



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

ORDER P-381

Appeal P-9200553

Ministry of the Attorney General



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ORDER

On October 1, 1992, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the provincial Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to "the prosecution case file and exhibits" entered at a criminal trial involving the requester. The record which the Ministry identified as being responsive to the request consisted of 92 pages. The Ministry gave total access to a portion of the record (31 pages), and denied access to the remaining pages, in whole or in part, pursuant to sections 14, 15, 19, and 21 of the Act.

The requester appealed the decision of the Ministry to withhold the remaining pages of the record.

During mediation of the appeal, the appellant agreed not to pursue access to certain pages of the record, and the Ministry disclosed to him other additional pages of the record. A total of 25 pages remain at issue. These pages are:

Parts of 13, 32, 33, 35; all of 40, 41, 42 and 43; parts of 51; all of 52, 53 and 54;
parts of 58, 64, 66, 68, 75 to 80 inclusive, 82, 85 and 92.

Complete settlement of the appeal was not possible, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Written representations were received from both the Ministry and the appellant.

In its representations, the Ministry indicated that its discretion to deny access to the remaining pages of the record was exercised under section 49 of the Act.

The Ministry has made no representations with respect to the application of the discretionary exemptions under sections 14 and 15; therefore, these sections will not be considered in this order.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the remaining parts of the record qualifies as "personal information" as defined in section 2(1) of the Act.

- B. Whether the discretionary exemption provided by section 19 of the Act applies to any parts of the record.
- C. If the answer to Issues A and B is yes, whether the discretionary exemption provided by section 49(a) of the Act applies to any parts of the record.
- D. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to any parts of the record.
- E. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies to any parts of the record.

SUBMISSIONS\CONCLUSIONS:

ISSUE A: Whether the information contained in the remaining parts of the record qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part:

"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,
...
- (d) the address, telephone number, fingerprints or blood type of the individual,
...
- (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;

Having reviewed the records, in my view, all of the remaining pages of the record contain information which qualifies as personal information under one or more of the aforementioned paragraphs of the definition of personal information. Pages 13, 40, 41, 42, 43, 52, 53, 54, 58, 64, 66, 75 to 80, 82 and 85 contain personal information that relates solely to the appellant and pages 32, 33, 35, 51, 68 and 92 contain personal information that relates to both the appellant and other identifiable individuals.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of institutions covered under the Act. However, this right of access is not absolute. Section 49 provides a number of exceptions to this general right of access, including sections 49(a) and (b) of the Act, which read as follows:

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

- (a) where section 12, 13, 14, 15, 16, 17, 18, **19**, 20, or 22 would apply to the disclosure of that personal information; [emphasis added]
- (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

I will now consider whether the provisions of section 49(a) apply to any parts of the record at issue in this appeal, by virtue of the application of section 19.

ISSUE B: Whether the discretionary exemption provided by section 19 of the Act applies to any parts of the record.

The Ministry claims that section 19 of the Act applies to pages 13, 40, 41, 42, 43, 52, 53, 54, 58, 64, 66, 75 to 80, 82 and 85 of the record.

Section 19 of the Act provides 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.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
(b) the communication must be of a confidential nature, **and**
(c) the communication must be between a client (or his agent) and a legal advisor, **and**
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

The severances on pages 13, 64, 66, 75 to 80, 82 and 85 of the record consist of handwritten notes on the sides and between the lines on these pages.

In its representations, the Ministry states that these notes were made by the Crown Attorney responsible for the prosecution of the case, during the process of litigation, and were intended to assist him in preparing for trial or for his own use at the trial. I have reviewed these notes, and in my opinion, they qualify for exemption under the second part of Branch 1 of the section 19 exemption, as being a record created especially for the lawyer's brief for existing litigation.

Pages 40 and 41 of the record consist of a letter from a Sheriff's Officer in the Ministry to an Investigating Officer of the Halton Regional Police concerning the possible laying of charges against the appellant. Pages 42 and 43 of the record consist of a letter from the Investigating Officer to the Crown Attorney for the Judicial District of Halton concerning the Sheriff's Officer's letter.

In its representations, the Ministry states that pages 40 and 41 were obtained especially for the Crown brief in contemplation of litigation, and that pages 42 and 43 were prepared for Crown counsel for the purpose of seeking legal advice. Having reviewed these pages of the record and the Ministry's representations, in my view, pages 40 and 41 of the record qualify for exemption under the second part of Branch 1, while pages 42 and 43 satisfy the test under Branch 2 of the section 19 exemption.

Pages 52 and 53 of the record consist of a memorandum from the Assistant Crown Attorney to his own file concerning the appellant's trial. In my view, these pages clearly fall within the second part of Branch 1 of the section 19 exemption as having been created especially for the lawyer's brief for existing litigation.

Page 54 of the record is a letter from the Assistant Crown Attorney to the Halton Regional Police Investigating Officer, requesting that certain additional investigations be conducted. Having reviewed this page, in my view, it qualifies for exemption under part 2 of Branch 1 of the section 19 exemption in that it was prepared by Crown counsel especially for his brief for existing litigation.

Page 58 of the record is a letter from the Crown Attorney to the Sheriff's Officer concerning the compilation of certain information about the appellant for use at the trial of the appellant. In my view, this page of the record clearly was created for the lawyer's brief to assist him in his preparation for trial, and accordingly, the severed part of this page qualifies for exemption under the second part of the Branch 1 test of section 19.

ISSUE C: If the answer to Issues A and B is yes, whether the discretionary exemption provided by section 49(a) of the Act applies to any parts of the record.

Under Issue A, I found that pages 13, 40, 41, 42, 43, 52, 53, 54, 58, 64, 66, 75 to 80, 82 and 85 of the record contain personal information that relates to the appellant, and under Issue B, I found that these parts of the record qualify for exemption under section 19 of the Act. Therefore, the discretionary exemption provided by section 49(a) is available to the Ministry with respect to these records.

The Ministry has provided representations regarding its decision to exercise discretion in favour of not disclosing these records. I have reviewed these representations and find nothing improper in the circumstances of this appeal.

ISSUE D: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to any parts of the record.

I found under Issue A that pages 32, 33, 35, 51, 68 and 92 of the record contain the personal information of both the appellant and other identifiable individuals. These pages must now be considered under section 49(b) of the Act.

Section 49(b) introduces a balancing principle. The Ministry must look at the information and weigh the appellant's right of access to his own personal information against the other individuals' right to the protection of their privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 49(b) gives the Ministry discretion to deny the appellant access to his personal information [Order 37].

Sections 21(2) and (3) of the Act provide guidance in determining if disclosure of personal information would constitute an unjustified invasion of another individual's personal privacy.

Section 21(3) lists the types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Sections 21(3)(b) reads as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Having carefully reviewed the parts of the record identified at the beginning of this issue, I find that they contain personal information that was compiled and is identifiable as part of an investigation into a possible violation of the Criminal Code of Canada by the appellant. The personal information on these pages includes the names, addresses and dates of birth of witnesses involved in the appellant's trial. Accordingly, I find the requirements for a presumed unjustified invasion of the personal privacy of other individuals under section 21(3)(b) has been satisfied.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been established, I must consider whether any other provisions of the Act come into play to rebut the presumption. Section 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). In my view, the record at issue in this appeal does not contain information relevant to section 21(4).

Section 21(2) of the Act also provides a list of factors, which, if present, would be relevant in the determination of whether disclosure of the record would be an unjustified invasion of personal privacy. Having carefully reviewed the record and the appellant's representations, in my view, none of the factors under section 21(2) which favour disclosure of the record are present in the circumstances of this appeal.

I have carefully considered the record at issue, the representations which have been provided, and the provisions of the Act, including any factors which could rebut the presumption of an unjustified invasion of personal privacy. In my view, the presumption raised by section 21(3)(b) of the Act has not been rebutted. Accordingly, I find that disclosure of the severed portions of pages 32, 33, 35, 51, 68 and 92 of the record would constitute an unjustified invasion of the personal privacy of the witnesses, and qualify for exemption under section 49(b) of the Act.

I have reviewed the Ministry's representations and find nothing improper in its exercise of discretion under section 49(b), as it relates to the parts of the record at issue which I found to be properly exempt.

Because of the manner in which I have disposed Issues A, B, C and D, it is not necessary for me to consider Issue E.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Asfaw Seife
Inquiry Officer

_____ December 16, 1992