



Information and Privacy
Commissioner/Ontario

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

ORDER P-442

Appeal P-9200712

Ministry of Finance



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ORDER

BACKGROUND:

The Ministry of Finance (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for all records held by the Ministry pertaining to the requesters' complaint of the handling of a disability claim by a named insurance company. The Ministry identified 252 responsive records, provided access to 241 records in their entirety, and denied access to the remaining 11 records, in whole or in part, pursuant to sections 13(1), 19 and 21(1) of the Act. The requesters appealed the Ministry's decision.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellants and the Ministry. Written representations were received from both parties.

The 11 records which remain at issue are as follows:

Records 1 to 6 are titled "Issue Sheets" and are dated April 22, 1991; May 27, 1991; July 24, 1991; September 17, 1991; April 6, 1992; and July 13, 1992, respectively. The severances on all of these records were made pursuant to section 13(1) of the Act.

Record 7 is a report of an actuary within the Ontario Insurance Commission (which is an agency of the Ministry). The severances on pages 26 and 27 of this record were made pursuant to section 21(1) of the Act.

Record 8 is an internal memorandum dated April 11, 1991. The Ministry has claimed section 19 of the Act for the entire record.

Record 9 is a computer printout of an internal "e-mail" message dated April 16, 1991. The Ministry claimed section 19 of the Act for the entire record.

Record 10 is an internal Ministry memorandum dated April 19, 1991. The Ministry claimed section 19 of the Act for this record.

Record 11 is handwritten notes of the author of Record 10, dated April 22, 1991. The Ministry claimed section 13(1) of the Act for this record.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies.
- C. Whether the discretionary exemption provided by section 13(1) applies.
- D. Whether the discretionary exemption provided by section 19 applies.
- E. Whether section 23 of the Act applies to any of the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records 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,

...

- (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;

I have reviewed all of the records at issue, and in my view, only Record 7 contains information which satisfies the requirements of the definition of personal information under section 2. I find that parts of the severances on this record contain personal information that relates to individuals other than the requesters.

The Ministry indicates that the severances on Record 7 relating to the names of insurance companies satisfies the definition of personal information because "even revealing the companies' names would, in the context of the passages in which they appear, be sufficient to reveal personal information." I have reviewed the severances in question, and in my view, they would not allow the drawing of accurate inferences about personal information.

Therefore, I find that the names of the insurance companies in Record 7 do not qualify as personal information about an identifiable individual under section 2 of the Act.

ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies.

Under Issue A, I have found that parts of Record 7 contain personal information that relates to individuals other than the requesters.

In its representations the Ministry submits that the information in which the individuals' names appear summarize the individuals' claims, injuries, and benefits received under an insurance plan. The Ministry claims that disclosure of the names of the individuals would be an unjustified invasion of their personal privacy under section 21 of the Act.

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. One of these exceptions relevant to the circumstances of this appeal is 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,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Because 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 section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

In the circumstances of this appeal, the only representations I have been provided with weigh in favour of finding that the section 21(1)(f) exception does not apply. In the absence of any evidence or argument to the contrary, I find that the exception provided by this section is not present, and that the mandatory exemption provided by section 21(1) of the Act applies to portions of Record 7 relating to the names of individuals.

ISSUE C: Whether the discretionary exemption provided by section 13(1) applies.

The Ministry claims section 13(1) of the Act applies to parts of Records 1-6, and to Record 11 in its entirety. 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.

Records 1-6 contain similar information. All of the information on these records, with the exception of three paragraphs under the heading "CONFIDENTIAL - ADVICE TO THE MINISTER", has been disclosed to the appellants. The severed information in each of the records is identical.

The Ministry states that Records 1-6 "were created for the information and advice of the Minister of Financial Institutions as a result of the complaints of the [appellants] in order to prepare him for any questions that could arise out of their complaints." The Ministry does not maintain that the severed information itself is "advice" or "recommendation", rather its position is that it "would reveal advice or recommendation by inference". In its representations, the Ministry identifies the specific advice which was given to the Minister, and which is not contained in the records. It claims that disclosure of the severances would reveal this advice.

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-248, P-348, P-356, and P-402).

It should be noted that information does not become "advice" or "recommendations" merely by virtue of the fact that it appears under a heading "Confidential - Advice to the Minister" or a similar characterization by its author; rather, the information itself must satisfy the objective criteria set out in the preceding paragraph. Having reviewed the severed information in Records 1-6, I find that they do not contain advice or recommendations. I am also of the view that disclosure of the severances would not permit the drawing of accurate inferences with respect to the advice actually provided to the Minister which is not contained in the records. Therefore, I find that the severances in Records 1-6 do not qualify for exemption under section 13(1) of the Act.

With respect to Record 11, the Ministry states that most of the record consists of advice from a lawyer of the Ministry to the person who was responsible for handling the legal aspects of the complaints of the appellants. The Ministry submits that what little factual information is in this record is interwoven with the advice such that the factual information cannot reasonably be severed.

I have reviewed Record 11. I agree with the Ministry that the majority of information contained in this record properly qualifies as "advice" or "recommendation". I also find that the factual information contained in the record is interwoven with the advice and recommendations that it is not reasonably practical to sever the record without revealing the exempt information.

Accordingly, I find that Record 11 qualifies for exemption under section 13(1) of the Act in its entirety.

Section 13(1) is a discretionary exemption which allows the Ministry to disclose information which qualifies for exemption under this section. I have reviewed the Ministry's representations regarding the exercise of discretion in favour of not disclosing the record, and find nothing improper in the circumstances. Accordingly, I find that Record 11 is exempt.

ISSUE D: Whether the discretionary exemption provided by section 19 applies.

The Ministry claims that section 19 of the Act applies to Records 8, 9, and 10 in their entirety.

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).

The Ministry submits that the records were prepared by or for Crown Counsel for use in giving legal advice and are exempt under Branch 2 of the section 19 exemption.

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)

I have reviewed Records 8, 9 and 10 and I find that they were all prepared by Crown Counsel for use in giving legal advice. Accordingly, I find that these three records qualify for exemption under Branch 2 of the section 19 exemption.

Section 19 is a discretionary exemption which allows the Ministry to disclose information which qualifies for exemption under the section. I have reviewed the Ministry's representations regarding its decision to deny access to the records, and I find nothing improper in the exercise of discretion, in the circumstances of this appeal. Accordingly, Records 8, 9 and 10 are exempt.

ISSUE E: Whether section 23 of the Act applies to any of the records.

In their representations and letter of appeal, the appellants submit that disclosure of the records would be in the public interest, thereby raising the possible application of section 23 of the Act.

Section 23 states:

An exemption from disclosure of a record under sections **13**, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.
[emphasis added]

Under Issues B and C, I found that portions of Record 7 are exempt under section 21, and Record 11 is exempt under section 13 in its entirety. (It should be noted that since section 19 is not one of the sections listed in section 23, the records which I found to be exempt under section 19 do not qualify for consideration under section 23).

The appellants submit that none of the parts of the records should be denied, as public servants are employed by the government to protect the public interest, and thus must be accountable to citizens.

It has been stated in a number of previous orders that, in order to satisfy the requirements of this section, there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption (Orders 24, 163, 183).

In the circumstances of this appeal, having reviewed the records exempt under sections 13 and 21, I am not convinced that there is a compelling public interest sufficient to outweigh the purpose of the exemptions under section 13 and 21 of the Act.

ORDER:

1. I order the Ministry to disclose to the appellants the severed portions of Records 1, 2, 3, 4, 5 and 6; and the names of the insurance companies severed from Record 7, within 15 days of the date of this order.
2. I uphold the Ministry's decision not to disclose Records 8, 9, 10 and 11 in their entirety; and portions of Record 7 relating to names of individuals.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellants pursuant to Provision 1, **only** upon my request.

Original signed by: _____
Asfaw Seife
Inquiry Officer

_____ April 1, 1993