



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2804

Appeal PA07-358

Ministry of Training, Colleges & Universities



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NATURE OF THE APPEAL:

The requester submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Training, Colleges and Universities (the Ministry) for access to:

. . . all records created, amended, received or distributed since September 1, 2006 (including electronic mail, paper and electronic documents, and voicemail messages) regarding [an identified students' organization], its acronym, or any variations of its name or acronym meant to refer to it [listing an identified group of organizations].

In response, the Ministry issued a decision under section 27 of the *Act* extending the time for responding to the request for an additional 14 days. At the end of that time, the Ministry issued a fee estimate to the requester in the amount of \$1,276.00 and requested a 50% deposit to proceed with the request.

The requester submitted the deposit and the Ministry issued a decision providing partial access to the responsive records. Access to the remaining records, in whole or in part, was denied on the basis that the information fell within the ambit of one or more of the exemptions contained in sections 17(1)(third party information), 18(1)(valuable government information), 21(1)(personal privacy), 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Act*. The Ministry also waived the balance of the fee.

The requester, now the appellant, appealed the decision to apply the exemptions to the records and the Ministry's position that other portions of the records were not responsive to the request. Specifically, he indicated that Records 26, 27, 27a, 30, 41, 46, 48, 81, 119, 125, 127, 129, 136, 193, 198, 207, 210, 211 and 213 contain responsive information.

During mediation, the appellant removed from the scope of the request all of the personal information that had been withheld under section 21(1) of the *Act*. In addition, after some discussion, the appellant agreed to remove from the scope of the appeal the information or records identified by the Ministry on its index as "non-responsive" from this appeal. The Ministry clarified that Record 212 was severed, with the undisclosed portion deemed to be "non-responsive."

The appellant pointed out that Record 96, which was an email, made reference to an attachment which was not included. The Ministry searched for this attachment, and issued a decision denying access to it, under section 13(1) of the *Act*. The appellant also appealed this decision.

As no other mediation was possible, this appeal was moved to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I began the inquiry by sending a Notice of Inquiry to the Ministry setting out the background and issues in the appeal and inviting its representations.

I received representations from the Ministry, in which it indicated that it no longer relies on the exemptions in sections 17(1) and 18(1) to Records 1, 31 and 34. It further indicated that it continues to claim the application of section 19 to the undisclosed portions of Record 216 and

section 13(1) to the undisclosed portions of Records 65, 66, 67, 73, the attachment to Record 96, and Records 144, 149 and 175.

I then provided a copy of the Notice of Inquiry to the appellant, along with a complete copy of the Ministry's representations, with the exception of a small portion which was withheld due to confidentiality concerns. The appellant also provided me with representations in response to the Notice and withdrew the appeal with respect to Record 73.

RECORDS:

Records 65, 66, 67, 96 (attachment only), 144, 149, 175 and 216 as described in the Ministry's index of records remain at issue in this appeal.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The Ministry claims the application of the discretionary exemption in section 13(1) to Records 65, 66, 67, the attachment to Record 96 and Records 144, 149 and 175. 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; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)* cited above]

The Ministry submits that the undisclosed portions of Records 65, 66 and 144, which are identical, form part of the Ministry's Issues Management Plan in respect of an event sponsored by the appellant's organization and held on February 7, 2007. The undisclosed portions of Record 67 and the attachment to Record 96 are also identical to each other and are part of the Ministry's Issues Management Plan in respect of a similar event sponsored by the organization represented by the appellant that was held on March 8, 2007.

It submits that portions of the records describing the ongoing campaign against tuition fee increases were disclosed to the appellant, including the appendices to them. However, it argues that information that describes the advice or recommendations of public servants on the Ministry's response to the organization's campaigns falls within the ambit of the section 13(1) exemption. It states:

The undisclosed portions of these records are entitled 'Strategy/Tactical Plan' and expressly open with a 'Recommendation'.

...

The balance of the undisclosed portions of the records set out a recommended course of action to be accepted or rejected with respect to the strategy, timing and implementation of the Ministry's public response to the [organization's] campaign.

The advice or recommendations on 'issues management' or 'communications' matters in this context must be maintained in confidence because the intended outcome of the advice or recommendations is some form of public communication. The Ministry maintains its news releases and other public communications on its public website. Indeed the news releases issued on and around the dates of the two days of protest in 2007 are still publicly available at: [a named website]. The Ministry submits that disclosing the advice or recommendations in these records would permit the appellant to use the public website to learn whether the advice or recommendations had been accepted or rejected.

With respect to Records 149 and 175, the Ministry indicates that it has disclosed all but the recommended course of action that is set out in these documents.

The appellant counters by submitting that it is unreasonable to expect that all of the withheld information in these records relates to advice or recommendations on a specific course of action. Rather, the appellant suggests that much of this information “would be rooted not in advice, but in factual, analytical and evaluative information and notifications and cautions.”

The appellant goes on to specifically submit that because Record 67 was approved by the Ministry and became the official plan undertaken by the government, its contents are no longer advice. Rather, the appellant argues that “[B]y the time a document becomes an approved Issues Management Plan, the work that precedes this approval would allow for public servants and policy makers the freedom needed to make decisions. Both the slides for the February 7 and March 8 student actions received the necessary approvals and would therefore no longer simply be advice, they actually contain the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of an exercise of power.

In a decision issued concurrently with this order arising from Appeal PA07-373-2 involving these same parties, Order PO-2803, I made certain findings with respect to a set of very similar documents to Records 65, 66, 67, 96 and 144. I found that:

The undisclosed portions of Records 12, 13 and 14 consist of four distinct sections, described as ‘Communications Objective,’ ‘Ministry Action Plan,’ ‘Key Messages’ and ‘Strategy/Tactical Plan.’ In each of these segments of the records, specific courses of action are laid out for the recipients of the documents. Records 13 and 14 appear to be earlier drafts of Record 12 and they contain similar, though not identical information.

In my view, the undisclosed information, including the remaining portion of Record 18, seeks to provide advice to the recipients of the Issue Management Plan about how to manage communications with the media and the public on the issue addressed in the document. The records describe a recommended course of action and also advice as to the message to be communicated, along with the way in which the Ministry’s position is to be portrayed. In my view, this information qualifies as “advice or recommendations” within the meaning of the section 13(1) exemption. I further find that none of the information remaining at issue falls within any of the exceptions to the exemption delineated in section 13(2).

In the present appeal, the Issues Management Plans reflected in Records 65, 66 and 144, as well as that in Record 67 and 96, relates to the Ministry’s response to two protest activities, sponsored by the organization represented by the appellant on February 7, 2007 and March 8, 2007, respectively. Portions of these records have been disclosed to the appellant while others, specifically those entitled “Communications Objective”, “Ministry Action Plan”, “Key Messages” and “Strategy/Tactical Plan”, have not.

I have reviewed the information contained in these records and conclude that, for the reasons expressed in the discussion of the application of section 13(1) quoted above from Order PO-

2803, they also qualify for exemption. The undisclosed portions of Records 65, 66, 67, 96 and 144 describe a recommended course of action that pertains to the communications strategy to be employed by Ministry staff with respect to the protest activities. In my view, this information is exempt from disclosure under section 13(1) and is not subject to any of the exceptions to the exemption in section 13(2).

With respect to the undisclosed portions of Records 149 and 175, I have carefully reviewed this information and conclude that the disclosure of the information in Record 149 would permit the drawing of an accurate inference as to the nature of the actual advice given to a civil servant by another. In addition, the undisclosed portion of Record 175 expressly sets out the advice given by a civil servant to the Minister's office regarding a specific issue. In my view, both of these portions of Records 149 and 175 are properly exempt under section 13(1) as they convey the advice provided to a civil servant and the Minister's office, respectively, or would allow it to be accurately inferred.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that the majority of Record 216 is exempt from disclosure under the solicitor-client communication privilege set forth in Branches 1 and 2 of the discretionary exemption in section 19, which reads:

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
- (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

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), or in the case of an educational institution, from section 19(c). 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 [Order P-1551].

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.)].

The Ministry submits that Record 216 is, on its face, a confidential communication between Crown counsel for the Ministry and a Ministry staff person in which the solicitor provides legal advice to her client on a legal matter of interest to the Ministry.

Findings

Based on my review of the contents of Record 216, I find that it represents a confidential communication between a solicitor and her client relating to the seeking and providing of legal advice on a legal issue. Accordingly, I find that Record 216 is exempt from disclosure under the solicitor-client communication privilege aspect of Branch 1 of section 19. In addition, I conclude that the privilege in this document has not been waived.

ORDER:

I uphold the Ministry's decision to deny access to Records 65, 66, 67, 96 (attachment only), 144, 149, 175 and 216 and I dismiss the appeal.

Original signed by: _____
Donald Hale
Adjudicator

July 8, 2009 _____