



Information and Privacy  
Commissioner/Ontario

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

# ORDER P-879

Appeal P-9400497

Ministry of Education and Training



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## NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). A request was made by a Sikh organization to the Ministry of Education and Training (the Ministry) for access to records relating to the efforts of the Government of Ontario to recognize the 5Ks (Kirpan, Kesh, Kara, Kangha, Kachhehra) of the Sikh religion from 1988 to the present.

The Ministry identified 10 records that were responsive to the request and denied access in part based on the following exemptions contained in the Act:

- advice or recommendations - section 13(1)
- third party information - section 17(1)
- solicitor-client privilege - section 19
- invasion of privacy - section 21

The requester appealed this decision. A Notice of Inquiry was provided to the parties to the appeal, including an individual whose name appears in one of the records (the affected person). Representations were received from the Ministry and the affected person.

In its representations, the Ministry withdrew its reliance on the section 17(1) exemption and advised that it had released six of the records at issue to the appellant. In addition, the affected person consented to the release of his name to the appellant. This was the only information withheld from Record 1. Accordingly, section 21 does not apply. Since no other exemptions have been claimed for this information, Record 1 should be disclosed to the appellant in its entirety. As this was the only record for which section 21 was claimed, that exemption is no longer at issue.

The three records, therefore, that remain at issue, with the exemptions claimed, are as follows:

- Record 6: Memorandum dated May 30, 1990 to the Director, Legal Services Legislation Branch at Ministry re: Inter-ministerial Committee on the 5Ks (page 2, paragraph 1, lines 4-5 and paragraph 4 withheld pursuant to section 19)
- Record 9A: Report: The 5Ks Inter-ministerial Committee (portions of page 10 withheld pursuant to section 13(1); portions of pages 6, 7 and 10 and pages 8 and 9 in their entirety withheld pursuant to section 19)
- Record 9B: Legal Opinion (attached to Record 9A) (entire document withheld pursuant to section 19)

## DISCUSSION:

## **SOLICITOR-CLIENT PRIVILEGE**

Under section 19 of the Act, the Ministry may 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).

[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.

[See Order 210]

Record 6 is a memorandum from a Ministry Education Officer to the Director of Legal Services in the Legislation Branch. The portions of this document which have not been disclosed consist of references to a legal opinion prepared by a Crown counsel at the Ministry of the Attorney General (Record 9B). The opinion was prepared for the Inter-ministerial Committee (the Committee) of which the Ministry Education Officer is a member. In Record 6, the Education Officer requests that the Director of Legal Services review the memorandum and the opinion and provide his comments on the documents.

I have carefully reviewed Record 6. I find that the information which has not been disclosed is subject to the common law solicitor-client privilege. It consists of confidential legal advice provided by a solicitor, counsel with the Ministry of the Attorney General, to her client, the Committee. I am, therefore, satisfied that information withheld from Record 6 is properly exempt under Branch 1 of the section 19 exemption.

The severed portions of Record 9A consist of references to legal opinions prepared by various Crown counsel and, therefore, Branch 2 of the section 19 exemption applies.

As I have previously noted, Record 9B consists of the complete legal opinion prepared by Crown counsel for the Committee and, therefore, falls under Branch 1 of section 19.

Accordingly, I find that the Ministry has properly applied the exemption in section 19 to Record 9B in its entirety and the portions of Records 6 and 9A for which the Ministry has relied on it.

## **ADVICE OR RECOMMENDATIONS**

The Ministry has claimed that section 13(1) applies to the bottom of page 10 of Record 9A only.

Section 13(1) of the Act states that:

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 and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

The Ministry submits that the severed portion of Record 9A contains the advice and recommendations of the Committee submitted to the Minister of Citizenship. The Ministry claims that this information outlines a possible course of action which could be taken in regard to the 5Ks issue as a result of analysis contained within the record. The Ministry indicates that, as Record 9A originated from the Ministry of Citizenship, it consulted with that Ministry before it made its decision not to disclose the record. The Ministry of Citizenship advised the Ministry that the advice and recommendations were sensitive and should not be released. Based on its own review of the record and these consultations, the Ministry then decided not to disclose the severed portion of Record 9A.

I have carefully reviewed that portion of Record 9A (bottom of page 10) which is entitled "Committee Recommendations". I am satisfied that it is exempt under section 13(1) as part of the government's deliberations on how to address the issue of the 5Ks.

### **ORDER:**

1. I uphold the Ministry's decision to deny access to Record 9B in its entirety and the severed portions of Record 6 and Record 9A.
2. I order the Ministry to disclose Record 1 in its entirety to the appellant within fifteen (15) days after the date of this order.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ February 27, 1995