



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

PRIVACY COMPLAINT REPORT

PRIVACY COMPLAINT PC-010007-1

Ministry of the Attorney General

November 16, 2001

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PRIVACY COMPLAINT NO. **PC-010007-1**

MEDIATOR: **Mona Wong**

INSTITUTION: **Ministry of the Attorney General**

SUMMARY OF COMPLAINT:

The Office of the Information and Privacy Commissioner/Ontario (the IPC) received a privacy complaint under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from an individual (the complainant) involving the Ministry of the Attorney General (the Ministry), and in particular, the Office of the Children's Lawyer (the OCL).

The complainant is a father of two minor children who are the subject of a custody/access court application. The OCL provided a lawyer for these children in connection with this proceeding. The complainant had been corresponding with the head of the OCL, the Children's Lawyer (the CL), about several matters. In one particular letter, the complainant outlined his specific concerns about the lawyer provided for his minor children by the OCL. The last paragraph of the letter states:

Please note, in closing, that the comments made in this letter are strictly confidential and not to be shared with any parties but the ones it is addressed to. Please govern yourself accordingly.

The CL shared this letter with the lawyer assigned to the complainant's children and also copied her and the complainant's own lawyer on later correspondence from the CL to the complainant, referring to the complainant's letter. By so doing, the complainant contends that the CL violated his privacy.

DISCUSSION:

Background

The OCL is a branch of the Ministry of the Attorney General (the Ministry) that is responsible for the protection of the civil legal interests of children. The OCL handles cases in property rights, primarily civil litigation and estates matters. With respect to personal rights, the OCL will become involved on behalf of a child in custody/access when so ordered by the court. The court will request that the CL provide services

to a child pursuant to section 89(3.1) or 112 of the *Courts of Justice Act*, R.S.O. 1990,c.43. Services will generally take one of the following forms:

- Legal representation
- Legal representation with social work assistance
- Social work investigation and report

Issues Arising from the Investigation

The following issues were identified as arising from the investigation:

- (A) Is the information "personal information" as defined in section 2(1) of the *Act*? If yes,
- (B) Was the disclosure of the personal information in accordance with section 42 of the *Act*?

Results of the Investigation

Issue A: Is the information "personal information" as defined in section 2(1) of the *Act*?

Section 2(1) of the *Act* defines "personal information" as recorded information about an identifiable individual, including,

...

- (e) the personal opinions or views of the individual except where they relate to another individual,
- (6) 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.

Based on the above, I have concluded that some of the information in the complainant's letter and the CL's response meets the requirements of paragraphs (f) and (h) of the definition of personal information in section

2(1) of the *Act*, and I am satisfied that this correspondence contains the complainant's personal information. In addition, however, I note that information of a critical or evaluative nature about a person's job or professional performance is considered the individual's personal information (Order P-1180), a view which is reinforced by paragraphs (e) and (g) of the definition. On this basis, I have concluded that information in the correspondence that is evaluative or critical of the lawyer appointed by the OCL to represent the complainant's children is the lawyer's personal information. I have also concluded that the correspondence contains the personal information of the complainant's children.

Issue B: Is the disclosure of the personal information in accordance with section 42 of the Act?

Under the *Act*, an institution shall not disclose personal information in its custody or under its control except in the circumstances outlined in sections 42(a) through (n). This complaint addresses the disclosures to the lawyer representing the complainant's children and to the complainant's own lawyer.

The OCL's submissions provide background on the role of the office and the individuals responsible for carrying out that role, as follows:

In providing legal representation to a child, OCL functions independently of all other parties to the proceedings. The Children's Lawyer will, after interviewing the parties and the child and speaking to collateral sources of information, take a position on behalf of the child. This position is often adverse in interest to one of the parties.

...

To provide services to children, the Office of the Children's Lawyer uses either in-house staff, or agents throughout the province who have been selected and trained by the Office to legally represent or provide social work services to children. The Office has 350 legal agents and 168 social work agents throughout the province of Ontario. The relationship between the Children's Lawyer and these lawyers and social workers is clearly one of principal and agents: the court order specifically states that the OCL is requested to provide services on behalf of a child, and the case is then assigned to either a lawyer or social worker or both. These individuals are paid by the Office of the Children's Lawyer and receive regular supervision on each of their files.

The Children's Lawyer handles a very large custody and access caseload. In the 2000-2001 fiscal year, the Children's Lawyer handled 1,784 legal representation and 1,131 social work investigation and report files. The Children's Lawyer also handled 2,891 child protection cases; the total volume in personal rights was 5,806 cases.

The OCL's submissions on the issue of disclosure are focussed on sections 42(d) of the *Act*. This section states:

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.

In support of its position that section 42(d) of the *Act* applies, the OCL states:

The Children's Lawyer submits that a lawyer representing children on behalf of OCL acts as agent of the Children's Lawyer; this principal-agent relationship means that a review of correspondence by the panel lawyer is tantamount to having the Children's Lawyer review it.

It is also the submission of the Children's Lawyer that the agent would be covered by s.42(d) of the *Freedom of Information and Protection of Privacy Act*. The Children's Lawyer is under an obligation at law to represent his child clients. Disclosure to the agent is necessary and proper to allow the Children's Lawyer to fulfill his function of representing children. If he cannot contact his agents who have in-depth knowledge of the cases and discuss concerns that have been raised, then issues will not be adequately addressed.

It is also the Children's Lawyer's position that the contents of the letter contained the complainant's opinion about the panel lawyer, and these views or opinions constitute the panel lawyer's personal information under clause (g) of the definition of "personal information" in s.2(1) of the *Freedom of Information and Protection of Privacy Act*. Accordingly, the agent was entitled under the *Act* to see the correspondence.

It is also the position of the Children's Lawyer that, given the large number of cases that are handled by OCL, a person writing to the Children's Lawyer to express concerns about an agent would reasonably expect the Children's Lawyer to communicate the contents of the letter with the agent so that the concerns could be addressed. The complainant copied several other individuals or organizations on each letter. These recipients of the letters were entities that would not have personal knowledge of his case, and would have to make inquiries in order to investigate the issues raised by the complainant in his letters.

The Children's Lawyer further submits that he was required by the Rules of Professional Conduct to share the correspondence with the complainant's own lawyer. Under Rule 4.03(2) of the Rules of Professional Conduct, a lawyer cannot deal with a person who is represented by another lawyer, save through or with the consent of that party's lawyer.

[The complainant] has his own counsel. In order not to be in breach of the Rules of

Professional Conduct, it was necessary that his counsel be aware of the correspondence that was being exchanged in this case. [The complainant's] lawyer has a solicitor-client relationship with him and by the Rules of Professional Conduct is prohibited from releasing the contents of this correspondence to others, if so advised by [the complainant].

Analysis

Disclosure to the Lawyer Representing the Complainant's Children

Section 42(d) only authorizes disclosure to an "officer" or "employee" of an institution. It is clear from the OCL's submissions that the lawyer representing the complainant's children (the "panel lawyer") is not a employee of OCL or the Ministry. This leaves the question of whether the panel lawyer could be described as an "officer" of either OCL or the Ministry. I have not been provided with any information to indicate that the panel lawyer occupies any post within either entity which would attract the description of "officer" in the usual corporate sense. In Order M-415, this office considered a broader definition for "officer" in the context of section 2(3) of the *Municipal Freedom of Information and Protection of Privacy Act*, and determined that the use of "officer" in that section was "... intended to identify the principal or controlling minds ..." of the body in question. Without deciding that this expanded definition is appropriate in the context of section 42 of the *Act*, there is no information before me to suggest that the panel lawyer is a "controlling mind" of the Ministry or OCL. Under the circumstances, I conclude that this individual is also not an "officer" for the purposes of section 42. Therefore section 42(d) does not authorize this disclosure.

The OCL also argues that the lawyer was an agent and that the viewing of this letter by the lawyer was "tantamount to the CL viewing it" and a necessary and proper part of the lawyer's functions as agent for the OCL under section 42(d). Though in my view the analysis in the preceding paragraph is sufficient to dispose of section 42(d), I will nevertheless consider this argument. Commissioner Ann Cavoukian considered a similar argument, relating to the term "use" in section 41 and "disclosure" in section 42, a "in A *Special Report to the Legislative Assembly of Ontario on the Disclosure of Personal Information by the Province of Ontario Savings Office, Ministry of Finance*. She concluded that, regardless of whether a "use" or "disclosure" was internal or external, it would have to be justified:

Section 42(d) of the *Act* makes it clear that the disclosure of personal information within an institution is a disclosure which must be justified in each case. ...

There would be no need for the Legislature to have enacted such a provision if disclosure within an institution were not considered a "disclosure" within the meaning of section 42. Indeed, section 42(d)'s dual requirements - that the employee must need the record in the performance of his or her duties and that disclosure must be a necessary and proper part of the institution's functions - underscores the Legislature's unambiguous objective that disclosure of personal information within an institution should be subject to scrutiny on a "need to know" basis. This, of course, is not to say that disclosure is not permitted to be made to persons outside of an institution; most of the remaining exceptions to the

prohibition contemplate circumstances where such disclosure is not only permitted, but desirable to achieve other legitimate government objectives. However, it is clear that disclosure of information within an institution is considered not simply to be a "use," for the reason only that it is internal and not external. An internal disclosure must be justified in accordance with the requirements of section 42.

While there may be circumstances in which it would be "necessary and proper", if the lawyer had been found to be an "officer" or "employee", to advise her of all or part of the concerns raised in the complainant's letter, I have concluded that, in view of the complainant's request that the letter be kept confidential, and the entire letter and response were shared, including the complainant's identifiers, this was not such a case.

I have also considered whether this disclosure could be justified under section 42(c) of the *Act*, which permits disclosure of personal information "... for the purpose for which it was obtained or compiled or for a consistent purpose". Section 42(c) contemplates both the original purpose for a collection, and a "consistent" purpose. Section 43 of the *Act* provides that, where information has been directly collected, a purpose is consistent "only if the individual might reasonably have expected such a use or disclosure". In this case, the complainant's information was collected directly from him.

In my view, the original purpose for obtaining or compiling this information relates to the OCL's mandate of providing legal representation to the complainant's children. Under normal circumstances, the original purpose for collecting the complainant's information might reasonably include dealing with the complainant's concerns about the lawyer who represented his children, thereby falling within the ambit of section 42(c). However, the circumstances of this case are distinguishable due to the fact that the complainant specifically requested confidentiality. In making this determination, I am not relying on the "PRIVATE & CONFIDENTIAL" notation on the complainant's letter; I am relying on the last paragraph of the complainant's letter which states:

Please note, in closing, that the comments made in this letter are strictly confidential and not to be shared with any parties but the ones it is addressed to. Please govern yourself accordingly.

In fact, the complainant might have reasonably expected that his letter would be shared, and included the above statement in the letter to ensure that it would not. In addition, by including this statement, the complainant has clearly differentiated something in this letter from the normal correspondence exchanged in the context of the litigation. As such, I am not satisfied that, in the particular and specific circumstances of this case, the submission of the letter could be seen as part of the original purpose for collecting the information. Nor, in my view, could it be said that the complainant might reasonably have expected this disclosure, as contemplated in the definition of "consistent" purpose under the *Act*. I have therefore concluded that section 42(c) does not apply.

The OCL also argues that the disclosure was appropriate because the substance of the remarks about the panel lawyer are that individual's personal information and not the complainant's. I found, above, that the comments about the lawyer constitute her personal information, and Part III of the *Act* deals with the access rights of individuals to their own personal information. In my view, however, the fact that it might have been appropriate to disclose the substance of the complaint to the lawyer in anonymized form does not justify the disclosure of the entire letter and response, as occurred in this case.

In its comments on the draft report dated October 17, 2001, the OCL indicates that contents of a complaint could have an impact on the best interests of the child, and in this respect could be relevant in the context of litigation. If that were the case, such a disclosure might, in my view, meet the requirements of section 42(c), or one of the other subsections within section 42. However, the OCL does not suggest that this is the case in the present circumstances.

Accordingly, I have concluded that the disclosure of the complainant's personal information to the panel lawyer was not in accordance with section 42 of the *Act*.

Disclosure to the Complainant's Lawyer

The OCL argues that this disclosure was mandated by Rule 4.03(2) of the Law Society's *Rules of Professional Conduct*. This rule states that "a lawyer shall not approach or deal with a person who is represented by another lawyer, save through or with the consent of that party's lawyer." The Society's commentary on this rule states that "the prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed".

While the relationship between the *Rules* and section 42 of the *Act* is not clear, I am not required to assess that relationship in the circumstances presented by this complaint. Given that the complainant wrote a personal letter regarding the representation of his children, rather than having his lawyer address the issue, and given his request that the correspondence be kept confidential, in my view the OCL ought to have concluded that the complainant had chosen not to be represented with respect to this matter. I am not satisfied that Rule 4.03(2) required that the CL's response be copied to the complainant's lawyer.

I find that the disclosure of the complainant's personal information to his own lawyer was not in accordance with section 42 of the *Act*.

Summary of Conclusions

I have reached the following conclusions based on the results of my investigation:

- (a) Some of the information in the complainant's letter and the CL's response meets the requirements of paragraphs (f) and (h) of the definition of personal information in section 2(1) of the *Act*, and this correspondence contains the complainant's personal

information.

Under paragraphs (e) and (g) of the definition, comments in the correspondence that are critical or evaluative of the panel lawyer are the panel lawyer's personal information.

The correspondence also contains the personal information of the complainant's children.

- (b) The disclosure of the complainant's personal information to the panel lawyer and the complainant's own lawyer are not in compliance with section 42 of the *Act*.

RECOMMENDATIONS:

I recommend that the OCL develop a guideline or procedure to address correspondence regarding complaints about lawyers in situations where:

- 1) an individual explicitly requests that the correspondence be kept confidential; or
- 2) there is uncertainty that the individual might reasonably expect a disclosure of the information.

The guideline or procedures should address at least the following points:

- obtaining the complainant's consent before informing the lawyer of any portions of the complaint that constitute the complainant's personal information (e.g. the complainant's name, combined with the fact of having made a complaint, as well as his/her home address, telephone number, e-mail address, etc.);
- how the OCL will respond to complaints where such consent is not provided (e.g. criteria to determine whether, and how, the OCL will take further action in such a case);
- how the OCL will deal with information pertaining to the child's best interest, and in particular, when it may be disclosed to counsel for use in any litigation being conducted on behalf of the OCL;
- how to deal with the personal information of other individuals named in the complaint (e.g. the children's personal information in this case);
- disclosure of the lawyer's own personal information to him/her (i.e. whether this should be done voluntarily by the OCL in all cases or in certain identified situations, or only in response to an access request by the lawyer) and severance of the personal information of other individuals in the absence of consent;
- disclosures to the complainant's own lawyer (consistent with the conclusion reached on this issue,

above).

The Ministry should provide the Office of the Information and Privacy Commissioner with proof of compliance with the above recommendation by **February 16, 2002**.

__Mona Wong
Mediator

November 16, 2001