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

ORDER P-441

Appeal P-9200589

Ministry of Natural Resources

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ORDER

BACKGROUND:

The Ministry of Natural Resources (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of:

> the recommendations and results from fact-finding exercise by [the Manager of the Ministry's Water Policy Section], who was acting as the Deputy Minister's designee at the Stage 2 of the grievance filed on January 29, 1990 and related to the provisions of Article 18.1 of the collective agreement.

The responsive record identified by the Ministry consists of a one-page covering memorandum, and an attached 12-page report with a one-page appendix. The Ministry provided access to all of the one-page covering memorandum with the exception of paragraphs 2 and 3, and all of the appendix with the exception of the last word and some symbols which appear on the page. Access to the remaining parts of the record was denied by the Ministry, pursuant to sections 13(1), 17(1)(d) and 19 of the Act. The requester appealed the Ministry's decision.

Mediation was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the requester, the Ministry and the fourteen individuals listed in the appendix (the affected persons). Representations were received from the Ministry, the appellant and three of the affected persons. In its representations, the Ministry raised sections 18(1)(c) and 21(1) of the Act as new exemption claims. One of the affected persons also identified section 21(1) as a relevant consideration. The other two affected persons who provided representations felt that the record should be released.

PRELIMINARY ISSUES:

Before considering the various exemptions claimed by the Ministry, I want to deal with two preliminary issues which arose during the course of this appeal.

First, in its original decision letter, the institution raised section 17(1)(d) of the Act as one of the bases for exempting the remaining parts of the record. However, the written representations submitted by the Ministry at the inquiry stage of this appeal make no reference to this exemption. Therefore, I conclude that the section 17(1)(d) exemption claim has been abandoned by the Ministry.

In any event, in order to qualify for exemption under section 17(1) of the Act, the information contained in a record must have been supplied to an institution, by a third party, which, by definition, is not part of the institution. The record at issue in this appeal was created by an employee of the Ministry and, in my view, could not qualify for consideration as "third party information" under section 17(1).

The second preliminary issue concerns the Ministry's claim in its representations that the record is a "privileged" document at both common law and under existing labour relations jurisprudence. Specifically, the Ministry submits that:

> All subsequent representatives of the employer in the case will read and rely heavily on the second stage report in choosing an appropriate course of action in response to the grievance. Accordingly, in jurisprudence arising out of labour relations, it is a record which is considered privileged by Labour Relations Tribunals.

The Ministry, in its representations, did not identify a confidentiality provision in any other statute that specifically overrides the provisions of the Act and covers the type of record which is at issue in this appeal. Section 67(2) of the Act lists the confidentiality provisions which prevail over the Act. Included on this list are certain provisions of the Labour Relations Act, the Colleges Collective Bargaining Act, and the Crown Employees Collective Bargaining Act which deal with the disclosure of information relating to membership in a trade union or other employee organization. None of the confidentiality provisions listed in section 67(2) deal with the type of record which is at issue in this appeal, and I find, therefore, that the record must be considered under the appropriate provisions of Parts II and IV of the Act.

Further, in my view, whether a record such as the one at issue in this appeal might be recognized as "privileged" in labour relations jurisprudence is not relevant to a request for access under the Act where that "privilege" is not codified in one of the exceptions to the right of access under sections 12 through 22 of the Act. Solicitor-client privilege is codified in section 19 of the Act, and I will deal with the application of section 19 to the record in my discussion of Issue B.

ISSUES:

The issues arising in this appeal are:

A. Whether the discretionary exemption provided by section 18(1)(c) of the Act applies to the record.

B. Whether the discretionary exemption provided by section 19 of the Act applies to the record.

C. Whether the discretionary exemption provided by section 13(1) of the Act applies to certain parts of the record.

D. Whether the record contains "personal information" as defined by section 2(1) of the Act.

E. If the answer to Issue E is yes, whether the mandatory exemption provided by section 21(1) of the Act applies to certain parts of the record.

SUBMISSIONS/CONCLUSIONS:

Because the Ministry claims sections 18(1)(c) and 19 with respect to the entire record, I will deal with the application of these exemptions first.

ISSUE A: Whether the discretionary exemption provided by section 18(1)(c) of the Act applies to the record.

Section 18(1)(c) of the Act states:

> A head may refuse to disclose a record that contains,
>
> > information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

To establish a valid exemption claim under section 18(1)(c), the Ministry must demonstrate a reasonable expectation of prejudice to the economic interests or competitive position of a government institution arising from disclosure of the information. It is not necessary to prove that the actual harm enumerated in the section will result from disclosure, only that the expectation of harm is based on reason and is not fanciful, imaginary or contrived (Order P-263, P-398).

In all cases where a claim for exemption is made under section 18 of the Act, the onus rests with the institution to demonstrate that the harms envisioned by this section are present or reasonably foreseeable. The evidence submitted by the Ministry must be detailed and convincing (Order 141). In the absence of sufficient evidence to support a claim under section 18, the record should be released to the appellant (Order 48).

In its representations, and in two affidavits attached as appendices to the representations, the Ministry submits that a reasonable expectation of harm to the economic interests of the Ontario Government would result from the disclosure of the record. The Ministry's position can be summarized as follows:

- Disclosure of the record will discourage full and frank discussion between the parties to grievance meetings which occur prior to litigation, thereby lessening the likelihood of settlement, and resulting in an increase of costs to the government for arbitration of employee grievances.

- Disclosure of the record would result in the union requesting Stage II reports "as a matter of course" and a reasonable consequence of such disclosure would be that:

(a) by making the employer's grievance strategies available to the union, harm to the Ministry's economic interests will occur "in defending claims from employment disputes", and

(b) Stage II reports will no longer be prepared, and the employer will "lose the benefit of continuity and analysis in preparation for litigation or settlement", thereby causing the government additional expense.

- Disclosure of the record would result in the union being able to make use of the information during collective bargaining, rendering the employer less successful in negotiations, and causing higher settlements.

Having reviewed the record and carefully considered the Ministry's representations, I am not satisfied that the Ministry has presented evidence which is "detailed and convincing" in demonstrating that its expectation of the harm set out in section 18(1)(c) is reasonably foreseeable. The representations and affidavits deal with possible consequences, but the Ministry has not demonstrated a clear, specific and understandable linkage between its allegations of harm under section 18(1)(c) and disclosure of the record at issue in this appeal. Nor, in my view, is it evident on the face of the record that the consequences contemplated by section 18(1)(c) could reasonably be expected to result from disclosure. Further, in my view, section 18(1)(c) does not contemplate prejudice to any so-called "economic interests" of a Ministry in its relations with its employees; rather, it provides institutions with a discretionary exemption which can be claimed for certain records if, in particular circumstances, disclosure could reasonably be

expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests.

Accordingly, I find that the Ministry has failed to establish that the record qualifies for exemption under section 18(1)(c) of the Act.

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

Section 19 of the Act states:

> 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 its representations, the Ministry submits that the record qualifies for exemption under Branch 2 of the test.

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]

In its representations, the Ministry states:

> The stage II grievance report is the basic record in the employer's case file. It is the basis upon which a settlement will be considered or sought, and the basis upon which the employer's case at litigation will be prepared. It is prepared either to promote settlement negotiations or to prepare for an arbitration board hearing.
>
> If the case is not settled, and proceeds to an arbitration board hearing, it is the practice of the Ministry of Natural Resources to be represented by legal counsel, ie., either by Ministry counsel, or by outside counsel specifically retained on a case-by-case basis.

It is clear that the record at issue in this appeal was not prepared by Crown Counsel; it was created by the Manager of the Ministry's Water Policy Section, who is not a lawyer. It is also evident from the face of the record that it was not prepared for Crown Counsel; it was created for presentation to senior management within a particular division of the Ministry. Although I can accept that in some instances Stage II grievance reports are eventually considered by Crown

Counsel in conducting litigation, based on the evidence presented in this appeal, I cannot accept that the author or recipient of the record was Crown Counsel, as required by the Branch 2 test, and I find that the record fails to qualify for exemption under section 19 of the Act, regardless of whether it can be established that the record was prepared in contemplation of litigation.

ISSUE C: Whether the discretionary exemption provided by section 13(1) of the Act applies to certain parts of the record.

Section 13(1) of the Act is claimed by the Ministry as the basis for exempting the two remaining paragraphs on the covering memorandum, and Recommendations 1-8 and the three paragraphs on page 11 of the report, headed "It is Not Only the What But Also the How".

Section 13(1) of the Act reads as follows:

> 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.

It has been established in a number of previous orders that "advice" for the purposes of section 13(1) must contain more than mere information. Generally speaking, "advice" pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient in the deliberative process (Orders 118, P-304, P-348, P-356 and P-402). "Recommendations" should be viewed in the same vein (Orders 161, P-402, P-428, P-348 and P-356).

In its representations, the Ministry submits that the parts of the record exempt under section 13(1) contain the advice and recommendations of an employee of the Ministry, which suggest several courses of action to be taken by the Ministry to resolve the grievance. The record was prepared for the Executive Director of the Ministry's Lands and Waters Section, and clearly describes a recommended method of resolving the grievance and addressing the concerns raised by several employees about the operation of the Drafting Section.

Having reviewed the record, in my view, Recommendations 1-8, the three paragraphs on page 11 of the report headed "It is Not Only the What but the How", and the third paragraph of the covering memorandum contain recommendations of a public servant, and qualify for exemption under 13(1) of the Act. I find that the second paragraph of the covering memorandum contains an opinion of the author of the report, but not "advice or recommendations", and this paragraph does not qualify for exemption under section 13(1).

I have reviewed the list of mandatory exceptions contained in section 13(2) of the Act, and find that none of them apply in the circumstances of this appeal.

Because section 13(1) is a discretionary exemption, I have also reviewed the Ministry's representations regarding its decision to exercise discretion in favour of claiming this exemption, and I find nothing improper in the circumstances of this appeal.

ISSUE D: Whether the record contains "personal information" as defined by section 2(1) of the Act.

The Ministry claims that certain parts of the record contain the personal information of various affected persons, and that these parts qualify for exemption under section 21(1) of the Act.

Before determining whether any parts of the record qualify for exemption under section 21(1), I must first determine if the record contains personal information.

Section 2(1) of the Act, defines "personal information", in part, as follows:

> personal information" means recorded information about an identifiable individual, including,
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> (g) the views or opinions of another individual about the individual, and
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> (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;

It has been established in a number of previous orders that information provided by an individual in a professional capacity or in the execution of employment responsibilities is not "personal information" (Orders 113, 139, 157, P-257, P-326). Therefore, I find that the views and opinions of the author of the report do not qualify as the personal information of this individual.

Having carefully reviewed the record, I find that the following parts contain the views or opinions of certain individuals about one of the affected persons, and therefore, qualify as that individual's personal information:

memorandum -	the last 8 words of paragraph 2;
page 2 -	first sentence of the first complete paragraph; third sentence of the second complete paragraph; second and fourth sentences of the third complete paragraph; and the heading and all of the fourth complete paragraph;
page 3 -	the heading and all of the fourth paragraph, and the last three sentences of the sixth paragraph;

page 5 - fourth sentence of the first full paragraph;

page 7 - all of final paragraph, with the exception of the first sentence and first bullet point;

page 12 - last sentence of the page.

I also find that the final word and the symbols severed by the Ministry from the appendix contain the personal information of one of more of the affected persons.

Finally, I find that no parts of the record contain the personal information of the appellant.

ISSUE F: If the answer to Issue E is yes, whether the mandatory exemption provided by section 21(1) of the Act applies to certain parts of the record.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information, except in certain circumstances, to anyone other than the individual to whom the information relates. One such circumstance is contained in section 21(1)(f) of the Act, which reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information. In order for me to find that the section 21(1)(f) exception applies, I must find that disclosure of the personal information would not constitute an unjustified invasion of personal privacy (Orders M-97 and P-432).

In the circumstances of this appeal, the appellant has provided no evidence in support of the relevance of any factors contained in section 21(2) which would weigh in favour of finding that disclosure of the personal information of the affected persons would not result in an unjustified invasion of their personal privacy. The only representations I have been provided with on this issue were submitted by the Ministry and one affected person, and they weigh in favour of finding that the section 21(1)(f) exception does not apply. Therefore, I find that the exception provided by this section does not apply, and that the mandatory exemption provided by section 21(1) of the Act applies.

ORDER:

1. I uphold the Ministry's decision to deny access to:

a) Recommendations 1-8 and the three paragraphs on page 11 headed "It is Not Only the What but the How" contained in the report;

b) Paragraph 3 and of the covering memorandum; and

c) The parts of the second paragraph of the covering memo, the parts of pages 2, 3, 5, 7 and 12 of the report, and the parts of the appendix which I have found to qualify for exemption under section 21(1) of the Act.

2. I order the Ministry to disclose the remaining parts of the record to the appellant within 35 days following the date of this Order and not earlier than the thirtieth (30th) day following the date of this Order. I have attached a highlighted version of the record with the copy of this order sent to the Ministry, which identifies the parts of the record which should **not** be disclosed.

3. In order to verify compliance with the provisions of this Order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to provision 2, **only** upon request.

Original signed by: April 1, 1993
Tom Mitchinson
Assistant Commissioner