



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

ORDER P-1102

Appeal P-9500613

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of the complete file that the Ministry holds with respect to the requester's involvement in the Official Guardian program.

The requester is a lawyer who previously served as a panel lawyer with the Office of the Official Guardian (now known as the Office of the Children's Lawyer). Each appointment is for a two year term. The requester was unsuccessful in two attempts to seek re-appointment and, as a result, expressed some concerns to the Ministry about the selection process.

The Ministry located a large number of records responsive to the request, granted access to some of them and denied access to the remainder, in whole or in part, claiming the application of the following exemptions contained in the Act:

- advice or recommendations - section 13(1)
- invasion of privacy - section 21

The requester appealed the Ministry's decision. During mediation of the appeal, the Ministry added sections 49(a) and (b) of the Act as further exemption claims. The records remaining at issue total 61 pages and consist of memorandums (in original and draft form), draft letters, briefing notes (in original and draft form), and notes.

A Notice of Inquiry was provided to the Ministry and the appellant. Representations were received from both parties.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

I have reviewed the records at issue. I find that all of the records contain the personal information of the appellant and that only page 94 (and its duplicate, page 260) contains the personal information of other identifiable individuals as well.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information. In this situation, the appellant is not required to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the appellant has a right of access to his/her own personal information, the only situation under section 49(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The Ministry argues that page 94 contains information relating to a custody and access dispute involving a young child and the parents and, in my view, is properly considered to be highly sensitive (section 21(2)(f)), which is a consideration favouring the non-disclosure of personal information.

Having considered all of the circumstances in this appeal, I find that disclosure of any part of page 94 which could lead to the identity of the child or the parents **would** constitute an unjustified invasion of the personal privacy of other identifiable individuals and I uphold the Ministry's decision to deny access to this part of the record pursuant to section 49(b) of the Act. I have highlighted the exempt information on a copy of this record which will be sent to the Ministry with this order.

ADVICE OR RECOMMENDATIONS/ DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a) of the Act, the Ministry has the discretion to deny access to records which contain an individual's own personal information in instances where certain exemptions would otherwise apply to that information. The exemptions listed in section 49(a) include the exemption claimed with respect to the remaining records, namely advice or recommendations (section 13(1)). In the discussion which follows, I will consider whether these records qualify for exemption under this section as a preliminary step in determining whether the exemption in section 49(a) applies to them.

Section 13(1) of the Act 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.

It has been established in a number of previous orders that in order to qualify as "advice" or "recommendations" within the meaning of section 13(1), 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. In addition, the information must relate to the giving of advice or the making of a recommendation, as opposed to the seeking of such information.

In Order 94, former Commissioner Sidney B. Linden discussed the general purpose of the section 13(1) exemption, and made the following comments:

... in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision_making and policy_making.

In Order P-434, Assistant Commissioner Tom Mitchinson expanded on the comments made by former Commissioner Linden as follows:

In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt by the Ministry under section 13(1) in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the Act would be to extend the exemption beyond its purpose and intent.

The Ministry submits that the information which has not been disclosed relates to recommended responses to the concerns raised by the appellant and would, therefore, reveal the advice or recommendations of a public servant. The Ministry further submits that the information contained in the records relates to suggested courses of action which will ultimately be accepted or rejected by its recipient during the deliberative process to determine how to respond to the appellant. The Ministry also says the recommendations regarding the appellant's re-appointment to the panel would also be exempt under section 13(1).

Records 27, 28, 30, 33, 59, 60, 61, 68-70, 85, 86, 89, 96, 110-113, 185, 189, 202, 204, 205 and 220 are notes, routing slips, covering memos, administrative records, fax cover sheets and fax transmission confirmations which do not contain or reveal any suggested courses of action. Records 176-177 and 180-181 are memoranda which are purely factual in nature, with no suggested course of action. These records do not qualify for exemption under section 13(1), and should be disclosed to the appellant.

Records 97-98, 101-102 and 106-107 are copies of the same briefing note. They are identical except for the lack of a signature on Records 97-98. I do not accept the Ministry's submission that all briefing notes and suggested responses are exempt from disclosure under section 13(1) of

the Act. The only information which relates to a suggested course of action is found in the "Recommended Attorney General Response" section of these records. This particular recommendation, however, does not relate to the deliberative process as contemplated by section 13(1) and referred to in Orders 94 and P-434. These records, therefore, do not qualify for exemption under section 13(1), and should be disclosed to the appellant.

Records 87-88 and 95 are memoranda which make reference to the above briefing note, and contain basically the same suggested course of action. For the reasons outlined above, I find that these records also do not qualify for exemption under section 13(1), and they should be disclosed to the appellant.

Records 90-91, 115-116 and 123-124 are copies of the same memo. They are identical except for the addition of some marginal notes on Records 123-124 and the identity of the recipient in the top right corner of the first page of each. Records 93 and 118 are identical copies of a draft version of the same memo. The suggested course of action in these records is the same as that found in the briefing note and the related memoranda considered above and, again, I find that these records do not qualify for exemption under section 13(1).

Records 63, 64, 65, 66, 71-73, 108, 109 and 203 are draft correspondence for the signature of two former Assistant Deputy Attorney Generals and the former Attorney General. Records 62 and 67 are memoranda which contain a fact based suggestion for revising one of the drafts. In my view, the suggestions made by way of these records are not sufficiently connected to the actual business of the Ministry for them to be considered part of the deliberative process as contemplated by the exemption. Accordingly, I find that these records do not qualify for exemption under section 13(1) of the Act.

Records 31 and 32 are a draft letter which the author provided to the Assistant Deputy Attorney General and another individual within the Ministry for their input regarding whether to proceed with the approach taken in the draft letter. While the author is seeking advice, he is, by way of the draft, suggesting a particular course of action which relates more directly to the actual business of the Ministry. In my view, disclosure of this record would reveal the recommendations of a public servant, and this record qualifies for exemption under section 13(1). Accordingly, I find that section 49(a) applies, and the record is exempt from disclosure.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 31 and 32 and the parts of Records 94 and 260 which I have highlighted on the copy of the records sent to the Ministry with this order.
2. I order the Ministry to disclose the remaining records and the parts of Records 94 and 260 which are not highlighted on the copy of the records sent to the Ministry with this order to the appellant by sending her a copy no later than **February 6, 1996**.
3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____

Holly Big Canoe
Inquiry Officer

January 17, 1996