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

ORDER 126

Appeal 880229

Ministry of Industry, Trade and Technology

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act"), which gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head to the Commissioner.

The facts of this appeal and the procedures employed in making the Order are as follows:

1. On May 3, 1988, the requester, an individual, made the following request to the Ministry of Industry, Trade and Technology (the "institution"):

    1. The record of invoices received from or in respect of and payments made to or in respect of all private investigators engaged directly by or indirectly on behalf of any of the Ministry of Industry, Trade and Technology, the Ontario Development Corporation, IDEA Corporation and IDEA Innovation Fund Inc. in connection with investigations relating to Graham Software Corporation, its predecessors and successors or persons having a direct or indirect beneficial interest therein, including but not limited to (a named individual).

    2. The record of reports of the foregoing investigations.

    3. The record of invoices and accounts received from and payments made to legal counsel retained by or on behalf of any of the Ministry of Industry, Trade & Technology, the Ontario Development Corporation, IDEA Corporation and IDEA Innovation

Fund Inc. in connection with investments made in, relations with, and claims asserted against Graham Software Corporation, its predecessors and successors or persons having a direct or indirect beneficial interest therein, including but not limited to (a named individual).

4. The record of measures taken by the Minister of Industry, Trade & Technology to satisfy himself that Supreme Court of Ontario proceeding Court File No. 26683/88 as commenced against me is not an abuse of the process of that Court.

Pursuant to s.48(1) of the Freedom of Information and Protection of Privacy Act, 1987, I request access to personal information (as defined in s.2(1) of the said Act) about myself in the custody or control of any of the Ministry of Industry, Trade and Technology, the Ontario Development Corporation, IDEA Corporation Fund Inc., the location of which is the files of the foregoing institutions, legal counsel retained by them and private investigators engaged by them or on their behalf maintained in connection with Graham Software Corporation, its predecessors and successors.

2. In a letter dated July 11, 1988, the institution refused to grant access to the requested records, giving reasons as follows:

With respect to your requests for records set out in paragraphs numbered 1, 2 and 3 of your letter of May 3, 1988, access to these records is denied. As you know, there is a substantial lawsuit presently in progress in the courts of Ontario which was commenced by IDEA Corporation against a number of defendants, including yourself... The aforesaid records requested by you are exempt from disclosure pursuant to section 19 of the Freedom of Information and Protection of Privacy Act, as being records that are subject to solicitor-client privilege, and/or

were prepared in contemplation of, and for use in, the litigation.
Access to the aforesaid records is also denied pursuant to section 18(1)(c) and (d). ...the aforesaid legal action involves a claim in excess of $5,000,000.00 and ...the records requested may have a significant impact on that litigation and therefore, should only be disclosable pursuant to the rules of court.

The records in Item 2 are also exempt from disclosure in the circumstances, pursuant to section 14(1)(b) and (f). The rules of court of the Supreme Court of Ontario contain specific provisions for production and disclosure of documents that are relevant in a lawsuit, and also documents which are not disclosable in a lawsuit. Those rules are designed to provide litigants with a fair trial or impartial adjudication and, therefore, we submit that the rules of court ought to prevail with respect to the records in issue.

The records in item 2 are also exempt from disclosure in the circumstances pursuant to section 21(1) and (3) of the Act, in that the records disclose personal information of persons other than the requestor. (sic)

With respect to Item 4 in your letter of May 3, 1988, access is denied pursuant to section 13(1) of the Act as being records containing advice or recommendations of a public servant or other person employed in the services of an institution or consultant retained by an institution, and also pursuant to section 19, on the grounds that any such record is subject to solicitor-client privilege.

With respect to your request pursuant to section 48(1) any such record or information is exempt from disclosure for the same reasons as set out above, namely the existing legal action and, in particular, sections 14(1)(b) and (f), 19 and also sections 49(a) and (b) of the Act.

3. By letter dated July 12, 1988, the requester appealed the denial of access. The appellant took the position that the refusal of access was "contrary to the Act" and that "the minister has failed to comply with severance obligations".

4. On July 18, 1988, I sent notice of the appeal to both parties.

5. The records relevant to this appeal were obtained and reviewed by an Appeals Officer from my staff. Settlement possibilities were discussed in the light of the various exempting provisions claimed. As both parties maintained their respective positions, no settlement could be achieved.

6. By letter dated January 5, 1989, I sent notice to the appellant and the institution that I was conducting an inquiry to review the decision of the institution. Enclosed with this letter was a report by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlined the facts of the appeal and set out questions which paraphrased those sections of the Act which appeared to the Appeals Officer or to any of the parties to be relevant to the appeal. The report stated that the parties, in making their representations to me, were not required to limit themselves to the questions set out in the report. It also advised the parties that if a relevant new issue was raised during the inquiry, each party would be notified and given an opportunity to make representations.

7. Written representations were received from both parties. Due to the circumstances of this appeal, the parties were also given an opportunity to make oral representations. I have considered all representations in making my Order.

Before addressing the specific issues raised in this appeal, it should be noted that the purposes of the Act, as set out in subsections 1(a) and (b) of the Act are as follows:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> ...
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Section 10 sets out a person's right of access to records as follows:

> (1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.
>
> (2) Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

Subsection 47(1) of the Act gives an individual a general right of access to:

> (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
>
> (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

Further, section 53 of the Act provides that the burden of proof that a record falls within one of the specified exemptions in the Act lies upon the head of an institution.

The issues arising in this appeal are as follows:

A. Whether the records or any portion of the records are exempt from disclosure under section 19 of the Act.

B. Whether the records or any portion of the records are exempt from disclosure under subsections 14(1)(b) or (f) of the Act.

C. Whether the records or any portion of the records are exempt from disclosure under either sections 13 or 18 of the Act.

D. Whether the records or any portion of the records are exempt from disclosure under section 49 of the Act.

ISSUE A: Whether the records or any portion of the records are exempt from disclosure under section 19 of the Act.

Section 19 of the Act states as follows:

> 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.

In Order 49 (Appeal Numbers 880017 and 880048), dated April 10, 1989, I dealt with the interpretation of section 19 of the Act. As outlined in that Order, section 19 provides an institution with a discretionary exemption covering two possible situations:

1. a head may refuse to disclose a record that is subject to either of the two branches of the common law solicitor-client privilege; or

2. a head may refuse disclosure if a record was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

As I stated at pages 12 and 13 of Order 49, the common law solicitor-client privilege has two branches which are as follows:

1. all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers directly related thereto) are privileged; and

2. papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated are privileged. ("litigation privilege")

For purposes of clarity, I have identified the records for which section 19 has been claimed and will deal with them in the order set out in the appellant's request of May 3, 1988.

(1) Invoices from and payments to private investigators.

(2) Reports of private investigators' investigations.

A court action has been commenced in the Supreme Court of Ontario by IDEA Innovation Fund Inc., a wholly owned subsidiary of the Ontario Development Corporation against the appellant and others. This action involves a claim for a substantial sum of money by way of damages together with certain other specified relief.

It is evident from a review of the private investigators' reports that the dominant purpose for which they were obtained was their intended use in litigation. Therefore, in my view, these records are subject to the litigation privilege branch of the common law solicitor-client privilege and are exempt from disclosure under section 19.

The invoices from and payments to private investigators are closely associated with the reports of the private investigators' investigations, which reports I have found to be exempt under section 19. In my view, under the circumstances, the invoices from and payments to private investigators are also exempt under section 19.

(3) Invoices and accounts received from and payments made to legal counsel retained by the institution.

I have reviewed 11 legal accounts that would respond to the appellant's request and these accounts all refer to the nature

of the legal services rendered by the law firm of Blake, Cassells and Graydon.

In considering the application of section 19 to these records, I have reviewed the decision in the case of The Mutual Life Assurance Company of Canada v. The Deputy General of Canada [1984] C.T.C. 155, Supreme Court of Ontario (Toronto Motions Court). In this case, an application was made by the Mutual Life Assurance Company of Canada under section 232 of the Income Tax Act, for orders respecting a number of documents seized and placed in the custody of the Deputy Sheriff of the Judicial District of Waterloo, in accordance with that section of the Income Tax Act. In particular one document was a photocopy of a letter from a law firm to the Assistant General Counsel of Mutual Life enclosing a statement of account of the law firm consisting of three and one-third legal size pages. The first page bore the account letterhead of the law firm. The document ended with the phrase "This is our account. Toronto ..." followed by the date, firm name and the signature of a partner at the law firm. The document did not contain legal advice itself but referred to professional services rendered by a number of lawyers associated with the law firm in advising Mutual Life about a particular project. The services referred to in the account included those of articling students and title searchers, consideration given by lawyers to the zoning by-laws, a site control agreement, a site plan agreement and a lease, consideration given to income tax aspects and work done in negotiating the transaction and settling the documents with the solicitors for other interested parties. The account included a statement of the number of hours worked and an itemized list of disbursements made by the law firm.

The question before the court was whether this document was one to which solicitor-client privilege attached under paragraph 232(1)(e) of the Income Tax Act. That subsection defines solicitor-client privilege as follows:

> (e) "solicitor-client privilege" means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between him and his lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.

In addressing the application of this section of the Income Tax Act, Southey, J. of the Supreme Court of Ontario, at pages 156-157, states as follows:

> Were it not for the concluding exception in the definition (subsection 232(1)(e)), I would have no difficulty in deciding that the statement of account like document 24 is ordinarily a document to which the solicitor-client privilege attaches. In a recently decided case **Re Ontario Securities Commission and Greymac Credit Corporation**, [1983] 41 OR (2d) 328, I had occasion to state the general scope of the solicitor-client privilege and used that adopted from **Wigmore on Evidence** by the Supreme of Canada in a recent case:
>
> > Where legal advice of any kind is sought from a professional legal advisor in his capacity as such the communications relating to that purpose made in confidence by the client are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.

> The privilege attaches not only to communications made by the client but obviously to communications made by the solicitor to the client as well and generally speaking covers all communications relating to the obtaining of legal advice. That general rule in my view would cover a statement of account.

I have reviewed each legal account and I am satisfied that the accounts reflect communications of a confidential character directly related to the seeking, formulating or giving of legal advice between a client and its legal adviser. Therefore, in my view, these records fall under the first branch of the common law solicitor-client privilege and are exempt from disclosure under section 19.

(4) Record of measures taken by the Minister of Industry, Trade and Technology to ensure there was no abuse of process.

I have been advised by the institution that a record responding to this request, if the request is narrowly interpreted, does not exist. However, in the course of its search to locate such a record, the institution found a letter which contains information which most closely responds to the appellant's request. It is a letter to the institution, from its legal adviser, outlining various legal alternatives and generally providing legal advice. This letter represents a communication of a confidential character between a client and its legal adviser directly related to the giving of legal advice. Therefore, this letter, in my view, falls within the first branch of the common law solicitor-client privilege and is exempt from disclosure.

(5) Records relating to the last section of paragraph four of the appellant's request.

The records relating to the last section of paragraph four of the appellant's request include lists and entries showing the amounts to be paid to various parties and the amounts owing at various times. They do not represent communications of a confidential character between the institution and its legal adviser. Further, it is not evident from a review of these records that they were created predominantly for the purpose of litigation or in contemplation of it. I am also not satisfied that these records are so closely associated with records to which solicitor-client privilege attaches that the privilege extends to them. Under these circumstances, I find that they do not qualify for exemption under section 19 of the Act.

ISSUE B: Whether the records or any portion of the records are exempt from disclosure under subsections 14(1)(b) or (f) of the Act.

Subsections 14(1)(b) and (f) of the Act read as follows:

> 14.--(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> ...
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> ...
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;

The institution claimed subsections 14(1)(b) and (f) to exempt the reports of the private investigators' investigations, and

the records relating to the last section of paragraph four of the appellant's request, i.e., for personal information about himself. Arguments concerning exemption under subsection 14(1)(f) were also raised by the institution with respect to the invoices from and payments to the private investigators.

Since I have found that the reports of the private investigators' investigations and the invoices and records documenting payments qualify for exemption under section 19 of the Act, it is not necessary for me to consider the application of section 14 to these records.

As noted earlier, the records relating to the last section of paragraph four of the appellant's request include lists and entries showing the amounts to be paid to various parties and the amounts owing at various times and I did not find them to be exempted by section 19 of the Act. While the institution in its July 18, 1988 response to the appellant claimed subsections 14(1)(b) and (f) of the Act, to exempt these records, in its representations to me the institution only dealt with the application of subsection 14(1)(f) of the Act.

Notwithstanding the lack of representations, I have considered the application of subsection 14(1)(b) to these records and find, based on a review of the records in light of the overall factual context provided by the representations, that they do not qualify for exemption under subsection 14(1)(b) of the Act.

With respect to the application of subsection 14(1)(f) of the Act, the institution submits that the context of litigation surrounding this appeal is such that disclosure of these records could reasonably be expected to deprive the institution of the

right to a fair trial or impartial adjudication. The institution points to the discovery process available in the context of civil actions and argues that it would be "patently and obviously unfair and unjust and impartial (sic) if one party to a lawsuit could circumvent the rules and by doing so obtain a potential advantage over his adversary".

In Order 48 (Appeal Number 880038), dated April 6, 1989, I considered the proper interpretation of subsection 14(1)(f) of the Act and responded to virtually the same argument made by the same institution. At pages 5 and 6 of that Order I stated:

> Section 64 sets out the impact of the Act on litigation, and reads as follows:
>
> (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
>
> (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.
>
> This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the Freedom of Information and Protection of Privacy Act, 1987 is unfair. The exemption provided by subsection 14(1)(f) should be considered in the context of the governing principles of the Act as outlined in section 1, and, in my view, in order to demonstrate unfairness under subsection 14(1)(f), an institution must produce more evidence than mere commencement of a legal action. Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. No such exemption exists, and, in my view, subsection 14(1)(f) or section 64 can not be

> interpreted so as to exempt records of this type without offending the purposes and principles of the Act.

In the present case, based on a review of the records at issue and having considered the representations of the institution, I am not convinced that disclosure of these records could reasonably be expected to deprive the institution of a fair trial. The institution, in my view, has not discharged the burden of proof, under section 53 of the Act, with respect to the application of subsection 14(1)(f). Thus, the records which relate to the last section of paragraph four of the appellant's request are not exempt from disclosure under subsection 14(1)(f) of the Act.

ISSUE C: Whether the records or any portion of the records are exempt from disclosure under sections 13 or 18 of the Act.

Since I have found that the records for which these sections were cited qualify for exemption under section 19 of the Act, it is not necessary for me to consider the application of sections 13 or 18 of the Act to these records.

ISSUE D: Whether the records or any portion of the records are exempt from disclosure under section 49 of the Act.

Subsection 49(b) of the Act states as follows:

> 49. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> ...

> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

The institution argues that disclosure of the records relating to the last section of paragraph four of the appellant's request, would constitute an unjustified invasion of other individuals' personal privacy:

> ...section 49(b) of the Freedom of Information and Protection of Privacy Act gives the head the discretion to refuse to disclose personal information where such disclosure would constitute an unjustified invasion of another individual's personal privacy. It is submitted that most of the information contained in the records requested relates to and is closely connected with information of other individuals and companies that were involved in events and occurrences that have resulted in the aforesaid legal action.

As noted earlier, the records relating to the last section of paragraph four of the appellant's request include lists and entries showing the amounts to be paid to various parties and amounts owing at various times. The records list the names of a number of individuals (not just the name of the appellant) beside entries showing monthly salaries and, in some cases, amounts owed to them. The names of various companies are also listed.

While I am satisfied that the disclosure of the names of individuals, other than the appellant, and accompanying entries would constitute an unjustified invasion of other individuals' personal privacy, not all the information in these records is recorded information about other identifiable individuals, i.e. personal information, as defined in section 2 of the Act.

Therefore, not all the information falls under subsection 49(b) of the Act.

The question of severance of exempt material as provided for under subsection 10(2) does not appear to have been addressed by the institution when considering the application of subsection 49(b) of the Act to these records. In my view, it would be reasonable for the institution to remove the names of individuals other than the appellant from the records and to disclose these records in their severed form to the appellant.

In summary, I uphold the decision of the head with respect to the exemption, pursuant to section 19, of the records requested in paragraphs numbered one, two, three and the first section of paragraph four of the appellant's request. I order the institution to disclose to the appellant severed copies of the records relating to the last section of paragraph four of the appellant's request within 20 days of the date of this Order. The institution is further ordered to notify me as to the date of such disclosure within five (5) days of the date on which disclosure is made.

Original signed by: December 4, 1989
Sidney B. Linden Date
Commissioner