties in anticipation of litigation before the Board of the AGCO. This record is litigation privileged and should not be disclosed.

Record 111 consists of three pages of handwritten notes by Legal Counsel made about a conversation with the Appellant and also contains her additional analysis. This record was made as a result of discussions to obtain further information in anticipation of litigation. This record is litigation privileged and should not be disclosed.

Record 113 consists of four pages of handwritten notes made by Crown Counsel regarding the Appellant's file. This contains a case review, legal analysis and notes on conversations with individuals related to the case. The notes were made in preparation for a prosecution of the Appellant to be conducted by AGCO Legal Counsel who also performed the role of Crown Counsel for the purposes of *Gaming Control Act* prosecutions. This record is litigation privileged and should not be disclosed.

Record 139 is an e-mail between Crown Counsel and the OPP officer investigating the Appellant's case. This e-mail pertains to witness coordination for the prosecution's case. The information provided by the OPP officer was used by Counsel in preparing a hearing strategy. As such, it is submitted that his record is litigation privileged and should not be released.

The AGC did not make representations on Record 109.

The appellant's submissions on the application of section 19 suggest that he requires a copy of the records at issue if they contain the head's decision.

Analysis and finding

Based on my review of the records and the AGC's representations, I accept that Record 9 represents a confidential communication between the Deputy Registrar at the AGC and AGC legal counsel made for the purpose of obtaining legal advice. I find that Record 9 is Branch 1 solicitor-client communication privileged and section 19 does apply.

In so far as Records 105, 109, 111, 113 and 139 are concerned, the AGC has claimed that these records were prepared in contemplation of litigation. Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)]. The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing

party or its counsel [*General Accident Assurance Co.*, cited above, and Order PO-2006 [aff'd, [2003] O.J. No. 3522 (Ont. Sup C.J.)].

Courts have described the “dominant purpose” test 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 [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

For section 19 to apply to Records 105, 109, 111 and 139, the following three requirements must be satisfied:

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 [Order MO-1337-I].

From my review of the records and the representations, I accept the AGC's submissions that when Records 105, 111, 113 and 139 were created, there was a reasonable prospect of litigation. The records demonstrate that the appellant was concerned over actions that the AGC had taken against him and that he had retained a lawyer to deal with the matters before the AGC. The records also describe discussions between the appellant and AGC counsel and reveal that matters were proceeding to a hearing. I am satisfied that AGC counsel who authored these records did so with a reasonable contemplation of litigation and the creation of these records was for the dominant purpose of that litigation. Accordingly, I find that the section 19 Branch 1 litigation privilege applies to Records 105, 111, 113 and 139 and, as such, are exempt under section 49(a) subject to my finding on the AGC's exercise of discretion.

While the AGC did not provide representations on Record 109, based on my careful review of this record, I find that it too is litigation privileged under Branch 1 of section 19. Record 109 is a two page email chain between the AGC and its counsel which describes the appellant's file and the appellant's request for his lawyer to speak to counsel. I am satisfied that the email chain in this record was created for the dominant purpose of litigation and find that section 19 applies. As a result, Record 109 is also exempt under section 49(a).

ADVICE TO GOVERNMENT

Next, I will consider whether section 13(1) applies to Records 21 and 22.

Section 13(1) states:

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

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions

- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; 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.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

Representations

The AGC submits the following in support of their position that section 13(1) applies to Records 21 and 22:

Record 21 is an e-mail between the Deputy Registrar and an AGC OPP officer tasked with investigating the [appellant]. It outlines the officer's concerns regarding the appellant's suitability for registration for consideration by the Deputy Registrar. The record contains an opinion of the OPP officer highlighting an issue to be addressed concerning the application. Given that this record is part of the consideration process required by the Deputy Registrar in order to arrive at a decision, it is submitted that the record falls within the section 13 exemption and should be withheld.

Record 22 is an e-mail between a Gaming Registration Officer and an OPP officer investigating the appellant. The Gaming Registration Officer requests further information on the investigation and the OPP officer provides details about the appellant's honesty and integrity issues, criminal convictions and court matters for consideration by the Deputy Registrar. The communication contained in this record was initiated by the Deputy Registrar who sought recommendations through the Gaming Registration Officer on the eligibility of the appellant. The information requested in this record was required as a component of the deliberative process that must occur as part of the formulation of advice. As such, disclosure of this type of information would serve to hinder the free flow of advice and recommendations by government officials. It is submitted that this record should not be released based on the exemption in section 13(1).

The appellant did not make specific representations on the application of section 13(1) to Records 21 and 22. However, he asks that I consider whether the mandatory exceptions in section 13(2) apply to any of the information for which the AGC has claimed section 13(1).

Analysis and finding

Based on my review of the records, I find that only part of Record 21 qualifies for exemption under section 13(1). Record 21 consists of two pages of an email chain. The email on page 2 of the record which asks a question about the appellant's file does not contain a suggested course of action that will ultimately be accepted or rejected by the person being advised. Similarly, portions of page 1 of this record also do not disclose a suggested course of action to be accepted or rejected by the person being advised. These parts of the record contain only requests for information about the appellant. In addition, I am not satisfied that this record is part of the consideration process required by the AGC's Deputy Registrar. While I accept that an AGC investigator or OPP officer's report may be part of the consideration process, I do not accept that the email chain in this record was part of the deliberative process. I find that section 13(1) does not apply to these portions of the record, accordingly.

The rest of the information in Record 21 qualifies as advice or recommendation within the meaning of section 13(1) as disclosure of this information would permit an individual to accurately infer the advice or recommendation given. As the AGC states in its representations, although Record 21 is an email chain between a number of different individuals, it is mainly a communication between an OPP officer and the Deputy Registrar. While the record does not specifically set out the actual recommendation, I accept that disclosure of this information would reveal the advice or recommendation given by the Deputy Registrar.

Similarly, I find that only part of Record 22 qualifies as advice or recommendation for the purposes of section 13(1). The email on the lower half of the page does not suggest a course of action that will ultimately be accepted or rejected by the person being advised. This part of the record is simply a request for the status of the appellant's file. I find that this part of the page does not qualify as advice or recommendation and should be disclosed as no additional exemptions were claimed for it. The other part of the email that appears on this record contains a suggested course of action that will ultimately be accepted or rejected by the person being advised. I uphold the application of section 13(1) to this part of Record 22 only.

In summary, I have found that portions of Records 21 and 22 are advice or recommendation for the purposes of section 13(1) and qualify for exemption under section 49(a) subject to my finding on the AGC's exercise of discretion. The portions of Records 21 and 22 which I have found are not exempt should be disclosed to the appellant.

PERSONAL PRIVACY

The AGC relies on section 49(b) together with the presumption in section 21(3)(b) and the factors favouring non-disclosure in sections 21(2)(f) and (h) to exempt Records 69 – 72, 76, 77, 78, 79, 80, 81, 85, 87, 88, 114, 115 and 172 from disclosure.

As stated above, section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an

“unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the appellant. This involves a weighing of the appellant’s right of access to his own personal information against the other individual’s right to protection of their privacy.

Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met. If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). If any of the paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

Section 21(3) lists a number of presumptions against disclosure. The Divisional Court has stated that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of factors set out in 21(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767, though it can be overcome if the personal information at issue falls under section 21(4) of the *Act*, or the “public interest override” at section 23 applies. In this appeal, neither section 21(4) nor section 23 were raised before me and I find that they do not apply in the circumstances.

Representations

The AGC submits that the personal information in Records 69 - 72, 75 - 81, 85, 87 – 88, 114, 115 and 172 was compiled and is identifiable as part of an investigation into a possible violation of law such that the presumption in section 21(3)(b) applies to this information. The AGC’s submissions on these records are set out briefly above under section 14(2)(a), however, I have included the more detailed description and submissions as follows:

The personal information set out in Records 69 – 75 is highly sensitive as disclosure would reveal the locations and names of witnesses to a potential crime, leading to possible ramifications towards these witnesses...Further, the reports were prepared by the OPP, an organization with an undisputed law enforcement mandate. By virtue of their status as law enforcement reports and the fact that the personal information contained within is sensitive and was compiled as part of investigations into possible violations of law, it is submitted that these records should not be disclosed.

Record 69 contains the names of several individuals and outlines the fears reported by some individuals with regard to the Appellant. The home address of an individual is also listed...The fact that the home address was gathered as part of an investigation into a law enforcement matter involving reported fear of the Appellant leads to the conclusion that the disclosure of the address would be an unjustified invasion of the complainant’s personal privacy.

Record 70 describes the findings of an OPP officer regarding allegations of trespass to property made against the Appellant and lists the surnames of three individuals.

Record 71 details the information received from a civilian witness regarding a handgun sighting at the residence of the Appellant. It describes the outcome of further investigation by police. The name and living/work arrangements of a possible suspect is contained in this report. Another individual's surname is also noted.

Record 72 is a report that was generated by an OPP officer as a result of a harassment complaint made against the Appellant. The investigation is described and the report lists the names and addresses of individuals involved.

Record 75 is a report made by the OPP regarding an allegation of theft made by a named individual against the Appellant. These records should not be disclosed as they...contain sensitive personal information that would lead to an unjustified invasion of privacy if revealed.

Records 76-79 are occurrence summary reports by OPP officers which detail the status, actions taken, initiation processes and analyses or persons involved in various criminal investigations. These reports contain the names, dates of birth, telephone numbers and addresses of numerous individuals.

Record 80 is an OPP incident report that describes the investigative activity by the Criminal Investigation Branch into the Appellant relating to drug and sexual crimes. The names and dates of birth of three suspects (including the Appellant) are listed.

Record 81 is an OPP report detailing an individual's request for police assistance and summarizes the officer's actions taken. The names of several individuals are noted.

Record 85 is an OPP report which describes a complaint of mortgage fraud against the Appellant. The report captures actions taken in furtherance of this investigation and comments by the reporting officer related to earlier interviews with the Appellant. Several names of individuals are recorded including the complainant/victim and possible suspects.

Record 87 is a CPIC (Canadian Police Information Centre) report on the Appellant. It contains a description of his criminal history, interim steps to be taken by police officers involved and the results of the scoring system used by CPIC. This report was compiled by the OPP together with numerous Canadian law enforcement agencies through the CPIC centralized reporting system.

Records 114-115 are occurrence summary reports by the OPP which detail the status of certain matters, actions taken, initiation processes and analyses of persons involved in various criminal investigations. These reports contain the names, dates of birth, telephone numbers and addresses of numerous individuals including complainants, witnesses and suspects.

Records 172 – 173 are occurrence summary report by OPP officers which detail the status of certain matters, actions taken, initiation processes and analyses of persons involved in various criminal investigations. These reports contain the names, dates of birth, telephone numbers and addresses of numerous individuals including complainants, victims, witnesses, potential suspects and other implicated individuals.

The AGC did not make submissions on Record 88; however, this record is also a CPIC report and is similar to Record 87.

The appellant did not make representations on the application of section 21(1). However, he submits that there have been a number of previous allegations and charges made against him which have been withdrawn. The appellant states that the only crime he has been convicted of is possession of marijuana. The appellant also submits that there are no charges pending against him and any matters involving the charges that arose out of the records at issue were dealt with over 3 years ago. The appellant submits that he requires disclosure of the reasons the AGC decided to refuse him a license under the *GCA*. Finally, the appellant submits that he has seen, read and gone over all of the 3000 pages of disclosure in the criminal proceedings against him and that he is aware of the names of any individuals referred to in the records.

Analysis and Finding

Based on my review of the records, I find that all of the records remaining at issue contain personal information that was compiled and is identifiable as part of an investigation into a possible violation of law. The records all relate to complaints made against the appellant by other individuals and the subsequent OPP investigations of possible violations under the *Criminal Code*. I accept the AGC's submission that disclosure of the personal information in these records is presumed to constitute an unjustified invasion of the personal privacy of the various individuals referred to in the records such that the presumption in section 21(3)(b) applies.

While I accept the appellant's submission that the investigations described in the records may relate to charges which were later withdrawn, I note that section 21(3)(b) may still apply even if no criminal proceedings were commenced against the individual. The presumption only requires that there be an investigation into a possible violation of law [Orders P-242 and MO-2235]. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213, PO-1849 and PO-2608].

Further, the appellant submits that he is aware of the names of the individuals involved in the incidents detailed in the records is unsubstantiated and I have not been provided with any evidence that the appellant actually has knowledge of the contents of the records at issue.

Accordingly, I find that the presumption in section 21(3)(b) applies to the personal information at issue in Records 69 - 72, 75 - 81, 85, 87 - 88, 114, 115 and 172 and that these records qualify for exemption under section 49(b) subject to my finding on the AGC's exercise of discretion.

EXERCISE OF DISCRETION

As noted, the sections 49(a) and (b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Notice of Inquiry sent to the AGC asked the institution to indicate whether it exercised its discretion under sections 49(a) and (b) in denying access to the records and to indicate the factors it considered in doing so. The AGC did not provide me with representations on its exercise of discretion and I am unable to determine from its submissions on the application of the exemptions that the AGC properly exercised its discretion. I further reviewed the decision letter provided to the appellant by the AGC and I was unable to find an indication of the AGC's exercise of discretion.

I would note that the AGC did consider whether it could sever the record to disclose only the appellant's personal information to him. However, these submissions only relate to the issue of severability of the records and do not fully address whether the AGC exercised its discretion to deny access to the records.

All of the records which I have found to be exempt under either section 49(a) or (b) contain the personal information of both the appellant and other individuals. While I accept that the AGC considered that disclosure of the records would give rise to an unjustified invasion of the personal privacy of the other individuals, I have little to indicate that the AGC also considered whether the records could be released to the appellant, regardless of the fact that they may qualify for exemption under 49(b).

In the circumstances, I am not persuaded that the AGC has exercised its discretion in denying access to the records that I have found exempt under sections 49(a) and (b). Accordingly, I will include a provision in this order requiring the AGC to do so.

ORDER:

1. I order the AGC to exercise its discretion regarding the application of sections 49(a) and (b) and to provide both the appellant and I with an outline of the factors it considered in exercising its discretion by **February 25, 2010**.
2. I remain seized of this matter in order to deal with any issues stemming from the exercise of discretion by the AGC.
3. I uphold the decision and dismiss the appeal otherwise.

Original Signed By: _____ February 3, 2010
Stephanie Haly
Adjudicator